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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

(the "**Applicants**")

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

VOLUME I OF II

March 20, 2018

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

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

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

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

Lawyers for the Applicants

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TAB 1

Court File No. CV-14-10629-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE REGIONAL	)	MONDAY, THE 15TH
	)	
SENIOR JUSTICE MORAWETZ	)	DAY OF SEPTEMBER, 2014

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF ESSAR STEEL CANADA INC., ESSAR STEEL ALGOMA INC., ALGOMA HOLDINGS B.V., CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

FINAL ORDER

THIS APPLICATION made by Essar Steel Canada Inc. ("**Essar Canada**"), Essar Steel Algoma Inc. ("**Algoma**"), Algoma Holdings B.V. ("**Holdings**"), Cannelton Iron Ore Company ("**Cannelton**") and Essar Steel Algoma Inc. USA ("**Essar USA**" and, together with Essar Canada, Algoma, Holdings and Cannelton, the "**Applicants**"), pursuant to section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, (the "**CBCA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application issued on July 16, 2014, the affidavits of Rajat Marwah sworn July 16, 2014, August 7, 2014 and September 10, 2014, together with the exhibits thereto, the amended and restated preliminary order of the Honourable Regional Senior Justice

Morawetz dated July 16, 2014 (the "**Preliminary Order**") and the interim order (the "**Interim Order**") of the Honourable Regional Senior Justice Morawetz dated August 8, 2014, and

ON HEARING the submissions of counsel for the Applicants, counsel to the *ad hoc* committee of holders of the 9.875% senior unsecured notes, counsel to Deutsche Bank Trust Company Americas, counsel to an *ad hoc* committee of holders of 9.375% senior secured notes issued by Algoma, and counsel to Essar Global Fund Limited, and on being advised that the Director appointed under the CBCA does not consider it necessary to appear on this application, no one appearing for any other person, and having determined that the Arrangement, as described in the Plan of Arrangement attached as Schedule "A" to this Final Order is an arrangement for the purposes of section 192 of the CBCA and is fair and reasonable in accordance with the requirements of that section, and on being advised that Algoma intends to rely on this Final Order and the declaration of fairness included herein as a basis of a claim to an exemption pursuant to section 3(a)(10) of the United States *Securities Act of 1933*, as amended, from the registration requirements otherwise imposed by that Act, regarding the issuance and distribution of securities in the United States of America pursuant to the Arrangement,

DEFINITIONS

1. **THIS COURT ORDERS** that all capitalized terms used in this Final Order but not otherwise defined herein shall have the meanings ascribed thereto in the Plan of Arrangement.

COMPLIANCE

2. **THIS COURT DECLARES** that the Applicants have complied with all actions or steps required to be taken by them pursuant to the Preliminary Order or the Interim Order or in connection with the documents or acts contemplated in the Preliminary Order, the Interim

Order, the Plan of Arrangement or the CBCA, including, without limitation any notice provisions provided therein.

THE MEETING

3. **THIS COURT DECLARES** that appropriate notice was provided in respect of the Meeting and that the Meeting was duly called and held in accordance with the Interim Order.

4. **THIS COURT DECLARES** that the Plan of Arrangement has been approved by the requisite majority of votes in accordance with the Interim Order, being at least two-thirds ($66^{2/3}\%$) of the votes cast in respect of the Arrangement Resolution at the Meeting in person or by proxy by Noteholders.

ARRANGEMENT

5. **THIS COURT ORDERS** that the Arrangement, as described in the Plan of Arrangement attached as Schedule "A" to this Final Order, shall be and is hereby approved.

6. **THIS COURT ORDERS** that the Applicants are authorized to take all steps and actions necessary or appropriate to implement the Arrangement and the transactions contemplated thereby in accordance with and subject to the terms of the Arrangement (including to enter into any agreements or other documents which are to come into effect in connection with the Arrangement).

7. **THIS COURT ORDERS** that as of the Effective Date, the Plan of Arrangement and all associated steps, transactions, arrangements, discharges and releases are approved, binding and effective as therein set out, and on the terms and conditions set forth in this Final Order, upon

the Applicants, the Noteholders and all other Persons affected by the Plan of Arrangement, the Preliminary Order, the Interim Order or this Final Order.

8. THIS COURT ORDERS that the Applicants shall be entitled to seek leave to vary this Final Order upon such terms and upon giving such notice as this Court may direct, to seek the advice and directions of this Court as to the implementation of this Final Order, and to apply for such further order or orders as may be appropriate.

RELEASES

9. THIS COURT ORDERS that the releases contemplated in the Plan of Arrangement, including those set out in sections 6.3, 6.4 and 6.5 of the Plan of Arrangement, are approved and that, on the Effective Date, the Corporation Released Parties shall be released in accordance with section 6.3 of the Plan of Arrangement and the Noteholder Released Parties shall be released in accordance with section 6.4 of the Plan of Arrangement, EGFL shall be released in accordance with section 6.5 of the Plan of Arrangement.

10. THIS COURT ORDERS that no action or other proceeding shall be commenced against the Existing Indenture Trustee which in any way arises from or relates to its capacity or conduct as indenture trustee of the Existing Unsecured Notes.

STAY OF PROCEEDINGS

11. THIS COURT ORDERS that the Stay of Proceedings set forth in paragraph 2 of the Preliminary Order is hereby terminated and, simultaneously with the termination, is replaced with paragraph 12 of this Final Order.

12. **THIS COURT ORDERS** that from and including the date of this Final Order until the earlier of the Effective Date and November 15, 2014 (the "**Stay Period**"), no person, including without limitation: (a) the lenders under the credit agreement and the credit facility created thereunder (the "**ABL Facility**") among Algoma, Holdings, Deutsche Bank Trust Company Americas, as administrative agent and as collateral agent, and the lenders party thereto from time to time; (b) the lenders under the credit agreement dated as of December 6, 2013, as amended (the "**Avenue Credit Agreement**"), among Algoma, Holdings, Avenue Capital Management II, L.P., as documentation agent, and the lenders party thereto from time to time; (c) the holders of the 9.375% senior secured notes issued by Algoma pursuant to an indenture dated as of December 14, 2009, as supplemented (the "**Secured Notes Indenture**"); (d) the Noteholders; (e) Avenue Special Opportunities Fund I, L.P., as assignee of the loan agreement dated as of May 6, 2013, as amended, between Algoma and Essar Steel Limited; or (f) any administrative agent, collateral agent, indenture trustee or similar person, shall have any right to terminate, accelerate, amend or declare in default or take any other enforcement steps under any contract or other agreement to which any of the Applicants is a party, including any contract or agreement to which any of the Applicants are borrower or guarantor, due to:

(a) any of the Applicants having made an application to this Honourable Court pursuant to section 192 of the CBCA;

(b) any of the Applicants being a party to this proceeding or being a party to the Arrangement;

(c) any default or cross-default resulting from the failure to make the interest payment under the Existing Unsecured Notes due on June 15, 2014 and the expiry of the related grace period;

(d) any default or cross-default resulting from the issuance by Algoma of financial statements containing a going-concern statement;

(e) any of the Applicants taking any step contemplated by or related to the Arrangement; or

(f) any default or cross-default resulting from the failure by Algoma to make payment of principal, interest and/or fees upon maturity of the ABL Facility, or any default or cross-default which occurs in connection with or as a result of such failure to pay under the ABL Facility,

without further order of this Honourable Court. Notwithstanding the maturity of the ABL Facility on September 20, 2014, during the Stay Period, Algoma will not be required to make any payment of principal or interest on such maturity date and will continue to make ordinary course interest payments as if the ABL Facility had not matured. On the Effective Date, in addition to the payment of all other amounts owing in respect of the ABL Facility, the Avenue Credit Agreement and the Secured Notes Indenture, Algoma shall pay to the lenders under the ABL Facility, the Avenue Credit Agreement and the Secured Notes Indenture, default interest, calculated in accordance with their respective agreements that has accrued on and after September 20, 2014 to and including the Effective Date. To the extent that this paragraph conflicts with any term of any order granted in the within proceeding, this paragraph shall govern.

AID AND RECOGNITION

13. THIS COURT seeks and requests the aid and recognition of any court or any judicial, regulatory or administrative body in any province 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 and any court or any judicial, regulatory or administrative body of the United States or other country to act in aid of and to assist this Court in carrying out the terms of this Final Order.

SEP 15 2014

SCHEDULE A

PLAN OF ARRANGEMENTUNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT* ATTACHED

PLAN OF ARRANGEMENT UNDER SECTION 192
OF THE *CANADA BUSINESS CORPORATIONS ACT*

ARTICLE I
DEFINITIONS AND INTERPRETATION

Section 1.1 Definitions

In this Plan of Arrangement, unless otherwise stated or unless the context otherwise requires, the following terms shall have the following meanings (and grammatical variations of such terms shall have corresponding meanings):

"**Accrued Interest**" means any and all accrued and unpaid interest (including, without limitation, the interest payment on the Existing Unsecured Notes that was due on June 16, 2014) on the Existing Unsecured Notes up to and including the Effective Date calculated based on the non-default rate of interest payable on the Existing Unsecured Notes.

"**Amalco**" has the meaning ascribed in Section 3.4(d).

"**Arrangement**" means the arrangement under Section 192 of the CBCA on the terms and subject to the conditions set forth in this Plan of Arrangement, subject to any amendments or variations made in accordance with the terms of the Support Agreement or this Plan of Arrangement or made at the direction of the Court in the Final Order.

"**Arrangement Resolution**" means the resolution of the Noteholders to approve the Arrangement and this Plan of Arrangement to be considered at the Meeting, in substantially the form attached hereto as Schedule B.

"**Articles of Arrangement**" means the articles of arrangement of Essar Canada and ESAI in respect of the Plan of Arrangement required by the CBCA to be sent to the Director after the Final Order is made, which shall include this Plan of Arrangement and otherwise be in substantially the form attached hereto as Schedule A.

"**Avenue Credit Facility**" means the credit agreement dated December 6, 2013, among, inter alia, ESAI, as borrower, Algoma Holdings B.V., certain subsidiaries of ESAI, Avenue Capital Management II, L.P., as documentation agent, and the lenders thereunder.

"**Bankruptcy Court**" means the United States Bankruptcy Court for the District of Delaware.

"**Business Day**" means any day, other than a Saturday or a Sunday, on which commercial banks are generally open for business in Toronto, Ontario and New York, New York.

"**Cash-Out Amount**" means a cash payment equal to 49.5% of all Accrued Interest and Unpaid Principal.

"**Cash-Out Election**" means the election of ESAI to cause Subco to pay the Cash-Out Amount to Noteholders in lieu of issuing the New Junior Secured Notes to Noteholders.

"**Cash Payment**" means a cash payment equal to 32.5% of all Accrued Interest and Unpaid Principal.

"**CBCA**" means the *Canada Business Corporations Act*.

"**Certificate of Arrangement**" means the certificate of arrangement to be issued by the Director giving effect to the Articles of Arrangement and this Plan of Arrangement.

"**Consenting Noteholders**" means those Noteholders who have entered into the Support Agreement, either as an original party thereto or by signing a joinder thereto.

"**Continuance**" means continuance of ESAI under the laws of Canada pursuant to section 187 of the CBCA.

"**Corporation Released Parties**" has the meaning ascribed in Section 6.3.

"**Court**" means the Ontario Superior Court of Justice.

"**Director**" means the Director appointed under Section 260 of the CBCA.

"**DTC**" means The Depository Trust & Clearing Corporation or any successor thereof.

"**Effective Date**" means the date shown on the Certificate of Arrangement issued by the Director under the CBCA.

"**Effective Time**" means 12:01 a.m., or such other time as may be specified by ESAI in writing, on the Effective Date.

"**EGFL**" means Essar Global Fund Limited, a Cayman Islands corporation.

"**EGFL Commitment**" means the funding commitments of EGFL to ESAI as set out in the EGFL Commitment Letter;

"**EGFL Commitment Letter**" means the commitment letter dated July 24, 2014 between EGFL and ESAI.

"**Entitlements**" means all legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to or arising out of, or in connection with, the Existing Unsecured Notes or the Existing Unsecured Note Indenture (including any guarantees granted in respect of, or pursuant to, the foregoing).

"**ESAI**" means Essar Steel Algoma Inc. and its successors and assigns.

"**Essar Canada**" means Essar Steel Canada Inc. and its successors and assigns.

"**Existing ABL Credit Facility**" means the credit agreement dated September 20, 2012, among, inter alia, ESAI, as borrower, Algoma Holdings B.V., certain subsidiaries of ESAI,

Deutsche Bank Trust Corporation Americas as administrative agent and collateral agent and the lenders thereunder, as amended.

"**Existing Indenture Trustee**" means BOKF, NA as successor to Wilmington Trust Company and any predecessors, successors and assigns, including Wilmington Trust Company, as trustee under the Existing Unsecured Note Indenture.

"**Existing Secured Debt**" means all indebtedness outstanding under the Existing ABL Credit Facility, the Existing Senior Secured Notes, the Avenue Credit Facility and the Transferred Secured Credit Facility.

"**Existing Senior Secured Notes**" means the 9.375% senior secured notes of ESAI due March 15, 2015, issued pursuant to the trust indenture dated December 14, 2009, among, inter alia, ESAI and Wilmington Trust Corporation, as trustee.

"**Existing Unsecured Note Indenture**" means the trust indenture dated as of June 20, 2007 between Algoma Acquisition Corp. and the Existing Indenture Trustee, as amended by a first supplemental indenture dated as of June 20, 2007 and a second supplemental indenture dated as of June 23, 2007, pursuant to which the Existing Unsecured Notes were issued, as amended, modified or supplemented from time to time.

"**Existing Unsecured Notes**" means the 9.875% Senior Notes of ESAI due June 15, 2015.

"**Final Order**" means the final order of the Court approving this Plan of Arrangement, as such order may be amended at any time prior to the Effective Date or, if appealed, then unless such appeal is withdrawn or denied, as affirmed or amended on appeal.

"**Governmental Authority**" means any nation or government, any federal, state, provincial, city, town, municipal, county, local or other political subdivision thereof or thereto and any department, commission, board, bureau, instrumentality, agency or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

"**Initial Consenting Noteholders**" means the Consenting Noteholders that entered into the Support Agreement on July 24, 2014 and any other Consenting Noteholders designated as an Initial Consenting Noteholder pursuant to section 12.11 of the Support Agreement.

"**Interim Order**" means the interim order of the Court dated August 8, 2014 pursuant to Section 192 of the CBCA, as such order may be amended at any time prior to the Effective Date or, if appealed, then unless such appeal is withdrawn or denied, as affirmed or amended on appeal.

"**Law**" means, with respect to any Person, any and all applicable law (statutory, common or otherwise), constitution, treaty, convention, ordinance, code, rule, regulation, order, injunction, judgment, decree, ruling or other similar requirement, whether domestic or foreign, enacted, adopted, promulgated or applied by a Governmental Authority that is binding upon or applicable to such Person or its business, undertaking, property or

securities and to the extent that they have the force of law, policies, guidelines, notices and protocols of any Governmental Authority, as amended.

"**Meeting**" means the meeting of the Noteholders to be held on the Meeting Date in accordance with the Interim Order to consider and, if deemed advisable, approve the Arrangement Resolution and to consider such other matters as may properly come before such meeting, and any adjournment(s) or postponement(s) thereof.

"**Meeting Date**" means September 10, 2014, subject to any postponement or adjournment of that date pursuant to the Interim Order or any other Order.

"**New Indenture Trustee**" means the trustee and its successors and assigns, under the New Junior Secured Notes Indenture.

"**New Junior Secured Notes**" means the new junior secured notes of Subco in a principal amount equal to 55% of the Unpaid Principal and Accrued Interest that may be issued to Noteholders on the Effective Date pursuant to the New Junior Secured Notes Indenture and which will be guaranteed by ESAI.

"**New Junior Secured Notes Indenture**" means the trust indenture to be entered into between Subco and the New Indenture Trustee on the Effective Date if the New Junior Secured Notes are to be issued under this Plan of Arrangement, which shall govern the New Junior Secured Notes.

"**New Junior Secured Notes Security Documents**" means the security agreement granting the New Junior Secured Notes a junior ranking security interest in the collateral package for the New Senior Secured Debt, the intercreditor agreement setting out the rights of holders of the New Junior Secured Notes, and all other documents and agreements governing or related to the security interest of the New Junior Secured Notes in the collateral package for the New Senior Secured Debt.

"**New Senior Secured Debt**" means the debt incurred by ESAI in connection with the Senior Debt Refinancing.

"**Noteholder Consideration**" has the meaning ascribed in Section 2.1.

"**Noteholder Released Parties**" has the meaning ascribed in Section 6.4.

"**Noteholders**" means holders of the Existing Unsecured Notes.

"**Obligations**" means all obligations, liabilities and indebtedness of ESAI and its affiliates with respect to or arising out of, or in connection with, the Existing Unsecured Notes or the Existing Unsecured Note Indenture (including any guarantees granted in respect of, or pursuant to, the foregoing) but, for greater certainty, shall not include any obligations or liabilities of ESAI and its affiliates with respect to or arising out of, or in connection with, the Support Agreement or the EGFL Commitment Letter.

"**Order**" means any order of the Court in these proceedings, including, without limitation, the Interim Order and the Final Order.

"**Person**" includes any individual, firm, partnership, limited partnership, joint venture, venture capital fund, association, trust, trustee, executor, administrator, legal personal representative, estate, group, body corporate (including a limited liability company and an unlimited liability company), corporation, unincorporated association or organization, governmental authority, syndicate or other entity, whether or not having legal status.

"**Plan of Arrangement**" means this plan of arrangement proposed under Section 192 of the CBCA, and any amendments or variations made in accordance with the terms of this Plan of Arrangement or made at the direction of the Court in the Final Order.

"**Pro Rata Share**" means, with respect to each Noteholder, the aggregate principal amount of the Existing Unsecured Notes held by such Noteholder divided by the aggregate principal amount of all outstanding Existing Unsecured Notes, in each case, as of immediately prior to the Effective Time;

"**Recognition Order**" means the order recognizing all proceedings before the Court in connection with the Arrangement issued by the Bankruptcy Court.

"**Record Date**" means July 24, 2014.

"**Restructuring**" means, collectively, the Arrangement, the EGFL Commitment and the Senior Debt Refinancing.

"**Senior Debt Refinancing**" means the refinancing of all existing secured credit facilities of, or secured notes issued by, ESAI that will rank senior in priority to the New Junior Secured Notes.

"**Subco**" means 1839688 Alberta ULC, an unlimited liability corporation formed under the *Business Corporations Act* (Alberta) that will elect to be a disregarded entity for US tax purposes and a wholly-owned subsidiary of ESAI prior to the amalgamation of ESAI and Essar Canada and, following the amalgamation of ESAI and Essar Canada, a wholly-owned subsidiary of Amalco.

"**Support Agreement**" means the restructuring support agreement (and all schedules and exhibits thereto) among ESAI, EGFL and the Consenting Noteholders dated July 24, 2014.

"**Tax Act**" means the *Income Tax Act* (Canada) and the regulations thereto.

"**Transferred Secured Credit Facility**" means the third lien loan between Essar Steel Limited and ESAI in the principal amount of $30 million transferred from Essar Steel Limited to a third party by way of an assignment and assumption agreement, which loan matures on December 20, 2014.

"**Unpaid Principal**" means the aggregate of all unpaid principal amounts owing to Noteholders in respect of the Existing Unsecured Notes immediately prior to the Effective Time.

Section 1.2 Definitions in the CBCA

Words and phrases used herein that are defined in the CBCA and not otherwise defined herein shall have the meanings ascribed thereto in the CBCA, unless the context otherwise requires.

Section 1.3 Articles of Reference

The terms "hereof", "hereunder", "herein" and similar expressions refer to this Plan of Arrangement and not to any particular article, section, subsection, clause or paragraph of this Plan of Arrangement, and include any agreements supplemental thereto. In this Plan of Arrangement, a reference to an article, section, subsection, clause or paragraph shall, unless otherwise stated, refer to an article, section, subsection, clause or paragraph of this Plan of Arrangement.

Section 1.4 Interpretation Not Affected by Headings

The division of this Plan of Arrangement into articles, sections, subsections, clauses and paragraphs and other portions, 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 of Arrangement.

Section 1.5 Gender and Number

In this Plan of Arrangement where the context requires, words importing the singular shall include the plural and *vice versa* and words importing the use of any gender shall include all genders.

Section 1.6 Date for any Action

In the event that the date on which any action is required to be taken hereunder is not a Business Day, such action shall be required to be taken on the next succeeding day which is a Business Day.

Section 1.7 Time

All times expressed herein are local time in Toronto, Ontario, Canada unless otherwise specified.

Section 1.8 Statutory References

Any reference in this Plan of Arrangement to a statute include all rules, regulations, policies and blanket orders made thereunder, and any and all amendments to the foregoing in force from time to time.

Section 1.9 Successors and Assigns

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

Section 1.10 Currency

Unless otherwise stated, all references herein to sums of money, cash or currency are expressed in lawful money of the United States.

Section 1.11 Consent of Initial Consenting Noteholders

Any matter requiring the agreement, waiver, consent or approval of the Initial Consenting Noteholders shall require the agreement, waiver, consent or approval of Initial Consenting Noteholders representing not less than a majority of the aggregate principal amount of the Existing Unsecured Notes held by the Initial Consenting Noteholders at the time such action is required.

Section 1.12 Governing Law

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

ARTICLE II
TREATMENT OF NOTEHOLDERS

Section 2.1 Treatment of Noteholders

(a) On the Effective Date, and in accordance with the steps and sequence set forth in this Plan of Arrangement, each Noteholder shall receive from Subco, in exchange for all of its right, title and interest in and to the Existing Unsecured Notes, its Pro Rata Share of the following (the "**Noteholder Consideration**"):

(i) the Cash Payment; and

(ii) either:

(A) the New Junior Secured Notes;

or, at the election of ESAI pursuant to the Cash-Out Election,

(B) the Cash-Out Amount.

(b) The Noteholder Consideration shall be allocated to Unpaid Principal.

(c) Each Noteholder shall and shall be deemed to irrevocably and finally exchange all of its right, title and interest in and to its Existing Unsecured Notes for its Pro Rata Share of the Noteholder Consideration on the Effective Date. The Pro Rata Share of the Noteholder Consideration paid, delivered and issued to each of the Noteholders shall be, and shall be deemed to be, received by the Noteholders in full and final settlement of the Existing Unsecured Notes and the Existing Unsecured Note Indenture, which shall be cancelled as of the Effective Date, together with all Entitlements of Noteholders (other than Subco) and Obligations to Noteholders (other than Subco), and upon such cancellation, the Existing Indenture Trustee shall be discharged and released.

ARTICLE III
ARRANGEMENT

Section 3.1 Articles of Arrangement and Effective Date

The Certificate of Arrangement shall implement this Plan of Arrangement. As soon as practicable after the satisfaction or waiver of the conditions set forth in Article V (excluding conditions that, by their terms, cannot be satisfied until the Effective Date, but subject to the satisfaction of those conditions as of the Effective Date), unless another time or date is agreed in writing among ESAI, EGFL and counsel to the Initial Consenting Noteholders, the Articles of Arrangement shall be filed by ESAI and Essar Canada with the Director.

Section 3.2 Binding Effect

On and from the Effective Time, this Plan of Arrangement and the transactions contemplated hereby shall be final and binding upon, and be deemed to have been consented and agreed upon by (i) ESAI, (ii) Essar Canada, (iii) Subco, (iv) the Noteholders, (v) the holders of any Entitlements, (vi) the Existing Indenture Trustee, and (vii) any other Person affected by or named in this Plan of Arrangement, including the respective heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing, without any further act or formality required on the part of any Person and shall constitute (y) a full, final and absolute settlement of all rights of the beneficial and legal owners of the Existing Unsecured Notes (other than Subco) attaching thereto or arising therefrom and (z) an absolute release and discharge of and from all Obligations of ESAI and its affiliates to Noteholders (other than Subco) in respect of the Existing Unsecured Notes and the Existing Unsecured Note Indenture.

On and from the Effective Time, without limiting the foregoing, (i) the beneficial and legal owners of the Existing Unsecured Notes (other than Subco), (ii) the holders of any Entitlements (other than Subco), (iii) the Existing Indenture Trustee, (iv) the New Indenture Trustee and (v) any other Person affected by or named in this Plan of Arrangement will be deemed to have executed and delivered to ESAI and its affiliates all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan of Arrangement.

Section 3.3 Preliminary Steps to the Arrangement

The following preliminary steps shall occur prior to the Effective Date as conditions precedent to the implementation of the Plan of Arrangement:

(a) the Continuance shall have been completed; and

(b) if ESAI wishes to exercise the Cash-Out Election, then (i) at least two (2) Business Days but not more than seven (7) calendar days prior to the Effective Date, ESAI shall give notice to the Noteholders of its decision to exercise the Cash-Out Election by giving written notice to legal counsel to the Initial Consenting Noteholders, to the Existing Indenture Trustee and its legal counsel and by posting a notice to ESAI's secured datasite accessible by Noteholders (the "Election Notice"), and (ii) ESAI shall thereafter be irrevocably bound to comply with its decision to exercise the Cash-Out Election. ESAI shall only be entitled to exercise the Cash-Out Election if (A) the Cash-Out Election is exercised in good faith and on the basis that sufficient funding will be available to complete the Cash Payment and the Cash-Out Amount on or prior to the Effective Date and (B) each of the conditions referenced in Section 5.1(2), being those which apply after a Cash-Out Election has been made, have been, or will prior to the Effective Date be, fulfilled or (with the prior written consent of the Initial Consenting Noteholders and EGFL) waived, except for those conditions which by their nature can only be satisfied on the Effective Date. For greater certainty, as a result of the delivery of the Election Notice in accordance with this Section 3.3(b), the Effective Date shall occur at least two (2) Business Days but not more than seven (7) calendar days from the date the Election Notice is delivered. In the event that ESAI delivers the Election Notice but Subco does not fund the Cash Payment and the Cash-Out Amount in accordance with Section 4.1(c) on or prior to the Effective Date, the Initial Consenting Noteholders shall be entitled to either (A) terminate the Plan of Arrangement and the Support Agreement and seek any remedies they may have thereunder, or (B) declare the Cash-Out Election null and void and elect to receive the Noteholder Consideration in the form of the Cash Payment and the New Junior Secured Notes at the Effective Date, in accordance with the Support Agreement (which shall remain in full force and effect) and the Plan of Arrangement as if the Cash-Out Election had never been made, and the rights and obligations of ESAI, EGFL and the Initial Consenting Noteholders under the Support Agreement, the EGFL Commitment Letter and the Plan of Arrangement shall continue, provided that ESAI will not thereafter be entitled to exercise any subsequent Cash-Out Election or deliver a subsequent Election Notice. With the exception of the application of Section 6.5 upon the issuance of the Certificate of Arrangement, nothing in this Plan of Arrangement shall affect EGFL's obligation to pay any Noteholder Payment (as such term is defined in the Support Agreement) that may become due and

payable in accordance with the terms and conditions of the Support Agreement or the EGFL Commitment Letter.

Section 3.4 The Arrangement

Commencing as of the Effective Time, the following events or transactions will occur sequentially, five minutes apart, in the order set out below unless otherwise noted and will be deemed to occur without any further act or formality required on the part of any Person, except as expressly provided herein:

(a) Notwithstanding the terms of the Existing Unsecured Note Indenture and the Existing Unsecured Notes, all Accrued Interest shall become immediately due and payable.

(b) As described in Section 2.1, each Noteholder shall irrevocably exchange and be deemed to exchange all of its Existing Unsecured Notes and all of its rights under the Existing Unsecured Notes and the Existing Unsecured Note Indenture in exchange for its Pro Rata Share of the Noteholder Consideration (and the Noteholder Consideration will be allocated to Unpaid Principal) and upon the Noteholders' receipt of the Noteholder Consideration, the Existing Unsecured Note Indenture shall be cancelled and all of the Entitlements of Noteholders (other than Subco) and Obligations to Noteholders (other than Subco) shall be irrevocably and finally settled, terminated, extinguished, cancelled and eliminated, as applicable, without the need of any further payment, action or otherwise and upon such cancellation, the Existing Indenture Trustee shall be discharged and released;

(c) In the event that the Cash-Out Election has not been exercised by ESAI, the New Junior Secured Notes Indenture and the New Junior Secured Notes Security Documents shall become effective; and

(d) ESAI and Essar Canada shall be amalgamated and continued as one corporation ("**Amalco**") under the CBCA in accordance with the following:

(i) Name. The name of Amalco shall be "Essar Steel Algoma Inc."

(ii) Registered Office. The registered office of Amalco shall be located in the City of Sault Ste Marie in the Province of Ontario. The address of the registered office of Amalco shall be 105 West Street, Sault Ste Marie, Ontario, Canada, P6A 7B4.

(iii) Restrictions on Business. None.

(iv) Authorized Capital. Amalco shall be authorized to issue an unlimited number of common shares.

(v) Restriction on Transfer. Securities of Amalco, other than non-convertible debt securities, may not be transferred unless: (a) (i) the

consent of the directors of Amalco is obtained; or (ii) the consent of shareholders holding more than 50% of the shares entitled to vote at such time is obtained; or (b) in the case of securities, other than shares, which are subject to restrictions on transfer contained in a security holders' agreement, such restrictions on transfer are complied with. The consent of the directors or the shareholders for the purposes of this section is evidenced by a resolution of the directors or shareholders, as the case may be, or by an instrument or instruments in writing signed by all of the directors, or shareholders holding more than 50% of the shares entitled to vote at such time, as the case may be.

(vi) Number of Directors. Amalco shall have a minimum of one director and a maximum of ten directors, until changed in accordance with the CBCA. Until changed by the shareholders of Amalco, or by the directors of Amalco if authorized by the shareholders, the number of directors of Amalco shall be ●.

(vii) First Directors. The first directors of Amalco shall be:

Name	Address	Resident Canadian
●		

The first directors of Amalco shall hold office until the first annual meeting of the shareholder of Amalco (or the signing of a written resolution in lieu thereof) or until their successors are elected or appointed;

(viii) Conversion or Cancellation of Shares. The issued and outstanding shares of each of ESAI and Essar Canada shall be converted into fully and non-assessable shares of Amalco or shall be cancelled without any repayment of capital in respect thereof as follows:

(A) each outstanding common share of ESAI shall be converted into a common share of Amalco; and

(B) all of the outstanding common shares of Essar Canada shall be cancelled without any repayment of capital in respect thereof;

(ix) Stated Capital. For the purposes of the CBCA, the aggregate stated capital attributable to the common shares of Amalco pursuant to the Arrangement on the conversion of the common shares of ESAI shall be the aggregate of the stated capital attributable to the common shares of ESAI so converted immediately before the amalgamation.

(x) By-laws. The by-laws of Amalco shall be the same as those of ESAI.

(xi) Effect of Amalgamation. The provisions of subsection 186(a) to (g) of the CBCA shall apply to the amalgamation with the result that:

(A) the amalgamation of the amalgamating corporations and their continuance as one corporation becomes effective;

(B) the property of each amalgamating corporation continues to be the property of the amalgamated corporation;

(C) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation;

(D) an existing cause of action, claim or liability to prosecution is unaffected;

(E) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation;

(F) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation; and

(G) the Articles of Arrangement are deemed to be the articles of incorporation of the amalgamated corporation and the Certificate of Arrangement is deemed to be the certificate of incorporation of the amalgamated corporation.

ARTICLE IV
IMPLEMENTATION OF ARRANGEMENT

Section 4.1 Delivery of Cash Payment and New Junior Secured Notes or Cash-Out Amount, as applicable

(a) The Existing Unsecured Notes are held by DTC (as sole registered holder of the Existing Unsecured Notes on behalf of the Noteholders) through its nominee company CEDE & Co.

(b) Upon the Effective Date, the requirement that distributions be made to the Existing Indenture Trustee under the Existing Unsecured Note Indenture shall be deemed dispensed with.

(c) In connection with Section 3.4(b), ESAI shall cause Subco to pay (or cause to be paid), on or prior to the Effective Date, the Cash Payment and the Cash-Out Amount (if applicable) to DTC or its nominee as registered holder of the global notes on behalf of all Noteholders and DTC shall pay (or cause to be paid) the aggregate amount of such Cash Payment and Cash-Out Amount (if

applicable) to Noteholders based on each Noteholders' Pro Rata Share, without deduction (subject to Section 4.2), abatement or rights of setoff or counterclaim of any nature.

(d) In connection with Section 3.4(b), the delivery of the New Junior Secured Notes, where the Cash-Out Election has not been made, to holders of Existing Unsecured Notes will be made through the facilities of DTC to DTC participants, who in turn will make delivery of the New Junior Secured Notes to the beneficial holders of the Existing Unsecured Notes pursuant to standing instructions and customary practices based on each Noteholder's Pro Rata Share. ESAI, Subco and the Existing Indenture Trustee shall have no liability or obligation in respect of all deliveries from DTC, or its nominee, to DTC participants or to beneficial holders.

(e) DTC will surrender, or will cause the surrender of, the certificates representing the Existing Unsecured Notes to ESAI so that such Existing Unsecured Notes can be cancelled and replaced by a certificate representing the Unsecured Notes registered in the name of Subco.

Section 4.2 Withholding Rights

ESAI and Subco will be entitled to deduct and withhold from the Cash Payment, and the New Junior Secured Notes or Cash-Out Amount, as applicable, all interest, other distributions or any consideration otherwise payable to any Noteholder under this Plan of Arrangement, such amounts as ESAI or Subco are required, entitled or permitted to deduct and withhold with respect to such payment under the Tax Act, the United States Internal Revenue Code of 1986 or any provision of any applicable federal, provincial, state, local or foreign tax Law, in each case, as amended. To the extent that amounts are so withheld, such withheld amounts will be treated for all purposes hereof as having been paid to the Noteholder in respect of which such deduction and withholding was made, provided that such withheld amounts are actually remitted to the appropriate taxing authority.

Section 4.3 Fractional Interests

In lieu of any fractional New Junior Secured Notes, each registered holder of Existing Unsecured Notes otherwise entitled to a fractional interest in New Junior Secured Notes will receive the nearest whole $1.00 (with fractions equal to exactly $0.50 being rounded up).

Section 4.4 Calculations

All amounts of consideration to be received under this Plan of Arrangement will be calculated to the nearest cent ($0.01) or to the nearest tenth of one percent (0.10%), as applicable. All calculations and determinations made by ESAI and Subco for the purposes of this Plan of Arrangement, including, without limitation, the allocation of amounts under Section 4.3 shall be conclusive, final and binding upon the Noteholders.

Applies if Cash Out

ARTICLE V
CONDITIONS PRECEDENT TO PLAN IMPLEMENTATION

Section 5.1 Conditions Precedent

(1) In the event that the Cash-Out Election has not been exercised by ESAI, the implementation of this Plan of Arrangement shall be conditional upon the fulfillment, satisfaction or waiver of the following conditions precedent, in each case in accordance with the terms thereof (provided that no condition may be waived without the prior written consent of the Initial Consenting Noteholders and EGFL and, solely in the case of paragraph (o) below, such condition shall not be waived without the prior written consent of the Existing Indenture Trustee):

(a) the Arrangement Resolution shall have been approved at the Meeting in accordance with the provisions of the Interim Order;

(b) the Final Order and the Recognition Order shall have been granted and be in full force and effect;

(c) ESAI, Essar Canada and Subco shall have taken all necessary corporate actions and proceedings in connection with the Arrangement;

(d) there shall not be in force any order or decree of any Governmental Authority that makes illegal or otherwise directly or indirectly restrains, enjoins or prohibits the Arrangement;

(e) the Plan of Arrangement shall have been implemented on or before November 15, 2014;

(f) the Director shall have issued the Certificate of Arrangement;

(g) all Definitive Documents (as defined in the Support Agreement), other than the definitive documents relating to the New Senior Secured Debt or other refinancing documents, shall be in form and substance reasonably acceptable to the Initial Consenting Noteholders and EGFL;

(h) the Senior Debt Refinancing shall have been completed on terms consistent with the terms described in the Support Agreement (or such other terms as the Initial Consenting Noteholders agree) and all of the definitive documents relating to the New Senior Secured Debt shall be in form and substance satisfactory to the Initial Consenting Noteholders and EGFL;

(i) the terms of the New Junior Secured Notes, the New Junior Secured Notes Indenture and the New Junior Secured Notes Security Documents shall be consistent with the terms set forth in the Support Agreement and shall be in form and substance reasonably acceptable to the Initial Consenting Noteholders;

(j) EGFL shall have funded to ESAI in cash all amounts of the Pre-Closing Liquidity Commitment (as defined in the EGFL Commitment Letter) that may be due or payable prior to the Effective Date, in the manner and on the terms set out in the Support Agreement;

(k) EGFL shall have complied with its funding commitments and other obligations under the EGFL Commitment Letter and the Support Agreement, which are in addition to its Pre-Closing Liquidity Commitment referenced in Subsection 5.1(1)(j) above;

(l) the unrestricted cash balance of ESAI shall not have fallen below $10 million at the close of business for ten (10) consecutive Business Days between July 24, 2014 and the Effective Date, except in circumstances where such occurrence was previously waived by the Initial Consenting Noteholders;

(m) ESAI shall be in compliance with the Minimum Liquidity Threshold (as defined in the Support Agreement);

(n) ESAI shall have paid (i) the reasonable and documented fees of EGFL as required pursuant to the EGFL Commitment Letter and the Support Agreement and (ii) the reasonable and documented fees of the legal and financial advisors to the Initial Consenting Noteholders as required pursuant to the Support Agreement;

(o) ESAI shall have paid to the Existing Indenture Trustee and its counsel, or into escrow with Kirkland & Ellis LLP, all amounts required to have been paid or escrowed on the Effective Date pursuant to Section 6.6 hereof;

(p) there shall have been no material breach by ESAI or EGFL of any of their undertakings, representations, warranties or covenants set forth in the Support Agreement, provided that such material breach would reasonably be expected to materially adversely affect the business or operations of ESAI, or the quantum or value of the consideration to be received by each Consenting Noteholder under the Restructuring, or would reasonably be expected to prevent or materially delay ESAI's ability to consummate the Restructuring by November 15, 2014 and which, if capable of being cured by ESAI or EGFL, is not cured within five (5) Business Days after receipt of written notice of such material breach (to the extent not otherwise waived by the Initial Consenting Noteholders in accordance with the terms of the Support Agreement);

(q) there shall have been no Material Adverse Effect (as defined in the Support Agreement);

(r) the stays granted by the Court and the Bankruptcy Court shall not have been vacated to allow foreclosure or other enforcement action against ESAI or any of its assets by holders of ESAI's funded indebtedness;

(s) ESAI shall not have commenced or undergone a receivership, liquidation, bankruptcy, debt enforcement proceeding or a proceeding under the *Companies' Creditors Arrangement Act*, the *Bankruptcy and Insolvency Act*, or the *Winding-Up and Restructuring Act*, unless such event occurs as part of an Alternative Restructuring (as defined in the Support Agreement); and

(t) there shall have been no Change of Control (as defined in the Existing Unsecured Note Indenture) of ESAI.

(2) In the event that ESAI provides notice to the Noteholders in accordance with Section 3.3(b) that it will exercise the Cash-Out Election, the implementation of this Plan of Arrangement shall be conditional upon the fulfillment, satisfaction or waiver of the conditions precedent set out in Subsections 5.1(1)(a) to (g), (j), (l), (n), (o) and (q) to (s) (and, for greater certainty, no other conditions precedent), in each case in accordance with the terms thereof (provided that no condition may be waived without the prior written consent of the Initial Consenting Noteholders and EGFL and provided further that solely in the case of paragraph (o) above, such condition shall not be waived without the prior written consent of the Existing Indenture Trustee).

ARTICLE VI
MISCELLANEOUS

Section 6.1 Amendments to the Plan of Arrangement

Subject to the terms and conditions of the Support Agreement, any amendment, modification, supplement or restatement to this Plan of Arrangement may be:

(a) proposed by ESAI, at its discretion, at any time prior to or at the Meeting, with or without any prior notice or communication to any other party, and if so proposed and accepted at such Meeting, shall become part of this Plan of Arrangement for all purposes;

(b) made after the Meeting but before date of the hearing for the Final Order (i) at the discretion of ESAI, if it concerns a matter which, in the reasonable opinion of ESAI, is not materially adverse to the financial or economic interests of the Noteholders or the Existing Indenture Trustee or (ii) with the approval of the Court at the hearing for the Final Order, in all other cases, including as to the steps and transactions to be implemented in connection with this Plan of Arrangement; and

(c) made following the date of the hearing for the Final Order (i) at the discretion of ESAI if it concerns a matter which, in the reasonable opinion of ESAI, is of an administrative nature or is required to better give effect to the implementation of this Plan of Arrangement or (ii) with the approval of the Court, in all other cases.

Section 6.2 Consents, Waivers and Agreements

At the Effective Time, each Noteholder and any other Person affected by this Plan of Arrangement will be deemed to have consented and agreed to all of the provisions of this Plan of Arrangement in its entirety. Without limitation to the foregoing, each Noteholder and any other Person affected by this Plan of Arrangement (including, without limitation, the Existing Indenture Trustee) will be deemed:

(a) to have executed and delivered to ESAI and Subco all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan of Arrangement in its entirety;

(b) to have waived any non-compliance or default by ESAI or Subco with or of any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Noteholder or other Person and ESAI and/or Subco with respect to the Existing Unsecured Notes and the Existing Unsecured Note Indenture that has occurred or exists on or prior to the Effective Time; and

(c) to have agreed that, if there is any conflict between the provisions of any such agreement and the provisions of this Plan of Arrangement, then the provisions of this Plan of Arrangement take precedence and priority and the provisions of such agreement or other arrangement are deemed to be amended accordingly.

Section 6.3 Release of Corporation Released Parties

Upon the issuance of the Certificate of Arrangement on the Effective Date, ESAI, Essar Canada, Subco and the Existing Indenture Trustee and their respective subsidiaries and affiliates' and their respective present and former shareholders, officers, directors, employees, auditors, advisors, legal counsel and agents (collectively, the "**Corporation Released Parties**") shall be released and discharged from any and all demands, claims, liabilities, 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, without limitation, any Person who may claim contribution or indemnification against or from any Corporation Released Party) 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 Date relating to, arising out of, or in connection with the Existing Unsecured Notes, the Existing Unsecured Note Indenture, the Support Agreement, the Arrangement, the Plan of Arrangement, the business and affairs of ESAI, Essar Canada or Subco with respect to or in connection with this Plan of Arrangement and any proceedings commenced with respect to or in connection with this Plan of Arrangement; provided that nothing in this paragraph will release or discharge any of the Corporation Released Parties from or in respect of any of their respective obligations under this Plan of Arrangement, the New Junior Secured Notes, the New Junior Secured Notes Security Documents, the New Junior Secured Notes

Indenture, the Existing Secured Debt or under any Order and further provided that nothing herein will release or discharge a Corporation Released Party if the Corporation Released Party is adjudged by the express terms of a non-appealable judgment rendered on a final determination on the merits to have committed gross negligence, fraud or wilful misconduct.

Section 6.4 Release of Noteholder Release Parties

Upon the issuance of the Certificate of Arrangement on the Effective Date, each of the Consenting Noteholders, together with their respective subsidiaries and affiliates and their respective present and former shareholders, officers, directors, employees, auditors, advisors, legal counsel and agents (collectively, the "**Noteholder Released Parties**"), shall be released and discharged from any and all demands, claims, liabilities, 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, without limitation, any Person who may claim contribution or indemnification against or from any Noteholder Released Party) 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 Date relating to, arising out of, or in connection with, the Existing Unsecured Notes, the Existing Unsecured Note Indenture, the Support Agreement, the Arrangement, the Plan of Arrangement and any proceedings commenced with respect to or in connection with this Plan of Arrangement; provided that nothing in this paragraph will release or discharge any of the Noteholder Released Parties from or in respect of any of their respective obligations under this Plan of Arrangement, the New Junior Secured Notes, the New Junior Secured Notes Security Documents, the New Junior Secured Notes Indenture, the Existing Secured Debt or under any Order and further provided that nothing herein will release or discharge a Noteholder Released Party if the Noteholder Released Party is adjudged by the express terms of a non-appealable judgment rendered on a final determination on the merits to have committed gross negligence, fraud or wilful misconduct.

Section 6.5 Release of EGFL

Upon the issuance of the Certificate of Arrangement on the Effective Date, EGFL shall be released and discharged from any and all demands, claims, liabilities, 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, without limitation, any Person who may claim contribution or indemnification against or from EGFL) 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 Date relating to, arising out of, or in connection with the Existing Unsecured Notes, the Existing Unsecured Note Indenture, the Support Agreement, the Arrangement, the Plan of Arrangement, the EGFL

Commitment Letter, the business and affairs of EGFL, ESAI, Essar Canada or Subco with respect to or in connection with this Plan of Arrangement and any proceedings commenced with respect to or in connection with this Plan of Arrangement; provided that nothing in this paragraph will release or discharge EGFL from or in respect of any of its respective obligations under this Plan of Arrangement, the New Junior Secured Notes, the New Junior Secured Notes Security Documents, the New Junior Secured Notes Indenture, the Existing Secured Debt or under any Order and further provided that nothing herein will release or discharge EGFL if EGFL is adjudged by the express terms of a non-appealable judgment rendered on a final determination on the merits to have committed gross negligence, fraud or wilful misconduct.

Section 6.6 Payment of Existing Indenture Trustee Fees

On the Effective Date, ESAI shall pay all reasonable and documented compensation, fees, and expenses of, and liabilities incurred, and all advances made by and owed to the Existing Indenture Trustee, including the fees, expenses and costs of its agents and attorneys, under the Existing Unsecured Note Indenture (collectively, the "Existing Indenture Trustee Charges"). The Existing Indenture Trustee and its agents and attorneys shall provide reasonably detailed invoices to ESAI no later than seven (7) days prior to the Effective Date (subject to redaction to preserve attorney-client privilege). If ESAI disputes any requested Existing Indenture Trustee Charges under the Existing Unsecured Note Indenture, ESAI shall (i) pay the undisputed portion of the Existing Indenture Trustee Charges and expenses on the Effective Date; (ii) notify the Existing Indenture Trustee in writing specifying the challenged time entry and the basis for such challenge as soon as practicable, but not later than the Effective Date; and (iii) remit and reserve in escrow with Kirkland & Ellis LLP, the disputed portion of the requested Existing Indenture Trustee Charges until such dispute is resolved consensually or by the Court or the Bankruptcy Court.

To the extent that the Existing Indenture Trustee provides services, or incurs costs or expenses, including professional fees and expenses, related to or in connection with the Plan of Arrangement, the Final Order or the Existing Unsecured Note Indenture, including Existing Indenture Trustee Charges, which were not invoiced prior to the Effective Date as set forth above or were incurred on or after the Effective Date, the Existing Indenture Trustee shall be entitled to receive from ESAI, reasonable and documented fees, costs and expenses, including professional fees, incurred in connection with such services. The payment of such fees and expenses will be made as soon as practicable and on the terms provided herein or as otherwise agreed to by the Existing Indenture Trustee and ESAI.

Section 6.7 Further Assurances

Notwithstanding that the transactions and events set out herein will occur and be deemed to occur in the order and in the manner set out in this Plan of Arrangement without any further act or formality, each of the Persons affected hereby shall make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by ESAI to better implement this Plan of Arrangement, at the sole cost of ESAI.

Section 6.8 Paramountcy

On and from the Effective Time, any conflict between this Plan of Arrangement and the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan agreement, support agreement, commitment letter, by-laws or other agreement, written or oral, and any and all amendments or supplements thereto existing between one or more of the Noteholders, on the one hand, and any of ESAI, Essar Canada, Subco and/or EGFL, on the other hand, as at the Effective Date will be deemed to be governed by the terms, conditions and provisions of this Plan of Arrangement and the Final Order, which shall take precedence and priority.

Section 6.9 Deeming Provisions

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

Section 6.10 Severability

If prior to the Effective Date, any provision of this Plan of Arrangement is held by the Court to be invalid, void or unenforceable, the Court, at the request of ESAI and subject to the consent of EGFL and counsel to the Initial Consenting Noteholders, acting reasonably, may alter and/or 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 this Plan of Arrangement will remain in full force and effect and will in no way be invalidated by such alteration or interpretation.

Section 6.11 Notices

Any notices or communication to be made or given hereunder shall be in writing and shall reflect this Plan of Arrangement and may, subject as hereinafter provided, be made or given by the Person making or giving it or by any agent of such Person authorized for that purpose by personal delivery, by prepaid mail or by telecopier addressed to the respective parties as follows:

(i) if to ESAI, Essar Canada or Subco:

Essar Steel Algoma Inc.
105 West Street
Sault Ste. Marie, Ontario
Canada P6A 7B4
Attention: J. Robert Sandoval, Esq.
Facsimile: (705) 945-2203

with a required copy (which shall not constitute notice) to:

Stikeman Elliott LLP

5300 Commerce Court West
199 Bay Street
Toronto, Ontario
Canada M5L 1B9
Attention: John Ciardullo and Ashley Taylor
Facsimile: (416) 947-0866

(ii) if to EGFL:

Essar Global Fund Limited
Clifton House
75 Fort Street, George Town
Grand Cayman
Cayman Islands
Attention: Joe Seifert and Susan Fennessey
Facsimile: (212) 308-2309

with a required copy (which shall not constitute notice) to:

McCarthy Tetrault
Box 48, Suite 5300, Toronto Dominion Bank Tower
Toronto, Ontario
Canada M5K 1E6
Attention: James Gage
Facsimile: (416) 868-0673

(iii) if to a Noteholder:

to the address for such Noteholder as shown on the records of the Existing Indenture Trustee;

with a required copy (which shall not constitute notice) to:

Goodmans LLP
3400-333 Bay Street
Toronto, Ontario
Canada M5H 2S7
Attention: Rob Chadwick and Joe Latham
Facsimile: (416) 979-1234

(iv) if to the Existing Indenture Trustee:

BOKF, NA
One Williams Center, 10SW
Tulsa, OK 74103
Attention: Marrien Neilson
Facsimile: (918) 588-6803

with a required copy (which shall not constitute notice) to:

Dickinson Wright LLP
199 Bay Street, Suite 2200
Commerce Court West
Toronto, ON M5L 1G4
Attention: Michael A. Weinczok
Facsimile: (416) 865-1398

or to such other address as any party may from time to time notify the others in accordance with this Section 6.11. In the event of any strike, lock-out or other event which interrupts postal service in any part of Canada or the United States, all notices and communications during such interruption may only be given or made by personal delivery or by telecopier and any notice or other communication given or made by prepaid mail within the five Business Day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been given or made. All such notices and communications shall be deemed to have been received, in the case of notice by telecopier or by delivery prior to 5:00 p.m. (local time) on a Business Day, when received or if received after 5:00 p.m. (local time) on a Business Day or at any time on a non-Business Day, on the next following Business Day and, in the case of notice mailed as aforesaid, on the fifth Business Day following the date on which such notice or other communication is mailed. The unintentional failure by ESAI, Essar Canada and/or Subco to give a notice contemplated hereunder to any particular Noteholder shall not invalidate this Plan of Arrangement or any action taken by any Person pursuant to this Plan of Arrangement.

SCHEDULE A
ARTICLES OF ARRANGEMENT

(see attached)

SCHEDULE B
ARRANGEMENT RESOLUTION

BE IT RESOLVED THAT:

1. The arrangement (the "**Arrangement**") pursuant to section 192 of the *Canada Business Corporations Act* (the "**CBCA**") of Essar Steel Algoma Inc. (the "**Corporation**") and Essar Steel Canada Inc., as set forth in the plan of arrangement of the Corporation attached as Appendix "B" to the management information circular of the Corporation dated August 12, 2014 (as the same may be, or may have been, amended, modified or supplemented, the "**Plan of Arrangement**") be and is hereby authorized, approved and adopted.

2. The Corporation is hereby authorized to apply to the Ontario Superior Court of Justice for the Final Order (as such term is defined in the Plan of Arrangement).

3. Notwithstanding the passing of this resolution or the passing of similar resolutions or the approval of the Ontario Superior Court of Justice, the Board of Directors of the Corporation, without further notice to, or approval of, the security holders of the Corporation, is hereby authorized and empowered to (a) amend, modify or supplement the Plan of Arrangement to the extent permitted thereby, and (b) subject to the terms of the Plan of Arrangement, to determine not to proceed with the Arrangement at any time prior to the Arrangement becoming effective pursuant to the provisions of the CBCA.

4. Any director or officer of the Corporation be and is hereby authorized and directed, for and on behalf of the Corporation, to execute and deliver, or cause to be executed and delivered, articles of arrangement and any and all other documents, agreements and instruments and to perform, or cause to be performed, such other acts and things, as in such person's opinion may be necessary or desirable to give full effect to these resolutions and the matters authorized hereby, including the transactions required or contemplated by the Arrangement, such determination to be conclusively evidenced by the execution and delivery of such documents, agreements or other instruments or the doing of any such act or thing.

IN THE MATTER OF AN APPLICATION UNDER 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF RULES 14.05(2) and 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF ESSAR STEEL CANADA INC., ESSAR STEEL ALGOMA INC., ALGOMA HOLDINGS B.V., CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Court File No. CV-14-10629-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
E-mail: ataylor@stikeman.com

Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
E-mail: kesaw@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicants

TAB 2

Court File No. CV-17-11809-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 20TH
	)	
JUSTICE HAINEY	)	DAY OF JUNE, 2017

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, AS AMENDED;

AND IN THE MATTER OF RULE 14.05(2) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF MOOD CORPORATION, AND INVOLVING MOOD MEDIA NORTH AMERICA, LLC, MUZAK LLC, MUZAK HOLDINGS LLC, MUZAK CAPITAL LLC, MOOD US ACQUISITION1, LLC, MOOD MEDIA NORTH AMERICAN HOLDINGS CORP., DMX HOLDINGS, LLC, DMX, LLC, DMX RESIDENTIAL HOLDINGS, LLC, DMX RESIDENTIAL, LLC, TECHNOMEDIA NY, LLC, TECHNOMEDIA SOLUTIONS, LLC, SERVICENET EXP, LLC, AND CONVERGENCE, LLC

FINAL ORDER

THIS APPLICATION made by the Applicant, Mood Media Corporation ("**Mood Media**" or the "**Applicant**"), and involving Mood Media North America, LLC, Muzak LLC, Muzak Holdings LLC, Muzak Capital LLC, Mood US Acquisition1, LLC, Mood Media North America Holdings Corp., DMX Holdings, LLC, DMX, LLC, DMX Residential Holdings, LLC, DMX Residential, LLC, Technomedia NY, LLC, Technomedia Solutions, LLC, ServiceNet EXP, LLC, and Convergence, LLC (together with Mood Media, the "**Mood Group**"), pursuant to section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, (the "**CBCA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application issued on May 18, 2017, the affidavit of Michael F. Zendan II sworn May 16, 2017, and the supplementary affidavit of Michael F. Zendan II sworn June 15, 2017, together with the exhibits thereto, and the Interim Order of the Honourable Justice Hainey dated May 18, 2017, and

ON HEARING the submissions of counsel for the Applicant and the other members of the Mood Group and counsel for the Sponsors, and on being advised that the Director appointed under the CBCA does not consider it necessary to appear on this application, no-one appearing for any other person, including any holders of voting common shares in the capital of Mood Media or any holders of Mood Media's 9.25% Senior Notes due 2020 (other than the Sponsors), and having determined that the Arrangement, as described in the Plan of Arrangement attached as Schedule "A" to this Order, is an arrangement for the purposes of section 192 of the CBCA and is fair and reasonable in accordance with the requirements of that section, and upon being advised that the Order shall serve as the basis for reliance on the exemption provided by Section 3(a)(10) of the *United States Securities Act of 1933*, as amended, from the registration requirements otherwise imposed by that act, regarding the distribution of common shares and notes of the Company pursuant to the Plan of Arrangement,

DEFINITIONS

1. **THIS COURT ORDERS** that all definitions used in this Order shall have the meanings ascribed thereto in the Plan of Arrangement or otherwise as specifically defined herein.

APPROVAL OF ARRANGEMENT

2. **THIS COURT ORDERS** that the Arrangement, as described in the Plan of Arrangement attached as Schedule "A" to this Order, shall be and is hereby approved.

3. **THIS COURT ORDERS** that as of the Effective Date, the Plan and all associated steps, releases and transactions are hereby approved, binding and effective as set out in the Plan, and on the terms and conditions set forth in this order, upon the Applicant, the Company Noteholders, the Company Shareholders, the Company Note Trustees, the New Company Note Trustees and all other Persons affected by the Plan. The steps to be taken and the terminations, cancellations, amendments, transfers, payments, exchanges, extinguishments, purchases, sales, releases, deliveries and any other transactions to be effected on the Effective Date are and shall be deemed to occur and be effected in the sequential order and at the times contemplated the Plan, without any further act or formality, on the Effective Date beginning at the Effective Time.

4. **THIS COURT ORDERS** that the Applicant shall be entitled to seek leave to vary this Order upon such terms and upon giving such notice as this court may direct, to seek the advice and directions of this court as to the implementation of this Order, and to apply for such further order or orders as may be appropriate.

5. **THIS COURT ORDERS** that the Applicant, and each of the Company Note Trustees, the New Company Note Trustees and The Depository Trust Company are authorized and directed to take all steps and actions necessary or appropriate to implement the Plan and the Arrangement and the other transactions contemplated thereby, including entering into the New Company Note Indenture, the issuance and

distribution of the New Company Notes, the discharge and release of the Company Note Indenture, and the cancellation of the Company Notes, in accordance with and subject to the terms of the Plan, including, without limitation, to enter into any agreements or other documents in connection with the Arrangement.

NO DEFAULT

6. **THIS COURT ORDERS** that, from and after the Effective Time, no person listed in Schedule "B" to this Order, and no party under the following instruments:

a) the Company Note Indenture, including the Company Noteholders and any administrative agent, collateral agent, indenture trustee or similar person;

b) the Credit Agreement, including the lenders thereto and any administrative agent, collateral agent, indenture trustee or similar person; and

c) MMGSA Note Indenture, including the holders of the MMGSA Notes and the MMGSA Note Trustee, and any administrative agent, collateral agent, indenture trustee or similar person;

shall have any right to terminate, accelerate, amend or declare in default or take any other enforcement steps under such instruments or any other contract, agreement or guarantee to which Mood Media, Mood Media North America, LLC, Muzak LLC, Muzak Holdings LLC, Muzak Capital LLC, Mood US Acquisition1, LLC, Mood Media North America Holdings Corp., DMX Holdings,

LLC, DMX, LLC, DMX Residential Holdings, LLC, DMX Residential, LLC, Technomedia NY, LLC, Technomedia Solutions, LLC, Servicenet EXP, LLC, And Convergence, LLC (together, the "**Mood Group**") is a party, including, without limitation, the guarantees given pursuant to the Company Note Indenture, the Credit Agreement or the MMGSA Note Indenture, and the security given pursuant to the Credit Agreement, by reason or as a result of the following ("**Filing Defaults**"):

a) Any Mood Group entity being party to these proceedings or being a party to the Arrangement;

b) Any Mood Group entity having made an Application to this Honourable Court under section 192 of the CBCA;

c) Any Mood Group entity having commenced, or being a party to, a proceeding under Chapter 15 of title 11 of the United States Code, 11 U.S.C. 101-1532 in the United States Bankruptcy Court for the Southern District of New York;

d) Any Mood Group entity taking any step contemplated by or related to the Arrangement; or

e) the operation of any default or cross-default resulting from the foregoing,

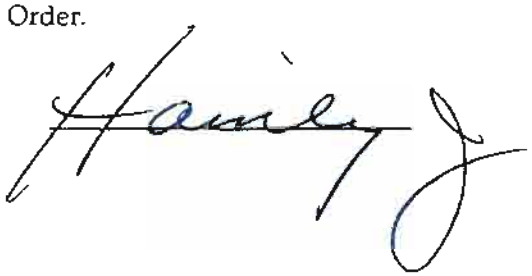
without further order of this Honourable Court.

TERMINATION OF CBCA PROCEEDINGS

7. **THIS COURT ORDERS** that the within Application is deemed to be terminated as of the Effective Date immediately following the implementation of the Arrangement.

AID AND RECOGNITION

8. THIS COURT seeks and requests the aid and recognition of any court or any judicial, regulatory or administrative body in any province 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 and any court or any judicial, regulatory or administrative body of the United States or other country to act in aid of and to assist this Court in carrying out the terms of this Order.



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

JUN 20 2017

PER / PAR

SCHEDULE A

PLAN OF ARRANGEMENT
UNDER SECTION 192 OF THE
CANADA BUSINESS CORPORATIONS ACT

[REPRODUCE PLAN OF ARRANGEMENT]

8505468.1amy

SCHEDULE A
PLAN OF ARRANGEMENT

PLAN OF ARRANGEMENT UNDER SECTION 192
OF THE *CANADA BUSINESS CORPORATIONS ACT*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF MOOD MEDIA CORPORATION AND INVOLVING, MOOD MEDIA NORTH AMERICA HOLDINGS CORP., SERVICENET EXP, LLC, TECHNOMEDIA NY, LLC, CONVERGENCE, LLC, TECHNOMEDIA SOLUTIONS, LLC, MOOD MEDIA NORTH AMERICA, LLC, DMX HOLDINGS, LLC, DMX, LLC, DMX RESIDENTIAL HOLDINGS, LLC, DMX RESIDENTIAL LLC, MOOD US ACQUISITION1, LLC, MUZAK HOLDINGS LLC, MUZAK LLC AND MUZAK CAPITAL LLC

ARTICLE 1
DEFINITIONS AND INTERPRETATION

1.1 Definitions

Unless indicated otherwise, where used in this Plan of Arrangement, terms used but not defined shall have the meanings specified in the Arrangement Agreement (as defined below) and the following terms shall have the following meanings (and grammatical variations of such terms shall have corresponding meanings):

"**Affiliate**" means, with respect to any Person, any other Person that, directly or indirectly, controls, is controlled by or is under common control with such Person; provided, that (other than in the case of the definitions of Apollo Backstop Amount, beneficially own, Eligible Company Noteholders, Funding Company Noteholder, or in Section 2.1(1) or Section 7.4), in no event shall (a) Apollo Sponsor or any of its respective Subsidiaries or the GSO Sponsors or any of their respective Subsidiaries be considered an Affiliate of any portfolio company, investment fund managed, advised, or sub-advised by, or affiliated with AGM or GSO/BDFM, respectively, (b) any portfolio company or investment fund managed, advised, or sub-advised by, or affiliated with AGM or GSO/BDFM, be considered to be an Affiliate of Apollo Sponsor or any of its Subsidiaries or of the GSO Sponsors or any of their respective Subsidiaries, respectively, (c) the GSO Sponsors or any of their respective Subsidiaries be considered an Affiliate of The Blackstone Group L.P. or any of its affiliates (other than the GSO Sponsors and any of their respective Subsidiaries), in each case, in its businesses distinct from the business of GSO/BDFM, or (d) The Blackstone Group L.P. or any of its affiliates (other than the GSO Sponsors and any of their respective Subsidiaries), in each case, in its businesses distinct from the business of GSO/BDFM, be considered to be an Affiliate of the GSO Sponsors or any of their respective Subsidiaries.

"**Aggregate Arrangement Cost**" means the aggregate amount of cash required to (a) pay the Aggregate Share Cash-Out Consideration, (b) pay an amount equal to the Dissent Amount to Dissenting Shareholders, (c) pay the Aggregate Company Option and Company DSU Cash-Out Consideration, (d) effect the MMGSA Note Redemption, (e) pay out the amounts outstanding

under the Credit Facility and otherwise payable in connection with the Credit Facility Refinancing, (f) make the payment contemplated by Section 3.3(1), and (g) pay all amounts (i) payable to the Company's advisors or otherwise payable by the Company in connection with the Arrangement, and (ii) that the Company is required to reimburse to the Sponsors pursuant to Section 4.2(4) of the Arrangement Agreement, in the case of the immediately foregoing clauses (a), (b), (c), (d), (e) and (f), as estimated by the Company in consultation with the Sponsors no later than the tenth Business Day prior to the expected Effective Date, in the case of the immediately foregoing subclause (g)(i), as estimated by the Company no later than the tenth Business Day prior to the expected Effective Date and, in the case of the immediately foregoing subclause (g)(ii), as estimated by the Sponsors no later than the tenth Business Day prior to the expected Effective Date.

"**Aggregate Company Option and Company DSU Cash-Out Consideration**" means the aggregate cash amounts payable under Section 3.3(2) and Section 3.3(3).

"**Aggregate Share Cash-Out Consideration**" means the aggregate amounts payable under Section 3.3(9).

"**AGM**" means Apollo Global Management, LLC, a Delaware limited liability company.

"**Apollo Backstop Amount**" means 58.27553% of the Backstopped Amount, which certain Affiliates of Apollo Sponsor have agreed to fund pursuant to the terms of the Apollo Equity Commitment Letter and Apollo Sponsor has agreed to fund pursuant to Section 2.10(2) of the Arrangement Agreement.

"**Apollo Sponsor**" means AP Mixtape Holdings, L.P., a limited partnership existing under the laws of Delaware.

"**Arrangement**" means an arrangement under section 192 of the CBCA on the terms and subject to the conditions set out in this Plan of Arrangement, subject to any amendments or variations to this Plan of Arrangement made in accordance with the terms of the Arrangement Agreement or this Plan of Arrangement or made at the direction of the Court in the Final Order with the prior written consent of the Company and the Sponsors, each acting reasonably.

"**Arrangement Agreement**" means the arrangement agreement made as of April 12, 2017 among the Company, Apollo Sponsor and the GSO Sponsors, as it may have been, or may from time to time be, amended, restated, replaced, supplemented or novated in accordance with its terms and including all schedules to it.

"**Arrangement Noteholder Resolution**" means the resolution of the Company Noteholders approving this Plan of Arrangement to be considered by the Company Noteholders at the Company Noteholder Meeting.

"**Arrangement Shareholder Resolution**" means the special resolution approving the Plan of Arrangement to be considered by the Company Shareholders at the Company Shareholder Meeting.

"**Articles of Arrangement**" means the articles of arrangement of the Company in respect of the Arrangement, required by the CBCA to be sent to the Director after the Final Order is made, which shall include the Plan of Arrangement and otherwise be in a form and satisfactory to the Company and the Sponsors, each acting reasonably.

"**Backstopped Amount**" means cash in an amount equal to the (i) New Capital Offering Amount, less (ii) the aggregate Participating Noteholder Commitment Amounts validly deposited in escrow by Participating Noteholders (other than the Sponsors) in accordance with Section 2.1(3).

"**beneficially own**" means, with respect to any Person, any security: (a) which such Person or any of such Person's Affiliates is deemed to beneficially own, directly or indirectly, within the meaning of Rule 13d-3 of the General Rules and Regulations under the Exchange Act; (b) which such Person or any Person acting jointly or in concert with such Person would be deemed to beneficially own with the meaning of Section 1.8 of National Instrument 62-104 – *Take-over Bids and Issuer Bids*; and (c) which are the subject of one or more repurchase agreements under which such Person or an Affiliate of such Person has a right or an obligation to acquire such security at settlement or optional termination of the agreement, whether or not presently exercisable.

"**Board**" means the board of directors of the Company as constituted from time to time.

"**Business Day**" means any day of the year, other than a Saturday, Sunday or any day on which major banks are closed for business in Toronto, Ontario, Canada, Austin, Texas, USA, Dover, Delaware, USA or New York, New York, USA.

"**CBCA**" means the *Canada Business Corporations Act*.

"**Certificate of Arrangement**" means the certificate of arrangement to be issued by the Director pursuant to subsection 192(7) of the CBCA in respect of the Articles of Arrangement.

"**Certificate of Domestication**" means the certificate of corporate domestication required by Section 388 of the DGCL in connection with the Continuance and Domestication.

"**Code**" means the United States Internal Revenue Code of 1986.

"**Company**" means Mood Media Corporation, a corporation continued under the CBCA.

"**Company Circular**" means the notice of the Company Shareholder Meeting, notice of the Company Noteholder Meeting and accompanying management information circular, including all schedules, appendices and exhibits to, and information incorporated by reference in, such management information circular, to be sent to the Company Shareholders in connection with the Company Shareholder Meeting and Company Noteholders in connection with the Company Noteholder Meeting, as amended, supplemented or otherwise modified from time to time in accordance with the terms of the Arrangement Agreement.

"**Company Common Shares**" means: (a) prior to the amendment to the Company's articles in Section 3.3(5)(a), the common shares in the capital of the Company; and (b) following the

amendment to the Company's articles in Section 3.3(5)(a), the Class A Shares in the capital of the Company.

"**Company DSUs**" means the outstanding deferred share units issued pursuant to the Company DSU Plan.

"**Company DSU Plan**" means the Company's deferred share unit plan dated May 7, 2015.

"**Company Meetings**" means, collectively, the Company Shareholder Meeting and the Company Noteholder Meeting.

"**Company Note Indenture**" means the indenture dated as of October 19, 2012 by and among the Company, the subsidiary guarantors party thereto, The Bank of New York Mellon, as U.S. trustee and BNY Trust Company of Canada, as trustee, as supplemented by that certain supplemental indenture dated as of January 9, 2013 by and among the Company, the guaranteeing subsidiaries and other subsidiary guarantors party thereto, The Bank of New York Mellon, as U.S. trustee and BNY Trust Company of Canada, as trustee.

"**Company Note Trustees**" means the trustees under the Company Note Indenture.

"**Company Noteholder Meeting**" means the meeting of Company Noteholders, including any adjournment or postponement of such meeting in accordance with the terms of this Agreement, to be called and held in accordance with the Interim Order to consider the Arrangement Noteholder Resolution and for any other purpose as may be set out in the Company Circular and agreed to in writing by the Sponsors, acting reasonably.

"**Company Noteholders**" means the holders of the Company Notes.

"**Company Notes**" means the $350,000,000 in aggregate principal amount of the Company's 9.25% Senior Notes due 2020 issued pursuant to the Company Note Indenture.

"**Company Optionholders**" means the holders of Company Options.

"**Company Options**" means the outstanding options to purchase Company Common Shares issued pursuant to the Company Stock Option Plan.

"**Company Shareholder Meeting**" means the special meeting of Company Shareholders, including any adjournment or postponement of such special meeting in accordance with the terms of this Agreement, to be called and held in accordance with the Interim Order to consider the Arrangement Shareholder Resolution and the Continuance and Domestication Resolution and for any other purpose as may be set out in the Company Circular and agreed to in writing by the Sponsors, acting reasonably.

"**Company Shareholders**" means the registered or beneficial holders of the Company Common Shares, as the context requires.

"**Company Stock Option Plan**" means the Company's share option plan effective June 19, 2008, as reapproved by the Company Shareholders on June 13, 2011 and May 13, 2014.

"**Company Warrant Indenture**" means the indenture dated August 6, 2015 between the Company and Computershare Trust Company of Canada providing for the issuance of warrants to purchase Company Common Shares.

"**Company Warrants**" means the outstanding warrants of the Company issued pursuant to the Company Warrant Indenture.

"**Consideration Common Shares**" means 682 New Company Common Shares per $1,000 of Funded Amount advanced by a Funding Company Noteholder.

"**Continuance and Domestication**" means the discontinuance of the Company from the jurisdiction of the CBCA and the concurrent domestication of the Company in the State of Delaware pursuant to the provisions of Section 388 of the DGCL.

"**Continuance and Domestication Resolution**" means special resolution approving the Continuance and Domestication to be considered by the Company Shareholders at the Company Shareholder Meeting.

"**control**" (including, with correlative meanings, the terms "**controlling**", "**controlled by**" and "**under common control with**"), as used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of that Person, whether through the ownership of voting securities, by contract or otherwise.

"**Court**" means the Ontario Superior Court of Justice (Commercial List).

"**Credit Agreement**" means the first lien credit agreement dated as of May 1, 2014 among, inter alia, the Company, as borrower, the lenders named therein, Credit Suisse AG (acting through its Cayman Islands branch) as the administrative agent, collateral agent and issuing bank, as amended from time to time.

"**Credit Facility**" means the credit facility available under the Credit Agreement.

"**Credit Facility Refinancing**" means the refinancing and replacement of the Credit Facility acceptable to the Sponsors, each acting reasonably and in a manner consistent in all material respects with the terms and conditions set forth in the Debt Commitment Letter.

"**Debt Commitment Letter**" means an executed commitment letter, dated as of April 12, 2017, among the Apollo Sponsor, the GSO Sponsors, the Company and the lenders party thereto, pursuant to which the lenders party thereto have committed, subject to the terms and conditions thereof, to lend the amounts set forth therein, as may be amended, modified or supplemented in accordance with its terms and the terms of the Arrangement Agreement.

"**Debt Financing Amount**" means the amount to be advanced to the Company (or a Subsidiary thereof) on the Effective Date pursuant to the Debt Commitment Letter.

"**Depositary**" means Computershare Investor Services Inc., or such other Person as the Company may appoint to act as depositary for the Company Common Shares and Company Notes in relation to the Arrangement, with the approval of the Sponsors, acting reasonably.

"DGCL" means the General Corporation Law of the State of Delaware.

"**Director**" means the Director appointed pursuant to section 260 of the CBCA.

"**Dissent Amount**" means an amount equal to the product of C$0.17 multiplied by the number of Dissenting Company Common Shares.

"**Dissent Rights**" has the meaning specified in Section 4.1.

"**Dissenting Company Common Share**" has the meaning specified in Section 3.3(4).

"**Dissenting Shareholder**" means a registered holder of Company Common Shares who has validly exercised Dissent Rights and has not withdrawn or been deemed to have withdrawn such exercise of Dissent Rights, but only in respect of the Company Common Shares in respect of which Dissent Rights are validly exercised by such holder in strict compliance with the terms of the Dissent Rights.

"DLLC 1" a limited liability company organized under the laws of Delaware and a wholly owned subsidiary of the Company.

"DLLC 2" a limited liability company organized under the laws of Delaware and a wholly owned subsidiary of DLLC 1.

"**Effective Date**" means the date shown on the Certificate of Arrangement giving effect to the Arrangement.

"**Effective Time**" means 12:01 a.m. on the Effective Date, or such other time as the Parties agree to in writing before the Effective Date.

"**Eligible Company Noteholders**" means a Person that is a Company Noteholder on the Participation Record Date or an Affiliate of such Company Noteholder to whom such Company Noteholder assigns its Subscription Option that is (i) in Canada, (ii) if such Person is in the United States, an institution that is an "accredited investor" within the meaning of Rule 501(a)(1), (2), (3) or (7) of Regulation D under the U.S. Securities Act; or (iii) if such Person is resident outside of Canada and the United States, qualified to participate in the New Capital Offering in accordance with the Laws of its jurisdiction of residence and has provided evidence satisfactory to the Company to demonstrate such qualification.

"**Entitlements**" means all legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to or arising out of, or in connection with, the Company Notes or the Company Note Indenture or the guarantees provided by the Subsidiary Guarantors in connection therewith, including any and all accrued and unpaid interest up to the Effective Date (including any guarantees granted in respect of, or pursuant to, the foregoing).

"**Final Order**" means the final order of the Court pursuant to section 192 of the CBCA in a form acceptable to the Company and the Sponsors, each acting reasonably, approving the Arrangement, as such order may be amended by the Court (which amendment shall be acceptable to both the Company and the Sponsors, each acting reasonably) at any time prior to the Effective Date or, if appealed, then, unless such appeal is withdrawn or denied, as affirmed or as amended (provided that any such amendment is acceptable to both the Company and the Sponsors, each acting reasonably) on appeal.

"**Funded Amount**" means, with respect to a Funding Company Noteholder, the amount that such Funding Company Noteholder has validly deposited with the Depositary pursuant to Section 2.1(3) or Section 2.1(4), as applicable.

"**Funding Company Noteholder**" means (a) a Participating Noteholder that has validly deposited all of such Participating Noteholder's Participating Noteholder Commitment Amount with the Depositary prior to the Participating Noteholder Funding Deadline pursuant to Section 2.1(3), and (b) each Sponsor (and each Affiliate thereof that beneficially owns Company Notes).

"**Governmental Entity**" means: (a) any international, multinational, national, federal, provincial, territorial, state, regional, municipal, local or other government, governmental or public department, central bank, court, tribunal, arbitral body, commission, board, bureau, ministry, agency or instrumentality, domestic or foreign; (b) any subdivision or authority of any of the above; (c) any quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under or for the account of any of the foregoing; or (d) any stock exchange.

"**GSO/BDFM**" means GSO / Blackstone Debt Funds Management LLC, a Delaware limited liability company.

"**GSO Backstop Amount**" means 41.72447% of the Backstopped Amount, which the GSO Sponsors have agreed to fund pursuant to Section 2.10(1) of the Arrangement Agreement.

"**GSO Sponsors**" means, collectively, FS Investment Corporation, a corporation existing under the laws of Maryland, FS Investment Corporation II, a corporation existing under the laws of Maryland, Cobbs Creek LLC, a limited liability company existing under the laws of Delaware, Juniata River LLC, a limited liability company existing under the laws of Delaware, Race Street Funding LLC, a limited liability company existing under the laws of Delaware, and Blackstone / GSO Strategic Credit Fund, a statutory trust existing under the laws of Delaware.

"**Interim Order**" means the interim order of the Court made pursuant to section 192 of the CBCA in a form acceptable to the Company and the Sponsors, each acting reasonably, providing for, among other things, the calling and holding of the Company Meeting, as such order may be amended by the Court (which amendment shall be acceptable to both the Company and the Sponsors, each acting reasonably).

"**Law**" means, with respect to any Person, any and all applicable law (statutory, common or otherwise), constitution, treaty, convention, ordinance, by-law, code, rule, regulation, order, injunction, notice, judgment, award, decree, ruling or other similar requirement, whether domestic or foreign, enacted, adopted, promulgated or applied by a Governmental Entity that is

binding upon or applicable to such Person or its business, undertaking, property or securities, and to the extent that they have the force of law, policies, guidelines, notices and protocols of any Governmental Entity, as amended unless expressly specified otherwise.

"**Letter of Transmittal**" means the letters of transmittal for use by Company Shareholders and Company Noteholders with respect to the Arrangement, which shall be mailed to Company Shareholders and Company Noteholders.

"**Lien**" means any mortgage, charge, pledge, hypothec, security interest, prior claim, encroachments, option, right of first refusal or first offer, occupancy right, covenant, assignment, lien (statutory or otherwise), defect of title, or restriction or adverse right or claim, or other third party interest or encumbrance of any kind, in each case, whether contingent or absolute.

"**Maximum New Capital Offering Amount**" means $50,000,000.

"**MMGSA Note Redemption**" means the repayment and redemption of all of the MMGSA Notes on or within 60 days of the Effective Date (in accordance with the terms and conditions of the MMGSA Note Indenture as determined by the Company, acting reasonably) and the satisfaction and discharge of the MMGSA Note Indenture as of the Effective Date.

"**MMGSA Notes**" means the $50,000,000 in aggregate principal amount of Mood Media Group S.A.'s 10% Senior Notes due 2023 issued pursuant to the MMGSA Notes Indenture as amended, restated, modified, renewed, extended, increased, refunded, replaced in any manner (whether upon or after termination or otherwise) or refinanced (including by means of sales of debt securities to institutional investors) in whole or in part from time to time.

"**MMGSA Note Indenture**" means the indenture dated as of August 6, 2015 by and among MMGSA, the subsidiary guarantors party thereto, the Company, as limited recourse guarantor, and MMGSA Note Trustee.

"**New Capital Offering**" means the offering to Eligible Company Noteholders to exercise their Subscription Option and participate in the investment of new capital in the Company in the total aggregate amount of the New Capital Offering Amount.

"**New Capital Offering Amount**" means the lesser of (i) the Maximum New Capital Offering Amount, and (ii) the amount, if any, by which the Aggregate Arrangement Cost exceeds the sum of the Debt Financing Amount and the Projected Cash-on Hand, and shall be determined by the Company in consultation with the Sponsors by no later than the tenth Business Day prior to the expected Effective Date; provided, that (a) the New Capital Offering Amount shall not be less than $25,000,000 and (b) any amount calculated or determined for purposes of this definition shall be subject to the thresholds, restrictions or other requirements as may be set forth in the Arrangement Agreement or other Definitive Documents to the extent any such threshold, restriction or other requirement is applicable to the determination of the New Capital Offering Amount.

"**New Company Common Shares**" has the meaning specified in Section 3.3(5)(b).

"**New Company Note Indenture**" means an indenture governing the New Company Notes to be dated the Effective Date, which shall be consistent with the New Company Notes Term Sheet attached as Appendix L to the Company Circular and otherwise acceptable to the Company and the Sponsors, each acting reasonably.

"**New Company Note Trustees**" means the trustees under the New Company Note Indenture.

"**New Company Notes**" means the $175 million aggregate principal amount of second lien notes to be issued by the Company on the Effective Date in accordance with Section 3.3(6) pursuant to the New Company Note Indenture, which notes shall be repayable in cash or, at the option of the Company, on a par for par basis with second lien notes (having substantially the same terms as the New Company Notes) to be co-issued by DLLC2 and SubCo in connection with the acquisition by DLLC 2 of all or substantially all of the assets of the Company.

"**Non-Participating Company Note Consideration**" means: (a) 150 New Company Common Shares; and (b) $500 principal amount of New Company Notes, per $1,000 principal amount of Company Notes.

"**Obligations**" means all obligations, liabilities and indebtedness of the Company and its Affiliates (including each of the Subsidiary Guarantors) with respect to or arising out of, or in connection with, the Company Notes or the Company Note Indenture (including any guarantees granted in respect of, or pursuant to, the foregoing).

"**Offsetting Amount**" means amounts payable to the Company by the Subscribing Shareholder that are to be offset against the Share Cash-Out Consideration to which the Subscribing Shareholder is otherwise entitled under Section 3.3(9), pursuant to the Subscription Agreement.

"**Participating Company Note Consideration**" means: (a)(i) 175 New Company Common Shares; and (ii) $500 principal amount of New Company Notes, per $1,000 principal amount of Company Notes, and (b) its Consideration Common Shares.

"**Participating Noteholder**" means an Eligible Company Noteholder who has duly completed and submitted a Subscription Option Exercise Form in accordance with the terms thereof in advance of the Participation Deadline in order to exercise its Subscription Option in full.

"**Participating Noteholder Commitment Amount**" means, as to any Participating Noteholder, the amount equal to the product of (i) the New Capital Offering Amount, multiplied by (ii) the percentage, rounded to the nearest tenth of a percent, obtained by dividing (A) the aggregate principal amount of all Company Notes beneficially owned by a Participating Noteholder on the Participation Record Date by (B) the aggregate principal amount of all outstanding Company Notes on the Participation Record Date.

"**Participating Noteholder Funding Deadline**" has the meaning specified in Section 2.1(3).

"**Participation Record Date**" means the date established by the Board, with the prior consent of the Sponsors, prior to the mailing of the Company Circular in consultation with the Sponsors; provided, that the Participation Record Date may be modified by the Board at any time (with the written consent of the Sponsors, acting reasonably).

"**Participation Deadline**" means 5:00 p.m. on the date established by the Board, with the prior consent of the Sponsors, prior to the mailing of the Company Circular in consultation with the Sponsors; provided, that the Participation Deadline may be modified by the Board at any time (with the written consent of the Sponsors, acting reasonably).

"**Parties**" means the Company, Apollo Sponsor and the GSO Sponsors, and "**Party**" means any one of them.

"**Person**" includes any individual, partnership, association, body corporate, organization, trust, estate, trustee, executor, administrator, legal representative, government (including Governmental Entity), syndicate or other entity, whether or not having legal status.

"**Plan of Arrangement**" means this plan of arrangement, including 0 hereto and any amendments or variations hereto made in accordance with the Arrangement Agreement or Section 7.1 or made at the direction of the Court in the Final Order with the prior written consent of the Company and the Sponsors, each acting reasonably.

"**Preferred Shares**" means the preferred shares, issuable in series, in the capital of the Company.

"**Projected Cash-on Hand**" means the Company's projected cash-on hand on the Effective Date in excess of $10 million, exclusive of the Debt Financing Amount and any amounts to be provided pursuant to the New Capital Offering, as estimated by the Company in consultation with the Sponsors no later than the tenth Business Day prior to the expected Effective Date.

"**Released Parties**" has the meaning specified in Section 7.4.

"**Share Cash-Out Consideration**" means C$0.17 per Company Common Share in cash.

"**Sponsors**" means, collectively, Apollo Sponsor and each of the GSO Sponsors.

"**SubCo**" means a corporation to be incorporated under the laws of Delaware and a wholly owned subsidiary of DLLC2.

"**Subscribing Shareholder**" means Arbiter Partners Capital Management, LLC.

"**Subscription Agreement**" means the voting and support and subscription agreement made as of April 12, 2017 among the Subscribing Shareholder, the Company and the Sponsors, as it may have been, or may from time to time be, amended, restated, replaced, supplemented or novated in accordance with its terms

"**Subscription Option**" means, with respect to each Eligible Company Noteholder, the option, which may be exercised by such Eligible Company Noteholder in accordance with the terms of this Plan of Arrangement and the Subscription Option Exercise Form, to participate in the New Capital Offering by electing, in accordance with the provisions of the Subscription Option Exercise Form, to invest its Participating Noteholder Commitment Amount.

"**Subscription Option Exercise Form**" means the certification and exercise form to be circulated to Company Noteholders pursuant to the Interim Order and completed by such Eligible Company Noteholders who wish to exercise their Subscription Option on the Effective Date.

"**Subsidiary**" means a Person that is controlled directly or indirectly by another Person and includes a Subsidiary of that Subsidiary.

"**Subsidiary Guarantors**" means, collectively, Mood Media North America Holdings Corp., ServiceNET Exp, LLC, Technomedia NY, LLC, Convergence, LLC, Technomedia Solutions, LLC, Mood Media North America, LLC, DMX Holdings, LLC, DMX, LLC, DMX Residential Holdings, LLC, DMX Residential, LLC, Mood US Acquisition1, LLC, Muzak Holdings LLC, Muzak LLC and Muzak Capital, LLC, as guarantors of the Company Notes.

"**Tax Act**" means the *Income Tax Act* (Canada).

"**U.S. Dollar Equivalent**" means the amount in the United States dollar equivalent of the Share Cash-Out Consideration per Company Common Share on the basis of the Bank of Canada's noon rate on the date that is three Business Days prior to the Effective Date.

"**U.S. Securities Act**" means the *United States Securities Act of 1933*.

1.2 Interpretation Not Affected by Headings

The division of this Plan of Arrangement into Articles, Sections, subsections and paragraphs and the insertion of headings are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Plan of Arrangement. Unless the contrary intention appears, references in this Plan of Arrangement to an Article, Section, subsection or paragraph by number or letter or both refer to the Article, Section, subsection or paragraph, respectively, bearing that designation in this Plan of Arrangement.

1.3 Number and Gender

In this Plan of Arrangement, unless the contrary intention appears, words importing the singular include the plural and *vice versa*, and words importing gender include all genders.

1.4 Certain Phrases

The words "**including**", "**includes**" and "**include**" mean "**including (or includes or include) without limitation**," and "**the aggregate of**", "**the total of**", "**the sum of**", or a phrase of similar meaning means "**the aggregate (or total or sum), without duplication, of.**"

1.5 Date for Any Action

If any period expires on a day which is not a Business Day or any event or condition is required by the terms of this Plan of Arrangement to occur or to be fulfilled on a day which is not a Business Day, such period shall expire or such event or condition shall occur or be fulfilled, as the case may be, on the next succeeding day which is a Business Day.

1.6 Time

Time is of the essence in this Plan of Arrangement. All times expressed herein or in any Letter of Transmittal are local time in Toronto, Ontario, Canada unless otherwise stipulated herein or therein.

1.7 Successors and Assigns

This Plan of Arrangement will be binding upon and enure to the benefit of the heirs, administrators, executors, representatives, successors and permitted assigns of any Person named or referred to in this Plan of Arrangement.

1.8 Currency

All references in this Plan of Arrangement to "$" are references to United States dollars, unless otherwise specified. All references to "C$" are references to Canadian dollars.

1.9 Statutory References

References to a particular statute or law shall be to such statute or law and the rules, regulations and published policies made thereunder, as in force as at the date of this Plan of Arrangement and, unless otherwise expressly provided, as the same may be amended, re-enacted, consolidated or replaced from time to time.

1.10 Governing Law

This Plan of Arrangement will be governed by and interpreted and enforced in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation or application of this Plan of Arrangement and all proceedings in connection with this Plan of Arrangement will be subject to the exclusive jurisdiction of the Court.

ARTICLE 2
ELECTIONS AND NEW CAPITAL OFFERING

2.1 Participation in New Capital Offering

(1) Each Eligible Company Noteholder shall have the right, but not the obligation, to irrevocably elect to exercise its Subscription Option in full (and not in part) by agreeing pursuant to the Subscription Option Exercise Form to invest (i) its maximum potential Participating Noteholder Commitment Amount calculated based on the assumption that the New Capital Offering Amount is equal to the Maximum New Capital Offering Amount, or (ii) in the event that the New Capital Offering Amount is determined in accordance with this Plan of Arrangement to be less than the Maximum New Capital Offering Amount, its Participating Noteholder Commitment Amount calculated based on such lesser New Capital Offering Amount. Exercise of the Subscription Option and participation in the New Capital Offering shall be subject to, among other things, the terms of this Plan of Arrangement, the Interim Order and the Subscription Option Exercise Form, and shall be conditioned upon the implementation of this Plan of

Arrangement and effective on the Effective Date at the time contemplated by and in accordance with Section 3.3. In order to exercise its Subscription Option, an Eligible Company Noteholder must return, or cause to be returned, the properly completed and duly executed Subscription Option Exercise Form in accordance with the terms thereof such that it is received by the Company prior to the Participation Deadline. The Company has the right, with the consent of the Sponsors, to accept a Subscription Option Exercise Form filed after the Participation Deadline and otherwise waive any deficiencies with respect to any Subscription Option Exercise Form submitted. Each Sponsor shall be deemed to have exercised the Subscription Options that have been assigned to it prior to the Effective Time by its Affiliates that beneficially own the Company Notes and each Sponsor (and each Affiliate thereof that beneficially owns Company Notes) shall be deemed to be a Participating Noteholder by virtue of the commitments by the Apollo Sponsor in Section 2.10(2) of the Arrangement Agreement and the GSO Sponsors in Section 2.10(1) of the Arrangement Agreement to fund (or cause the funding of) the applicable portion of the Backstopped Amount without any need to complete and return the Subscription Option Exercise Form.

(2) The Company shall have, by no later than 11:00 a.m. on the seventh Business Day prior to the expected Effective Date,

(a) informed in writing (which may include by e-mail) each of the Participating Noteholders (other than the Sponsors) of (i) the expected Effective Date, (ii) the New Capital Offering Amount, and (iii) the Participating Noteholder Commitment Amount required to be deposited with the Depositary in escrow by such Participating Noteholder by the Participating Noteholder Funding Deadline in order to participate in the New Capital Offering and the manner in which such deposit must be completed; and

(b) informed in writing (which may include by e-mail) each Sponsor of (i) the expected Effective Date, (ii) the New Capital Offering Amount, and (iii) the aggregate of the Apollo Backstop Amount or GSO Backstop Amount, as applicable, required to be deposited with the Depositary by such Sponsor on the Effective Date pursuant to the New Capital Offering and the Apollo Commitment Letter;

(3) Each Participating Noteholder (other than the Sponsors) must deposit their Participating Noteholder Commitment Amount with the Depositary in escrow such that it is received by the Depositary by no later than 11:00 a.m. on the date that is two Business Days prior to the expected Effective Date (the "**Participating Noteholder Funding Deadline**"). The Company shall announce by way of a publicly disseminated news release, subject to approval by the Sponsors, each acting reasonably, the Participating Noteholder Funding Deadline on or before the fifth Business Day prior to such date.

(4) In accordance with the terms of the Arrangement Agreement, the Apollo Sponsor shall deposit the Apollo Backstop Amount and the GSO Sponsors shall deposit the GSO Backstop Amount, as applicable, with the Depositary on the Effective Date.

(5) Any Participating Noteholder (other than the Sponsors) that does not deposit their Participating Noteholder Commitment Amount with the Depositary in escrow such that it is received by the Depositary by the Participating Noteholder Funding Deadline shall be automatically deemed to no longer be a Participating Noteholder and will be deemed to be, after the expiration of the Participating Noteholder Funding Deadline, a Non-Participating Noteholder for all purposes of this Plan of Arrangement.

ARTICLE 3
THE ARRANGEMENT

3.1 Arrangement Agreement

This Plan of Arrangement is made pursuant to the Arrangement Agreement.

3.2 Effectiveness

(1) This Plan of Arrangement will become effective at, and will be binding at and after the Effective Time, without any further act or formality required on the part of any Person, on the Company, Apollo Sponsor, the GSO Sponsors, all registered holders and all beneficial owners of Company Common Shares (including, for greater certainty, Dissenting Shareholders), all registered holders and all beneficial owners of Company Notes, all registered holders and beneficial owners of Company Options, Company DSUs and Company Warrants, the registrar and transfer agent in respect of the Company Common Shares, the Company Note Trustees, the Depositary, the warrant agent for the Company and all other Persons.

(2) The Articles of Arrangement and the Certificate of Arrangement shall be filed and issued, respectively, with respect to the Arrangement in its entirety. The Certificate of Arrangement shall be conclusive evidence that the Arrangement has become effective and that each of the provisions Section 3.3 has become effective in the sequence and at the times set out therein.

(3) Other than as expressly provided for herein, no portion of this Plan of Arrangement shall take effect with respect to any party or Person until the Effective Time.

3.3 The Arrangement

Commencing at the Effective Time, the following steps shall occur and shall be deemed to occur in the following sequence without any further authorization, act or formality:

(1) all unpaid interest accrued to the Effective Date on the Company Notes shall be paid by the Company;

(2) notwithstanding anything in the Company Stock Option Plan to the contrary, each Company Option outstanding immediately prior to the Effective Time (whether vested or unvested), shall be deemed to be unconditionally vested and exercisable, and such Company Option shall be deemed to be assigned and transferred by the holder thereof to the Company in exchange for a cash payment from the Company to such holder equal

to the amount (if any) by which the Share Cash-Out Consideration exceeds the exercise price of such Company Option, in each case, less any amounts withheld in accordance with Section 7.5, and such Company Option shall immediately be cancelled and, for greater certainty, where such amount is a negative, no Person shall be obligated to pay the holder of such Company Option any amount in respect of the cancellation of such Company Option, and immediately thereafter the Company Stock Option Plan, all Company Options and any agreements related thereto shall be terminated and the Company shall have no liabilities or obligations with respect to any Company Option, the Company Stock Option Plan or any such agreement except as expressly set out in this Section 3.3(1);

(3) notwithstanding anything in the Company DSU Plan to the contrary, each Company DSU that is outstanding immediately prior to the Effective Time, whether vested or unvested, shall be assigned and transferred by the holder thereof to the Company in exchange for a cash payment from the Company to such holder equal to the U.S. Dollar Equivalent of the Share Cash-Out Consideration per Company Common Share less any amounts withheld in accordance with Section 7.5 and each such Company DSU shall be immediately cancelled;

(4) each Company Common Share in respect of which Dissent Rights have been validly exercised and not withdrawn (each a "**Dissenting Company Common Share**") shall be deemed to be transferred by the holder thereof to the Company for cancellation without any further act or formality in consideration for a debt claim against the Company for the amount determined in accordance with Section 4.1, and:

(a) such holder shall cease to be the holder of the Company Common Share so transferred and to have any rights as holder of such Company Common Share other than the right to be paid by the Company the amount determined in accordance with Section 4.1; and

(b) the name of each such holder shall be removed from the register of holders of Company Common Shares as it relates to the Company Common Share so transferred and cancelled;

(5) the articles of the Company shall be amended as follows:

(a) to change the designation of the Company Common Shares from "Common Shares" to "Class A Shares" and to replace the rights, privileges and conditions attaching to such shares with the rights, privileges and conditions set out in 0;

(b) to add a class of shares designated as "common shares" having the following rights, privileges and conditions (such shares, being "**New Company Common Shares**"):

(i) Dividend: The holders of the common shares, after the payment of any dividends payable to the holders of the Preferred Shares, shall be entitled to receive and the Company shall pay thereon if, as and when declared by the board of directors of the Company, out of the monies of the

Company properly applicable to the payment of dividends in any financial year, such dividends in any financial year as the board of directors may by resolution determine.

(ii) Participation in Assets on Dissolution: In the event of the liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, the holders of the common shares shall be entitled to receive, subject to the prior rights of the holders of the Preferred Shares and the holders of the Class A Shares, all of the remaining property and assets of the Company.

(iii) Voting Rights: The holder of a common share shall be entitled to one (1) vote for each common share held, at any meeting of shareholders of the Company other than meetings of the holders of another class of shares.

and to authorize the Company to issue an unlimited number of such New Company Common Shares;

(6) (i) the Company Notes beneficially owned by Funding Company Noteholders shall be, and shall be deemed to be, exchanged for the Participating Company Note Consideration, and (ii) the Company Notes beneficially owned by all other Company Noteholders shall be, and shall be deemed to be, exchanged for the Non-Participating Company Note Consideration, in each case less any amounts withheld in accordance with Section 7.5, and:

(a) each holder of such Company Notes shall cease to be the holder of such Company Notes and to have any rights as a holder of such Company Notes other than the right to the Participating Company Note Consideration or the Non-Participating Company Note Consideration, as applicable;

(b) the name of each holder of such Company Notes shall be removed from the register of holders of Company Notes, and the name of each holder of such Company Notes (or its designee) shall be added to the register of holders of New Company Common Shares and of New Company Notes; and

(c) the Company Notes shall be, and shall be deemed to be, cancelled;

(7) concurrently with the exchanges in Section 3.3(6), the Company Note Indenture shall be cancelled and all of the Entitlements and Obligations of the Company Noteholders shall be irrevocably and finally settled, terminated, extinguished, cancelled and eliminated without the need of any further payment, action or otherwise and upon such cancellation, the Company Note Indenture shall be discharged and released;

(8) concurrently with the exchanges in Section 3.3(6), the Company shall become entitled to the Funded Amounts deposited with the Depositary pursuant to Sections 2.1(3) and 2.1(4) and shall issue to each Funding Company Noteholder, in addition to the Participating Company Note Consideration to which it is entitled to receive pursuant to

Section 3.3(6), 568 New Common Shares per $1,000 of Funded Amount advanced by such Funding Company Noteholder;

(9) each Company Common Share shall be, and shall be deemed to be, acquired, redeemed and cancelled by the Company solely in exchange for a cash payment equal to the Share Cash-Out Consideration, and less any amounts withheld in accordance with Section 7.5, provided, that the Company shall not be required to pay the Share Cash-Out Consideration in cash in respect of, and to the extent of any Offsetting Amounts and such Offsetting Amounts shall be reduced on a dollar for dollar basis by the Share Cash-Out Consideration otherwise payable to the Subscribing Shareholder, and

(a) the holder of each Company Common Share acquired, redeemed and cancelled pursuant to Section 3.3(9) shall cease to be the holder of the Company Common Share so transferred and to have any rights as holder of such Company Common Share other than the right to be paid by the Share Cash-Out Consideration (subject to reduction in respect of any Offsetting Amounts), as applicable, in accordance with this Plan of Arrangement; and

(b) the name of such holder shall be removed from the register of holders of Company Common Shares as it relates to the Company Common Share so acquired, redeemed and cancelled;

(10) the Company Warrants shall be terminated and cancelled for no consideration; and

(11) the Domestication Documentation will be filed in order to effect the Continuance and Domestication whereby the Company will be domesticated in the State of Delaware and will continue as a corporation under the DGCL under the same name and with the registered address of c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, New Castle County, Delaware 19808.

3.4 Delaware Corporate Law Matters

For the purposes of the Continuance and Domestication, the application to domesticate the Company to the State of Delaware shall be made on the following basis:

(1) the Certificate of Domestication, the certificate of incorporation and the by-laws of the Company immediately following the Continuance and Domestication (the "**Domestication Documentation**") shall be in the form approved by the Company and the Sponsors, each acting reasonably; and

(2) the authorized capital of the Company immediately following the Continuance and Domestication shall be 225,000,000 shares of common stock and 50,000,000 shares of preferred stock, par value $0.01.

3.5 Fractional Interests and Calculations

(1) If the aggregate number of New Company Common Shares to which a Company Noteholder would be entitled under this Plan of Arrangement would include a

fractional share, then the number of New Company Common Shares that such former Company Noteholder is entitled to receive shall be rounded down to the next whole number and no former Company Noteholder will be entitled to any consideration or compensation in respect of such fractional New Company Common Shares.

(2) If a Company Noteholder would be entitled under this Plan of Arrangement to receive any fractional interest of New Company Notes, then such former Company Noteholder will receive the nearest $1.00 (with fractions equal to exactly $0.50 being rounded up).

(3) Unless otherwise specified herein, all amounts of consideration to be received under this Plan of Arrangement will be calculated to the nearest cent ($0.01 or C$0.01) or to the nearest tenth of one percent (0.10%), as applicable. All calculations and determinations made by the Company for the purposes of this Plan of Arrangement, including, the allocation of any fractional amounts shall be conclusive, final and binding upon the Company Shareholders, Company Noteholders.

3.6 Lost Certificates

In the event any certificate which immediately prior to the Effective Time represented one or more outstanding Company Common Shares or Company Notes shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Company Shareholder or Company Noteholder claiming such certificate to be lost, stolen or destroyed, the Depositary will deliver in exchange for such lost, stolen or destroyed certificate, a cheque, wire or other form of immediately available funds for the consideration that such Company Shareholder or Company Noteholder has the right to receive in accordance with Section 3.3 and such Company Shareholder's or Company Noteholder's Letter of Transmittal. When authorizing such payment in exchange for any lost, stolen or destroyed certificate, the Company Shareholder or Company Noteholder to whom payment is to be made shall, as a condition precedent to the delivery thereof, give a bond satisfactory to the Company and the Depositary in such sum as the Company may direct or otherwise indemnify the Company in a manner satisfactory to the Company against any claim that may be made against the Company with respect to the certificate alleged to have been lost, stolen or destroyed.

3.7 Stated Capital

The amount to be maintained in, or to be added to, the stated capital account of the Company Common Shares and the New Company Common Shares issued pursuant to this Plan of Arrangement for the purposes of the CBCA will be determined by the Board in consultation with the Sponsors. The Board, in consultation with the Sponsors, shall be entitled to increase stated capital of the New Company Common Shares by the amount of any contributed surplus applicable to such New Company Common Shares at such time on the Effective Date as may be determined by the Board, in consultation with the Sponsors.

3.8 Transfers Free and Clear

Any transfer of securities pursuant to this Plan of Arrangement shall be free and clear of all Liens.

ARTICLE 4
RIGHTS OF DISSENT

4.1 Dissent Rights

(1) Registered holders of Company Common Shares may exercise rights of dissent with respect to such Company Common Shares pursuant to and in the manner set forth in section 190 of the CBCA as modified and supplemented by the Interim Order, the Final Order and this Section 4.1 in connection with the Arrangement Shareholder Resolution and the Continuance and Domestication Resolution (the "**Dissent Rights**"); provided that, notwithstanding (a) subsection 190(5) of the CBCA, the written objection to the Arrangement Shareholder Resolution must be received by the Company not later than 5:00 p.m. two (2) Business Days immediately preceding the date of the Company Shareholder Meeting.

(2) Dissenting Shareholders who are ultimately determined to be entitled to be paid fair value for their Company Common Shares (i) shall be entitled to be paid by the Company the fair value of such Company Common Shares, which fair value, notwithstanding anything to the contrary contained in Part XV of the CBCA, shall be determined as of the close of business on the Business Day before the Arrangement Shareholder Resolution was adopted, and (ii) will not be entitled to any other payment or consideration under the Arrangement, including any payment that would be payable under the Arrangement had such registered holders not exercised their Dissent Rights in respect of such Company Common Shares.

(3) Dissenting Shareholders who validly withdraw their Dissent Rights or who are ultimately determined not to be entitled, for any reason, to be paid fair value for their Company Common Shares shall be deemed to have participated in the Arrangement pursuant to Section 3.3(9) on the same basis as a non-dissenting holder of Company Common Shares.

(4) In no circumstances shall the Company, Apollo Sponsor, the GSO Sponsors or any of their respective successors or any other Person be required to recognize a Person exercising Dissent Rights unless such Person is the registered holder of those Company Common Shares in respect of which such rights are sought to be exercised. In no case shall the Company, Apollo Sponsor, the GSO Sponsors, the Depositary, the registrar and transfer agent in respect of the Company Common Shares, the registrar and transfer agent in respect of the Company Notes or any other Person be required to recognize a Dissenting Shareholder as a holder of Company Common Shares after the Effective Time and the name of each Dissenting Shareholder shall be deleted from the register of holders of Company Common Shares as at the Effective Time as provided in Article 3.

(5) No rights of dissent shall be available to Company Optionholders or holders of Company DSUs or Company Warrants in connection with the Arrangement. In addition to any other restrictions under the CBCA, holders of Company Common Shares who vote in favour of the Arrangement Shareholder Resolution, or have instructed a proxyholder to vote such Company Common Shares in favour of the Arrangement Shareholder Resolution shall not be entitled to exercise Dissent Rights and shall be

deemed to have not exercised Dissent Rights in respect of such Company Common Shares.

ARTICLE 5
PAYMENTS AND FRACTIONAL SHARES

5.1 Letter of Transmittal

At the time of mailing the Company Circular or as soon as practicable thereafter, the Company shall forward to each registered Company Shareholder and Company Noteholder at the address of such Person as it appears on the register maintained by or on behalf of the Company in respect of the holders of Company Common Shares or Company Notes, as applicable, a Letter of Transmittal.

5.2 Payment of Consideration

(1) Prior to the filing of the Articles of Arrangement and in accordance with Article 2, the Participating Noteholders and the Sponsors shall deposit, or arrange to be deposited, cash with the Depositary equal to the New Capital Offering Amount.

(2) Upon surrender to the Depositary for cancellation of a certificate which immediately prior to the Effective Time represented outstanding Company Common Shares (other than Company Common Shares in respect of which Dissent Rights have been validly exercised and not withdrawn) or Company Notes, as applicable, together with a duly completed and executed Letter of Transmittal and such additional documents and instruments as the Depositary may reasonably require, the Company Shareholder or Company Noteholder of such surrendered certificate shall be entitled to receive in exchange therefor from the Depositary, and the Depositary shall deliver to such Company Shareholder or Company Noteholder as soon as practicable after the Effective Time, the consideration which such holder has the right to receive under this Plan of Arrangement for such Company Common Shares or Company Notes, as applicable, less any amounts withheld pursuant to Section 7.5, and any certificate so surrendered shall forthwith be cancelled.

(3) Until surrendered as contemplated by Section 5.2(1), each certificate which immediately prior to the Effective Time represented any Company Common Shares (other than Company Common Shares in respect of which Dissent Rights have been validly exercised and not withdrawn) or Company Notes shall be deemed after the Effective Time to represent only the right to receive upon such surrender consideration which such holder has the right to receive under this Plan of Arrangement for such Company Common Shares or Company Notes as contemplated in Section 5.2(1), less any amounts withheld pursuant to Section 7.5. Any such certificate formerly representing Company Common Shares or Company Notes not duly surrendered on or before the sixth anniversary of the Effective Date shall cease to represent a claim by or interest of any former Company Shareholder or Company Noteholder of any kind or nature against or in the Company, Apollo Sponsor or GSO Sponsors. On such anniversary date, all certificates representing Company Common Shares or Company Notes shall be deemed to have been surrendered to the Company and consideration to which such former

holder was entitled, together with any entitlements to dividends, distributions and interest thereon, shall be deemed to have been surrendered to the Company or any successor thereof for no consideration.

(4) On or as soon as practicable after the Effective Date, the Company shall pay the amounts, less any amounts withheld pursuant to Section 7.5, to be paid to Company Optionholders and holders of Company DSUs, either (i) pursuant to normal payroll practices and procedures of the Company, or (ii) by cheque, wire or other form of immediately available funds (delivered to such holder of Company Options or Company DSUs, as reflected on the register maintained by or on behalf of the Company in respect of the Company Options or Company DSUs, as applicable).

(5) Any payment made by way of cheque by the Depositary or, if applicable, the Company, pursuant to this Plan of Arrangement that has not been deposited or has been returned to the Depositary or, if applicable, the Company, or that otherwise remains unclaimed, in each case on or before the sixth anniversary of the Effective Date, and any right or claim to payment of consideration hereunder that remains outstanding on the sixth anniversary of the Effective Date, shall cease to represent a right or claim of any kind or nature and the right of the Company Shareholder, Company Noteholder, Company Optionholder or holder of Company DSUs to receive the consideration for Company Common Shares, Company Notes, Company Options or Company DSUs, as the case may be, pursuant to this Plan of Arrangement shall terminate and be deemed to be surrendered and forfeited to the Company or any successor thereof for no consideration.

(6) No holder of Company Common Shares, Company Notes, Company Options or Company DSUs shall be entitled to receive any consideration with respect to such securities other than the consideration to which such holder is entitled to receive in accordance with Article 3 and this Section 5.1 and, for greater certainty, no such holder will be entitled to receive any interest, dividends, premium or other payment or distribution in connection therewith other than as contemplated in Section 7.6.

ARTICLE 6
CONDITIONS TO EFFECTIVENESS

6.1 Conditions to Effectiveness

The effectiveness of the Arrangement shall be conditional upon the fulfillment, satisfaction or waiver of all conditions set forth in Article 6 of the Arrangement Agreement. If the conditions set forth in Article 6 of the Arrangement Agreement are not satisfied or waived by the Outside Date, the Arrangement and the Final Order shall cease to have any further force or effect and will not be binding on any Person.

ARTICLE 7
GENERAL

7.1 Amendment

(1) The Company and the Sponsors may amend, modify and/or supplement this Plan of Arrangement at any time and from time to time prior to the Effective Time, provided that any such amendment, modification or supplement must be approved by the Company and the Sponsors and, if made following either Company Meeting, approved by the Court and communicated to Company Shareholders, Company Noteholders and others as may be required by the Interim Order in the manner required by the Court (if so required).

(2) Any amendment, modification or supplement to this Plan of Arrangement which is directed by the Court following either Company Meeting shall be effective only if (a) it is consented to in writing by the Company and the Sponsors, in each case, acting reasonably, and (ii) if required by the Court, it is consented to by the Company Shareholders and the Company Noteholders in the manner directed by the Court.

(3) Any amendment, modification or supplement to this Plan of Arrangement may be proposed by the Company or jointly by the Sponsors at any time prior to the Company Meetings, provided that the Company and the Sponsors shall each have consented thereto in writing, with or without any other prior notice or communication, and if so proposed and accepted by the Persons voting at the Company Meetings in accordance with the Interim Order, shall become part of this Plan of Arrangement for all purposes.

(4) This Plan of Arrangement may be withdrawn prior to the Effective Time in accordance with the terms of the Arrangement Agreement.

(5) Notwithstanding any other provision of this Section 7.1, any amendment, modification or supplement to this Plan of Arrangement may be made by the Company, with the consent of the Sponsors, provided that it concerns a matter which, in the reasonable opinion of the Company, is of an administrative nature required to better give effect to the implementation of this Plan of Arrangement and is not adverse to the financial or economic interest of any former Company Shareholder, former Company Noteholder, former Company Optionholder, former holder of Company DSUs or former holder of Company Warrants.

7.2 Consents, Waivers and Agreements

At the Effective Time, each Company Shareholder, Company Noteholder and any other Person affected by this Plan of Arrangement will be deemed to have consented and agreed to all of the provisions of this Plan of Arrangement in its entirety. Without limitation to the foregoing, each Company Noteholder and any other Person affected by this Plan of Arrangement (including the Company Note Trustees) will be deemed:

(1) to have executed and delivered to the Company all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan of Arrangement in its entirety;

(2) to have waived any non-compliance or default by the Company with or of any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Company Noteholder or other Person and the Company with respect to the Company Notes and the Company Note Indenture that has occurred or exists on or prior to the Effective Time; and

(3) to have agreed that, if there is any conflict between the provisions of any such agreement and the provisions of this Plan of Arrangement, then the provisions of this Plan of Arrangement take precedence and priority and the provisions of such agreement or other arrangement are deemed to be amended accordingly.

7.3 Consents, Waivers and Agreements

(1) If a term is used in this Plan of Arrangement to refer to more than one (1) Party, then unless otherwise specified in this Plan of Arrangement: (a) an obligation of those Parties is several and neither joint nor joint and several; (b) a right of those Parties is held by each of them severally; (c) any other reference to that Party or term is a reference to each of those Parties separately, such that a representation, warranty or covenant relates to each of them separately; (d) nothing contained herein, and no action taken by any Sponsor pursuant hereto shall be deemed to constitute the Sponsors as a partnership, an association or joint venture of any kind, or create a presumption that the Sponsors are in any way acting other than in their individual capacities; and (e) none of the Sponsors shall have any fiduciary duty or other duties or responsibilities in any kind or form to each other, the Company or any of the Company's other lenders, noteholders or stakeholders as a result of this Plan of Arrangement.

(2) Each Sponsor acknowledges that: (a) no other Sponsor will be acting as agent of such Sponsor in connection with monitoring such Sponsor's investment or enforcing its rights under this Plan of Arrangement; and (b) any approval, waiver, or consent required by this Plan of Arrangement that by its terms requires approval, waiver, or consent of any of the Sponsors or the Sponsors shall require the approval, waiver, or consent of each of the Sponsors.

7.4 Releases

Upon the issuance of the Certificate of Arrangement on the Effective Date, the Company, the Company Note Trustees and the Sponsors and their respective Subsidiaries and Affiliates' and their respective present and former shareholders, officers, directors, employees, auditors, advisors, legal counsel and agents (collectively, the "**Released Parties**") shall be released and discharged from any and all demands, claims, liabilities, 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 any Released Party)

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 Date relating to, arising out of, or in connection with the Company Notes, the Company Note Indenture, the Arrangement Agreement, the Arrangement, the Plan of Arrangement and any proceedings commenced with respect to or in connection with this Plan of Arrangement; provided that nothing in this Section 7.4 will release or discharge any of the Released Parties from or in respect of any of their respective obligations under this Plan of Arrangement, the New Company Notes, the New Company Note Indenture, and further provided that nothing herein will release or discharge a Released Party if the Released Party is adjudged by the express terms of a non-appealable judgment rendered on a final determination on the merits to have committed gross negligence, fraud or willful misconduct.

7.5 Withholding Rights

The Company and any of the Subsidiaries of the Company, the Depositary and their respective Affiliates, as the case may be, shall be entitled to deduct or withhold from any amounts contemplated to be payable to any Company Shareholder, Company Noteholder, Company Optionholder or holder of Company DSUs under this Plan of Arrangement such amounts as are required to be deducted or withheld with respect to such payment under the Code, Tax Act or any other provision of federal, provincial, territorial, state, local or foreign tax Law, in each case, as amended or succeeded, or the administrative practice of the relevant Governmental Entity administering such Law, and subject to the provisions of any applicable income tax treaty, and shall remit or cause to be remitted the amount so deducted or withheld to the appropriate Governmental Entity. To the extent that amounts are so deducted or withheld, such deducted or withheld amounts shall be treated for all purposes as having been paid to the recipient of the payment in respect of which such deduction or withholding was made, provided that such deducted or withheld amounts are actually remitted in accordance with applicable law to the appropriate taxing authority.

7.6 Post-Effective Time Dividends and Distributions

No dividends or other distributions payable in respect of New Company Common Shares with a record date after the Effective Time shall be paid to the holder of any certificate or certificates which, immediately prior to the Effective Time, represented outstanding Company Notes converted pursuant to Section 3.3(6) in respect of which New Company Common Shares were issued pursuant to the Arrangement, and all such dividends and other distributions shall be paid by the Company to the Depositary and shall be held by the Depositary in trust for such holders, in each case until the surrender of such certificate or certificates (or affidavit in accordance with Section 3.6) in accordance with Section 5.2(1) or until surrendered and/or forfeiture in accordance with Section 5.2(3). Subject to applicable Laws, following surrender of any such certificate or certificates (or affidavit in accordance with Section 3.6) in accordance with Section 5.2(1) there shall be paid to the holder thereof, without interest, the amount of dividends or other distributions with a record date after the Effective Time theretofore paid with respect to such New Company Common Shares to which such holder is entitled pursuant to the Arrangement.

7.7 Paramountcy

From and after the Effective Time: (a) this Plan of Arrangement shall take precedence and priority over any and all Company Common Shares, Company Notes (including the Company Note Indenture), Company Options, Company DSUs issued or outstanding prior to the Effective Time; (b) the rights and obligations of Company, Apollo Sponsor, GSO Sponsors, all registered holders and all beneficial owners of Company Common Shares, all registered holders and all beneficial owners of Company Notes, all registered holders and beneficial owners of Company Options, Company DSUs and Company Warrants, the registrar and transfer agent in respect of the Company Common Shares, the Company Note Trustees and the Depositary, shall be solely as provided for in this Plan of Arrangement; and (c) all actions, causes of action, claims, proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Company Common Shares, Company Notes, Company Options or Company DSUs shall be deemed to have been settled, compromised, released and determined without liability expect as set forth in this Plan of Arrangement.

7.8 Further Assurances

Notwithstanding that the transactions and events set out in this Plan of Arrangement shall occur and be deemed to have occurred in the order set out herein, without any further authorization, act or formality, each of the Parties shall make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by any of them in order to implement this Plan of Arrangement and to further document or evidence any of the transactions or events set out herein.

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SCHEDULE I
TERMS FOR THE CLASS A SHARES OF THE COMPANY

The Corporation shall be authorized to issue an unlimited number of Class A Shares. The rights, privileges and conditions attaching to the Class A Shares as a class shall be as follows:

1. Class A Shares

1.1 Dividend

The holders of Class A Shares shall not be entitled to receive any dividends thereon.

1.2 Participation in Assets on Dissolution

In the event of the liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of the Class A Shares shall be entitled to receive, subject to the prior rights of the holders of the Preferred Shares, to receive from the property of the Company a sum equivalent to the aggregate Redemption Call Purchase Price (as hereinafter defined) of all the Class A Shares beneficially owned by them respectively before any amount shall be paid or any property of the Company distributed to the holders of common shares. After payment to the holders of Class A Shares of the amount so payable to them as above provided they shall not be entitled to share in any further distribution of the property of the Company.

1.3 Voting Rights

The Class A Shares shall be non-voting.

1.4 Call Rights

(a) The Company will have the overriding right (the "**Redemption Call Right**"), to and shall purchase from the holders of Class A Shares (other than Arrangement Participating Class A Shareholders) at the Redemption Call Time all of the Class A Shares then outstanding (other than those held by Arrangement Participating Class A Shareholders) for a cash payment equal to the Share Cash-Out Consideration (the "**Redemption Call Purchase Price**"). Upon the exercise of the Redemption Call Right by the Company, each holder will be obligated to sell all of the Class A Shares beneficially owned by the holder to the Company for cancellation at the Redemption Call Time and delivery by the Company to the holder of the Redemption Call Purchase Price for each share will be made on or as soon as practicable after the Redemption Call Time upon presentation and surrender to the Company of the certificates representing the Class A Shares or the Company Warrants which were exchanged for Class A Shares. From and after the Redemption Call Time, the holders of the Class A Shares called for purchase shall not be entitled to exercise any of the rights of shareholders in respect thereof unless payment of the Redemption Call Purchase Price 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.

(b) The Redemption Call Right shall be deemed to be exercised at each applicable Redemption Call Time. Upon the exercise of the Redemption Call Right, the Company will purchase and the holders will sell all of the Class A Shares (other than those held by

Arrangement Participating Class A Shareholders) then outstanding for a price per share equal to the Redemption Call Purchase Price

(c) Each holder of a Class A Share prior to the Redemption Call Time, whether of record or beneficial, by virtue of becoming and being a holder, will be deemed to acknowledge the Redemption Call Right in favour of the Company, and the overriding nature of this right in connection with the purchase for cancellation of Class A Shares and to be bound by such right in favour of the Company.

1.5 Other Defined Terms

For the purpose of these terms attaching to the Class A Shares, the following terms have the following meanings:

"**Arrangement**" means the arrangement under section 192 of the CBCA contemplated by, and on the terms and subject to the conditions set out in, the Plan of Arrangement.

"**Arrangement Participating Class A Shareholders**" means the holders of Class A Share whose Class A Shares are redeemed in accordance with Section 3.3(4) or Section 3.3(9) of the Plan of Arrangement.

"**Articles of Arrangement**" means the articles of arrangement of the Company in respect of the Arrangement sent to the Director after the Final Order was made.

"**CBCA**" means the *Canada Business Corporations Act*, as amended.

"**Certificate of Arrangement**" means the certificate of arrangement of the Company dated ●, 2017 issued by the Director pursuant to subsection 192(7) of the CBCA in respect of the Articles of Arrangement giving effect to the Arrangement.

"**Company Warrant Indenture**" means the indenture dated August 6, 2015 between the Company and Computershare Trust Company of Canada providing for the issuance of warrants to purchase Class A Shares.

"**Company Warrants**" means the outstanding warrants of the Company issued pursuant to the Company Warrant Indenture.

"**Court**" means the Ontario Superior Court of Justice (Commercial List).

"Director" means the Director appointed pursuant to section 260 of the CBCA.

"**Effective Date**" means the date shown on the Certificate of Arrangement giving effect to the Arrangement.

"**Final Order**" means the final order of the Court dated ●, 2017 and any amendments made thereto prior to the Effective Date, approving the Arrangement.

"**Plan of Arrangement**" means the plan of arrangement involving the Company approved by the Court pursuant to the Final Order.

"**Redemption Call Time**" means, with respect to any Class A Share, the first moment in time immediately following the issuance of the Class A Share.

"**Share Cash-Out Consideration**" means C$0.17 per Class A Share in cash.

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SCHEDULE B

100 SEBETHE DRIVE, LLC.

APRA NZ LIMITED

AT&T CORP.

AT&T DIGITAL MEDIA CENTERS, INC., BY NATIONAL DIGITAL TELEVISION CENTER, INC.

AT&T LEGAL

BITMAX LLC

BOSE BV

BOSE CORPORATION

CAPSTAR INVESTMENT PARTNERS, LP

CELLCO PARTNERSHIP AND ITS CONTROLLED AND/OR MANAGED AFFILIATES DOING BUSINESS AS VERIZON WIRELESS

CHIPOTLE

COMCAST TECHNOLOGY SOLUTIONS

CONCORD MUSIC GROUP, INC.,

CONNECT MUSIC LICENSING SERVICE INC

CORE SERVICES CORPORATION

DIGICHIEF, LLC

DIRECTV. INC.

DISH NETWORK LLC

DISNEYLAND-VISTA RECORDS

DMX INTERNATIONAL LICENSING LTD

ENTERPRISE FLEET MANAGEMENT, INC.; ENTERPRISE PM TRUST

ENTERPRISE LEASING COMPANY, SE

EPIDEMIC SOUND AB

GBT US LLC D/B/A AMERICAN EXPRESS GLOBAL BUSINESS TRAVEL

GRUBMAN INDURSKY & SHIRE

HARMAN PROFESSIONAL, INC.

HERMAN ELECTRONICS, INC.

HUDSON MERRILL PLACE LLC

INTELSAT USA SALES LLC ("SKYNET")

JP MORGAN CHASE BANK

KLIPSCH GROUP, INC.

KOBALT MUSIC PUBLISHING AMERICA, INC.

LAKEMONT INDUSTRIAL HOLDING COMPANY

MAINICHI VIDEO-AUDIO SYSTEM, INC.

METROLINK BUSINESS PARK, LLC

MICROSPACE COMMUNICATIONS CORPORATION

MOM AND POP MUSIC CO.

NIPPON REDIFFUSION LIMITED

ORACLE USA, INC.

OTAY TERMINAL ~ CALLE FORTUNADA, LLC

OUTREACH MEDIA SOLUTIONS LLC D/B/A WOVENMEDIA

PCTC ASSOCIATES, LP

PHONOGRAPHIC PERFORMANCE LIMITED

REGENCY OFFICE CENTER, L.P.

SAGE-HARTLAND PARK, L.P.

SAGE-MONTEREY OAKS, LTD.

SCPP

SESAC LLC

SHAZAM ENTERTAINMENT LIMITED

SHAZAM ENTERTAINMENT LIMITED LEGAL DEPARTMENT

SONY MUSIC ENTERTAINMENT

SONY MUSIC, A GROUP OF SONY MUSIC ENTERTAINMENT INC.

STINGRAY 360 COMMERCIAL SOLUTIONS INC.

SUB POP RECORDS, INC.

SUNNIWELL CO. LTD.

TEXAS ROADHOUSE

THE HARRY FOX AGENCY, INC.

TJX

TOYO MEDIA LINKS CO. LTD.

UNIVERSAL MUSIC ENTERPRISES, A DIVISION OF UMG RECORDINGS, INC.

VERIZON WIRELESS LEGAL & EXTERNAL AFFAIRS DEPT.

WALT DISNEY RECORDS AND ITS SUBSIDIARIES

WELLS FARGO

WESTPORT RESEARCH ASSOCIATES, INC.

WINDSTREAM

WINDSTREAM COMMUNICATIONS

YAHOO! INC.

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT INVOLVING MOOD MEDIA CORPORATION

Court File No. CV-17-11809-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FINAL ORDER

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David R. Byers LSUC#: 22992W
Tel: (416) 869-5697
dbyers@stikeman.com
Alex Rose LSUC#: 49415P
Tel: (416) 869-5261
arose@stikeman.com
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-5230
kesaw@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicant

TAB 3

Court File No. CV-17-587401-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE REGIONAL	)	THURSDAY, THE 14TH
	)	
SENIOR JUSTICE MORAWETZ	)	DAY OF DECEMBER, 2017

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, AS AMENDED AND RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF RGL RESERVOIR MANAGEMENT INC. AND 10504360 CANADA INC. AND INVOLVING RGL RESERVOIR MANAGEMENT GROUP INC., RGL RESERVOIR HOLDINGS INC. AND PACIFIC PERFORATING, INC.

FINAL ORDER

THIS APPLICATION made by RGL Reservoir Management Inc. ("**RGL Management**") and 10504360 Canada Inc. ("**RGL NewCo**", and together with RGL Management, the "**Applicants**") pursuant to section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (the "**CBCA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application and the affidavit of Hansine Ullberg Kostelecky sworn November 28, 2017, the supplementary affidavit of Hansine Ullberg Kostelecky sworn December 13, 2017 (the "**Second Kostelecky Affidavit**") and the Interim Order of this Court dated November 29, 2017 (the "**Interim Order**"), and

ON HEARING the submission of counsel for the Applicants and the Supporting Secured Debtholders (as defined in the Second Kostelecky Affidavit), and those other parties

present, and on being advised that the Director appointed under the CBCA (the "**Director**") does not consider it necessary to appear, and having determined that the Arrangement, as described in the Plan of Arrangement attached as Schedule "A" to this Order (the "**Plan of Arrangement**"), is an arrangement for the purposes of section 192 of the CBCA and is fair and reasonable in accordance with the requirements of that section, and upon being advised that the Order shall serve as the basis for reliance on the exemption provided by Section 3(a)(10) of the *United States Securities Act of 1933*, as amended, from the registration requirements otherwise imposed by that act, regarding the distribution of common shares of the Company pursuant to the Plan of Arrangement.

Definitions

1. **THIS COURT ORDERS** that all capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the Plan of Arrangement.

Approval of Arrangement

2. **THIS COURT ORDERS** that (a) the Arrangement, as described in the Plan of Arrangement, is an arrangement within the meaning of section 192 of the CBCA, and (b) the Arrangement, as described in the Plan of Arrangement, is fair and reasonable, including to all persons entitled to receive RGL NewCo Shares in exchange for their Secured Debt and/or Affected Shares.

3. **THIS COURT ORDERS** that the Arrangement, as described in the Plan of Arrangement, shall be and is hereby approved.

4. **THIS COURT ORDERS** that each of the RGL Parties, the Existing First Lien Agent and the Exchange Debt Agent are authorized and directed to take all steps and actions necessary or appropriate to implement the Plan of Arrangement and the Arrangement and the other transactions contemplated thereby in accordance with and subject to the terms of the Plan of Arrangement, including (a) to enter into any agreements or other documents which are to come into effect in connection with the Arrangement, and (b) in the Existing First Lien Agent's and the Exchange Debt Agent's respective capacities as collateral agents, to execute and deliver (or direct to be executed and delivered) such releases, terminations and discharges of security and liens as are required to give effect to the Plan of Arrangement and the Arrangement.

5. **THIS COURT ORDERS** that as of the Effective Date, the Plan of Arrangement and all associated steps and transactions are hereby approved, binding and effective as set out in the Plan of Arrangement, and on the terms and conditions set forth in this Order, upon the RGL Parties, the Secured Debtholders, the Existing First Lien Agent, the Exchange Debt Agent, the Affected Shareholders, the Affected Equity Holders, the Released Parties and all other Persons affected by the Plan of Arrangement.

No Default

6. **THIS COURT ORDERS** that, from and after the Effective Time, no party under the Existing First Lien Credit Agreement or the Shareholders Agreement, shall have any right to terminate, accelerate, amend or declare in default or take any other enforcement steps under such instruments or any other contract, agreement, or guarantee to which any of the RGL Parties are party to, by reason or as a result of the following (the "**Filing Defaults**"):

a) any of the Applicants having made an application to this Court pursuant to Section 192 of the CBCA;

b) any of the Applicants being a party to or involved in this proceeding, any ancillary proceedings or the Arrangement, or

c) any default or cross default under the Secured Debt Documents;

d) any of the Applicants taking any step contemplated by or related to the Arrangement,

without further order of this Honourable Court, and that from and after the Effective Time, all such Persons shall be deemed to have agreed that, if there is any conflict between the provisions of any agreement or other arrangement, written or oral, existing between such Person and any of the RGL Parties and the provisions of the Plan of Arrangement, then the provisions of the Plan of Arrangement take precedence and priority and the provisions of such agreement or other arrangement are deemed to be amended accordingly.

Releases

7. **THIS COURT ORDERS** that, from and after the Effective Date, at the time and in the sequence set forth in the Plan of Arrangement, the releases set forth in section 5.1 of the Plan of Arrangement shall be binding and effective as set out in the Plan of Arrangement.

Service

7. **THIS COURT ORDERS** that service or notice of this Application, the notice in respect of the Meetings and the Interim Order is hereby deemed good and sufficient service.

Service of this Order shall be made on all persons who appeared on this application, either by counsel or in person, and upon the Director, but is otherwise dispensed with.

Aid and Recognition

8. **THIS COURT ORDERS** that this Order shall have full force and effect in all other Provinces and Territories of Canada and shall be enforced in the courts of each of the Provinces and Territories of Canada in the same manner in all respects as if this Order had been made by the Court enforcing it.

9. **THIS COURT** seeks and requests the aid and recognition 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 and any court or any judicial, regulatory or administrative body of the United States or other country to act in aid of and to assist this Court in carrying out the terms of this Order.

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

DEC 14 2017

PER / PAR:

SCHEDULE "A"

PLAN OF ARRANGEMENT

[See attached]

Court File No. CV-17-587401-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE RULES OF CIVIL PROCEDURE

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF RGL RESERVOIR MANAGEMENT INC. AND 10504360 CANADA INC. AND INVOLVING RGL RESERVOIR MANAGEMENT GROUP INC., RGL RESERVOIR HOLDINGS INC. AND PACIFIC PERFORATING INC.

PLAN OF ARRANGEMENT

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PLAN OF ARRANGEMENT

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Plan, unless otherwise stated:

"**Affected Equity Holder**" means, collectively, the Affected Shareholders and the Other Affected Equity Holders.

"**Affected Shareholder**" means a holder of the Affected Shares, in its capacity as such, and for greater certainty excludes the Dissenting Shareholders.

"**Affected Shareholder Pro Rata Share**" means the percentage the number of Affected Shares held by an Affected Shareholder bears to the aggregate of all Affected Shares as at the Effective Date immediately following the occurrence of the step contemplated by Section 4.3(b) of this Plan.

"**Affected Shares**" means all RGL Group Shares that are issued and outstanding immediately following the occurrence of the step contemplated by Section 4.3(b) of this Plan, excluding for greater certainty the Dissenting Shares.

"**Applicants**" means, collectively, RGL Management and RGL NewCo, and Applicant means any one of them.

"**Arrangement**" means an arrangement under section 192 of the CBCA on the terms and subject to the conditions set out in this Plan, subject to any amendments or variations thereto made in accordance with the Arrangement Agreement and Section 7.6 of this Plan or made at the direction of the Court in the Interim Order or the Final Order or otherwise with the consent of the Applicants and the Requisite Consenting Secured Debtholders, each acting reasonably.

"**Arrangement Agreement**" means the arrangement agreement dated November 27, 2017, among the Applicants, and any amendment thereto.

"**Articles of Arrangement**" means the articles of arrangement of the Applicants in respect of the Arrangement, in form and substance satisfactory to the Applicants and the Requisite Consenting Secured Debtholders, that are required to be filed with the CBCA Director after the Final Order is made in order for the Arrangement to become effective on the Effective Date.

"**BCBCA**" means the *Business Corporations Act* (British Columbia), S.B.C. 2002, c. 57.

"**Business Day**" means any day, other than a Saturday, or a Sunday or a statutory or civic holiday, on which banks are generally open for business in Toronto, Ontario and Calgary, Alberta.

"**CBCA**" means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended.

"**CBCA Director**" means the Director appointed under section 260 of the CBCA.

"**CBCA Proceedings**" means the proceedings commenced by the Applicants under the CBCA in connection with this Plan.

"**Certificate of Arrangement**" means the certificate giving effect to the Arrangement, to be issued by the CBCA Director pursuant to section 192(7) of the CBCA.

"**Circular**" means the management information circular of the Applicants dated November 30, 2017.

"**Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against the RGL Parties, in any capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, whether at law or in equity, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, any legal, statutory, equitable or fiduciary duty) or by reason of any equity interest, right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and together with any security enforcement costs or legal costs associated with any such claim, and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, warranty, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any claim made or asserted against the RGL Parties through any affiliate, subsidiary, associated or related person, or any right or ability of any Person to advance a claim for an accounting, reconciliation, contribution, indemnity, restitution or otherwise with respect to any matter, grievance, action (including any class action or proceeding before an administrative tribunal), cause or chose in action, whether existing at present or commenced in the future.

"**Court**" means the Ontario Superior Court of Justice (Commercial List).

"**Dissent Rights**" has the meaning given to it in Section 2.3(a).

"**Dissenting Share**" means each RGL Group Share in respect of which Dissent Rights have been validly exercised and not withdrawn.

"**Dissenting Shareholder**" means a holder of RGL Group Shares who has validly exercised Dissent Rights and has not withdrawn or been deemed to have withdrawn such exercise of Dissent Rights, but only in respect of the RGL Group Shares in respect of which Dissent Rights are validly exercised by such holder in strict compliance with the terms of the Dissent Rights.

"**Effective Date**" means the date shown on the Certificate of Arrangement issued by the CBCA Director.

"**Effective Time**" means a time on the Effective Date as the Applicants and the Requisite Consenting Secured Debtholders may agree, each acting reasonably.

"**Employee Bonuses**" means (i) the annual executive cash bonus for 2017 payable under RGL Management's Annual Cash Bonus Plan, and (ii) the change of control bonus payments payable under RGL Management's Change of Control Bonus Plan, in each case including those amounts accruing pursuant to the applicable bonus plan on December 31, 2017 and as payable in accordance with the Recapitalization Term Sheet.

"**Exchange Debt Agent**" means, collectively, the administrative and collateral agents under the Exchange Debt Credit Agreement, which shall be acceptable to the RGL Parties and the Requisite Consenting Secured Debtholders, acting reasonably.

"**Exchange Debt**" means US$75,000,000 of secured debt issued by RGL Management pursuant to the Exchange Debt Credit Agreement.

"**Exchange Debt Credit Agreement**" means the credit agreement governing the Exchange Debt to be effective as of the Effective Date among RGL Management and the Exchange Debt Agent, on the terms and conditions described in Schedule B to the Recapitalization Term Sheet and as may otherwise be agreed by the RGL Parties and the Requisite Consenting Secured Debtholders.

"**Exercised Options**" has the meaning given to it in Section 2.2(b).

"**Exercising Optionholder**" has the meaning given to it in Section 2.2(b).

"**Existing First Lien Agent**" means Goldman Sachs Lending Partners LLC, in its capacity as administrative agent under the Existing First Lien Credit Agreement.

"**Existing First Lien Credit Agreement**" means, collectively, (i) the First Lien Credit Agreement dated August 14, 2014, by and among, *inter alia*, RGL Reservoir Operations Inc., the borrower party thereto, Goldman Sachs Lending Partners LLC, as the administrative agent, and the lenders , arrangers, bookrunners, syndication agents and documentation agents party thereto; and (ii) Amendment No. 1 to First Lien Credit Agreement dated March 11, 2016, by and among, *inter alia*, RGL Reservoir Management Inc. (formerly known as RGL Reservoir Operations Inc.,), RGL Reservoir Holdings Inc., Goldman Sachs Lending Partners LLC, the lenders party thereto and AI RGL (Luxembourg), S.Â.R.L. and CPPIB Credit Investments Inc. as new lenders thereto.

"**Final Order**" means the Order of the Court approving the Arrangement under section 192 of the CBCA, which shall include such terms as may be necessary or appropriate to give effect to the Arrangement and this Plan, in form and substance satisfactory to the Applicants and the Requisite Consenting Secured Debtholders.

"**Governmental Entity**" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.

"**Interim Order**" means the interim order of the Court in respect of the Applicants pursuant to the CBCA, in form and substance acceptable to the Requisite Consenting Secured Debtholders, which, among other things, calls and sets the date for the Meetings, as such order may be amended from time to time in a manner acceptable to the Requisite Consenting Secured Debtholders.

"**Law**" means any law, statute, order, decree, consent decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada, the United States, or any other country, or any domestic or foreign state, county, province, city or other political subdivision or of any Governmental Entity.

"**Material Adverse Event**" means any change, development, effect, event, circumstance, fact or occurrence that individually or in the aggregate with other such changes, developments, effects, events, circumstances, facts or occurrences, (A) is material and adverse to the business, condition (financial or otherwise), properties, assets, liabilities, operations or results of operations of the RGL Parties, taken as a whole, or (B) prevents or materially adversely affects the ability of the RGL Parties to timely perform their obligations under the Arrangement or pursuant to any agreement, document or other instrument contemplated thereby, except, any change, development, effect, event, circumstance, fact or occurrence resulting from or relating to: (a) any change in GAAP, IFRS or ASPE; (b) any change in commodity prices or in currency exchange rates; (c) any adoption, proposal, implementation or change in applicable laws or any interpretation thereof by any governmental entity; (provided that in the case of (b) and (c) above, such conditions do not have a materially disproportionate effect on the RGL Parties relative to other companies in its industry); (d) any change in global, national or regional political conditions (including the outbreak of war or acts of terrorism) or in general economic, business, regulatory, political or market conditions or in national or global financial or capital markets; (e) any natural disaster; (f) the execution, announcement or performance of the Arrangement or any other related agreement and the completion of the transactions contemplated hereby; (g) the failure, in and of itself, of the RGL Parties to meet any internal or public projections, forecasts or estimates of revenues, production or earnings; or (h) any action taken by the RGL Parties which is contemplated in this Plan of Arrangement or is consented to by the Requisite Consenting Secured Debtholders.

"**Meetings**" means, collectively, (i) the Secured Debtholders' Meeting, (ii) the Shareholders' Meeting.

"**New Management Incentive Plan**" means the term sheet for the new management incentive plan to be put in place as soon as practicable after the Effective Date on terms

agreed to by the RGL Parties and the Requisite Consenting Secured Debtholders, acting reasonably, which shall represent 10% of the outstanding RGL NewCo Shares on a fully diluted basis on the Effective Date.

"**New RGL Holdings Shares**" has the meaning given to it in Section 4.3(g)(ii).

"**New RGL Management Shares**" has the meaning given to it in Section 4.3(g)(i).

"**New Shares**" means all RGL NewCo Shares, New RGL Holdings Shares and New RGL Management Shares contemplated to be issued pursuant to this Plan.

"**New Warrant Certificates**" means the warrant certificates dated as of the Effective Date between RGL NewCo and the holders of the New Warrants, in substantially the form attached as Schedule C and as may otherwise be agreed by the RGL Parties and the Requisite Consenting Secured Debtholders, acting reasonably.

"**New Warrants**" means the aggregate 1,750,000 warrants to receive RGL NewCo Shares to be issued by RGL NewCo on the terms and conditions described in Schedule "C" to the Recapitalization Term Sheet as partial consideration for the Affected Shares.

"**Options**" means options to purchase RGL Group Shares issued and outstanding under the Stock Option Plan.

"**Option Exercise Deadline**" means 5:00 p.m. on December 8, 2017.

"**Option Exercise Election Form**" has the meaning given to it in Section 2.2(b).

"**Optionholder**" means a holder of Options on the Record Date.

"**Order**" means any order of the Court in the CBCA Proceedings.

"**Other Affected Equity**" means all of the equity of RGL Group with the exception of the RGL Group Shares, including, without limitation, any and all Options, preferred shares, options, warrants, conversion privileges, calls, subscriptions, exchangeable securities or other, plans (including stock option plans), agreements, arrangements or commitments (pre-emptive, contingent or otherwise) obligating RGL Group to issue or sell shares in the capital of RGL Group or any securities or obligations of any kind convertible into or exchangeable for such shares.

"**Other Affected Equity Holders**" means the holders of any Other Affected Equity.

"**Outside Date**" means December 31, 2017, or such other date as the Applicants and the Requisite Consenting Secured Debtholders may agree.

"**Person**" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Governmental Entity or any agency, officer or

instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status.

"**Plan**" means this plan of arrangement and any amendments, modifications or supplements hereto made in accordance with the terms hereof or made at the direction of the Court in the Interim Order or Final Order or otherwise, but in all cases with the consent of the Applicants and the Requisite Consenting Secured Debtholders.

"**Recapitalization Term Sheet**" means the Recapitalization Term Sheet entered into among RGL Group, RGL Holdings, RGL Management, Pacific Perforating Inc. and certain of the Secured Debtholders on November 30, 2017.

"**Record Date**" means 5:00 p.m. on November 29, 2017;

"**Released Parties**" means, collectively, the RGL Released Parties and the Securityholder Released Parties.

"**Remaining Principal Amount**" has the meaning given to it in Section 4.3(e).

"**Requisite Consenting Secured Debtholders**" means a majority of the Supporting Secured Debtholders, where such majority is only achieved if such Supporting Secured Debtholders also hold a majority of the Secured Debt, where each Supporting Secured Debtholder will have one vote for each $1,000 of principal amount of the Secured Debt held by such holder.

"**RGL Group**" means RGL Reservoir Management Group Inc., a corporation incorporated pursuant to the BCBCA.

"**RGL Group Shares**" means, collectively, the Class A-1 Common Shares and Class A-2 Common shares in the capital of RGL Group.

"**RGL Group Shareholders**" means holders of RGL Group Shares.

"**RGL Holdings**" means RGL Reservoir Holdings Inc., a corporation incorporated pursuant to the BCBCA.

"**RGL Management**" means RGL Reservoir Management Inc., a corporation continued under the CBCA.

"**RGL NewCo**" means 10504360 Canada Inc., a corporation incorporated pursuant to the CBCA.

"**RGL NewCo Shareholders Agreement**" means the shareholders agreement to be entered into as of the Effective Time by the holders of RGL Newco Shares which shall be in form and substance satisfactory to the Company and the Requisite Consenting Secured Debtholders.

"**RGL NewCo Board**" means RGL NewCo's board of directors appointed on the Effective Date, the members of which shall include RGL NewCo's chief executive officer and four members provided by the Requisite Consenting Secured Debtholders.

"**RGL NewCo Shares**" means the common shares in the capital of RGL NewCo.

"**RGL Parties**" means, collectively, the Applicants, RGL Group, RGL Holdings and each of their respective subsidiaries and affiliates.

"**RGL Released Parties**" means, collectively, the RGL Parties, and each of their respective current and former directors, officers, managers, partners, shareholders, employees, advisors, legal counsel and agents.

"**Secured Debt**" means the debt outstanding under the Secured Debt Documents, including unpaid principal and accrued and unpaid interest thereon.

"**Secured Debt Documents**" means, collectively, the Existing First Lien Credit Agreement and all related documentation, including, without limitation, all guarantee and security documentation, related to the foregoing.

"**Secured Debt Exchange Shares**" means the aggregate 23,250,000 RGL NewCo Shares to be issued in partial exchange for the Secured Debt in accordance with this Plan of Arrangement.

"**Secured Debtholder**" means a holder of Secured Debt.

"**Secured Debtholder Advisors**" means Cassels Brock & Blackwell LLP, Houlihan Lokey Capital, Inc. and Sullivan & Cromwell LLP.

"**Secured Debtholder Claim**" means any Claim of a Secured Debtholder for amounts payable to it under the Secured Debt Documents, including all principal, accrued interest, make-whole, premium and other amounts owing under Secured Debt Documents.

"**Secured Debtholder Exchange Consideration**" has the meaning given to it in Section 2.1(a)(i).

"**Secured Debtholders' Arrangement Resolution**" means the resolution of the Secured Debtholders relating to the Arrangement to be considered at the Secured Debtholders' Meeting, substantially in the form attached as Appendix "B" to the Circular.

"**Secured Debtholders' Meeting**" means the meeting of the Secured Debtholders as of the Record Date to be called and held pursuant to the Interim Order for the purpose of considering and voting on the Secured Debtholders' Arrangement Resolution and to consider such other matters as may properly come before such meeting and includes any adjournment(s) or postponement(s) of such meeting.

"**Secured Debtholder Exchange Consideration Value**" in respect of a Secured Debtholder means the product of (A) the sum of (i) US$75,000,000, and (ii) the fair

market value of the Secured Debt Exchange Shares at the time they are issued pursuant to Section 4.3(f) of this Plan of Arrangement; and (B) its Secured Debtholder Pro Rata Share.

"**Secured Debtholder Pro Rata Share**" means the percentage that a Secured Debtholders' principal amount of Secured Debt bears to the aggregate principal amount of all Secured Debt as at the Effective Date, provided that for the purposes of determining the Secured Debtholder Pro Rata Share, all Secured Debt denominated in Canadian Dollars shall be converted to US Dollars based on the Bank of Canada exchange rate on the Record Date.

"**Secured Debtholder Share Receipt Instruction Form**" means the Share Receipt Instructions Regarding Secured Debt Exchange Shares form to be distributed to Secured Debtholders together with the Circular.

"**Securityholder Released Parties**" means, collectively, the Secured Debtholders, the Existing First Lien Agent, and each of their respective current and former officers, directors, employees, auditors, financial advisors, legal counsel and agents and for greater certainty but without limitation shall include the Secured Debtholder Advisors.

"**Shareholder Exchange Shares**" means the aggregate 1,750,000 RGL NewCo Shares to be issued by RGL Newco as partial consideration for the Affected Shares in accordance with this Plan of Arrangement.

"**Shareholders Agreement**" means the Second Amended and Restated Shareholders Agreement by and among, *inter alia*, AI RGL (Luxembourg) S.Â.R.L. and RGL Group.

"**Shareholders' Arrangement Resolution**" means the resolution of the RGL Group Shareholders relating to the Arrangement considered at the Shareholders' Meeting, substantially in the form attached as Appendix "A" to the Circular.

"**Shareholders' Meeting**" means the meeting of the RGL Group Shareholders as of the Record Date to be called and held pursuant to the Interim Order for the purpose of considering and voting on the Shareholders' Arrangement Resolution and to consider such other matters as may properly come before such meeting and includes any adjournment(s) or postponement(s) of such meeting.

"**Stock Option Plan**" means RGL Group's amended and restated stock option plan effective as of September 12, 2014.

"**Supporting Secured Debtholders**" means those Secured Debtholders party to the Recapitalization Term Sheet.

"**US Dollars**" or "**US$**" means the lawful currency of the United States of America.

1.2 Certain Rules of Interpretation

For the purposes of this Plan:

(a) Unless otherwise expressly provided herein, any reference in this Plan to an instrument, agreement or an Order or an existing document or exhibit filed or to be filed means such instrument, agreement, Order, document or exhibit as it may have been or may be amended, modified, or supplemented in accordance with its terms;

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

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

(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 but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(e) Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends;

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

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

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

1.3 Governing Law

This Plan shall be governed by and construed in accordance with the laws of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation 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.

1.4 Currency

Unless otherwise stated, all references in this Plan to sums of money are expressed in, and all payments provided for herein shall be made in, U.S. Dollars.

1.5 Date for Any Action

If the date on which any action is required to be taken hereunder by a Person is not a Business Day, such action shall be required to be taken on the next succeeding day which is a Business Day.

1.6 Time

Time shall be of the essence in this Plan. Unless otherwise specified, all references to time expressed in this Plan and in any document issued in connection with this Plan 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.

ARTICLE 2
TREATMENT OF AFFECTED PARTIES

2.1 Treatment of Secured Debtholders

(a) On the Effective Date, and in accordance with the steps and in the sequence set forth in Section 4.3:

(i) each Secured Debtholder shall and shall be deemed to irrevocably and finally forgive, settle and extinguish (i) the full amount of accrued and unpaid interest owing to such Secured Debtholder on its Secured Debt, and (ii) a portion of the principal amount of its Secured Debt, for no consideration such that the remaining principal amount of the Secured Debt owing to each Secured Debtholder is equal to the Secured Debtholder Exchange Consideration Value in respect of the Secured Debtholder, and to thereafter exchange its remaining Secured Debt for the following consideration, which shall and shall be deemed to be received in full and final settlement of its Secured Debt (collectively, the "**Secured Debtholder Exchange Consideration**"):

(A) its Secured Debtholder Pro Rata Share of the Exchange Debt; and

(B) its Secured Debtholder Pro Rata Share of the Secured Debt Exchange Shares,

which Secured Debtholder Exchange Consideration shall be received by each Secured Debtholder in full and final settlement of its Secured Debt and its Secured Debtholder Claim.

(b) After giving effect to the terms of this Section 2.1, the obligations of the RGL Parties with respect to the Secured Debt and the Secured Debt Documents shall, and shall be deemed to, have been irrevocably and finally extinguished, each Secured Debtholder shall have no further right, title or interest in or to Secured Debt or its Secured Debtholder Claim, and the Secured Debt and Secured Debt Documents shall be cancelled.

2.2 Treatment of Optionholders

(a) Each Optionholder shall be entitled to exercise its Options, prior to the Effective Time, whether vested or unvested, and receive RGL Group Shares in accordance with the terms hereof, provided that the right of an Optionholder to exercise its Options shall be subject to, among other things, the terms of this Plan, the Interim Order and the Option Exercise Election Form, conditioned upon the implementation of this Plan and effective on the Effective Date in accordance with Section 4.3.

(b) RGL Group shall deliver (or cause to be delivered) an Option exercise election form (an "**Option Exercise Election Form**") to each Optionholder, which Option Exercise Election Form shall include instructions for the completion and submission of such Option Exercise Election Form. In order to exercise its options, an Optionholder shall return, or cause to be returned, a duly executed Option Exercise Election Form to RGL Group (and such other documentation as may be required in accordance with the terms thereof) together with the exercise price payable only in respect of such options, in accordance with the terms thereof on or prior to the Option Exercise Deadline. Each Optionholder that returns a duly executed Option Exercise Election Form in accordance with the terms hereof shall constitute an "**Exercising Optionholder**" and the Options held by such Electing Optionholder shall constitute "**Exercised Options**".

(c) On the Effective Date, RGL Group shall be deemed to have issued to each Exercising Optionholder that number of RGL Group Shares contemplated by the terms of its Exercised Options in accordance with Section 4.3.

2.3 Dissent Rights of Holders of RGL Group Shares

(a) Holders of RGL Group Shares may exercise rights of dissent with respect to such RGL Group Shares pursuant to and in the manner set forth in section 190 of the CBCA, as modified and supplemented by the Interim Order and this Plan (the "**Dissent Rights**"), in connection with the Shareholders' Arrangement Resolution; provided that, notwithstanding (a) subsection 190(5) of the CBCA, the written

objection to the Shareholders' Arrangement Resolution must be received by RGL Group at or before the Shareholders' Meeting.

(b) Dissenting Shareholders who are ultimately determined to be entitled to be paid fair value for their Dissenting Shares (i) shall be entitled to be paid by RGL Group the fair value of such Dissenting Share, which fair value, notwithstanding anything to the contrary contained in Part XV of the CBCA, shall be determined as of the close of business on the Business Day before the Shareholders' Arrangement Resolution was adopted, and (ii) will not be entitled to any other payment or consideration under the Arrangement, including any payment that would be payable under the Arrangement had such registered holders not exercised their Dissent Rights in respect of such Dissenting Shares.

(c) No rights of dissent shall be available to Optionholders or Other Affected Equity Holders in connection with the Arrangement. In addition to any other restrictions under the CBCA, holders of RGL Group Shares who vote in favour of the Shareholders' Arrangement Resolution, or have instructed a proxyholder to vote such RGL Group Shares in favour of the Shareholders' Arrangement Resolution shall not be entitled to exercise Dissent Rights and shall be deemed to have not exercised Dissent Rights in respect of such RGL Group Shares.

2.4 Treatment of Affected Shareholders and Other Affected Equity Holders

(a) On the Effective Date, and in accordance with the steps and in the sequence set forth in Section 4.3:

(i) each Affected Shareholder (including, for greater certainty, each Exercising Optionholder in respect of the Affected Shares deemed to be issued to it in exchange for its Existing Options in accordance with Section 4.3(b) of this Plan) shall and shall be deemed to irrevocably have exchanged its Affected Shares for its Affected Shareholder Pro Rata Share of (y) the Shareholder Exchange Shares, and (z) the New Warrants;

(ii) after giving effect to the terms of Section 2.4(a), all of the Other Affected Equity shall be terminated and cancelled and shall be deemed to be terminated and cancelled without the need for any repayment of capital thereof or any other liability, payment or compensation therefor and, for greater certainty, no holder of Other Affected Equity shall be entitled to receive any interest, dividends, premium or other payment in connection therewith.

(b) The Shareholders Agreement shall be terminated and cancelled and be deemed to be terminated and cancelled without any further act or formality.

ARTICLE 3
ISSUANCES AND DISTRIBUTIONS

3.1 Delivery of the Exchange Debt

The delivery of the Exchange Debt (and any certificates or other evidence of holdings thereof) to the Secured Debtholders shall be made in accordance with standing procedures in place with the Exchange Debt Agent, and a register of holders of the Exchange Debt will be maintained by the Exchange Debt Agent. Each Secured Debtholder shall be deemed to be a party to the Exchange Debt Credit Agreement as a lender thereunder.

3.2 Issuance and Delivery of New Shares and New Warrants

(a) All New Shares issued and outstanding as part of the implementation of this Plan shall be deemed to be issued and outstanding as fully-paid and non-assessable. The amount to be maintained in, or to be added to, the stated capital account of the RGL NewCo Shares issued by RGL NewCo pursuant to this Plan for the purposes of the CBCA will be determined by the RGL NewCo Board.

(b) Each Affected Shareholder entitled to Shareholder Exchange Shares and New Warrants will only receive the certificates representing such Shareholder Exchange Shares or New Warrants upon receipt by RGL NewCo of a duly completed Letter of Transmittal (together with a certificate or certificates representing any Affected Shares held by such Person and all other required documents contemplated by the Letter of Transmittal). Each Affected Shareholder shall be deemed to be a party to the RGL NewCo Shareholders Agreement in its capacity as a holder of RGL NewCo Shares following the completion of the transactions contemplated by Section 4.3.

(c) Each Secured Debtholder entitled to Secured Debt Exchange Shares will only receive the certificates representing such Secured Debt Exchange Shares upon receipt by RGL NewCo of a duly completed Secured Debtholder Share Receipt Instruction Form (together with all other required documents contemplated by the Secured Debtholder Share Receipt Instruction Form). Each Secured Debtholder shall be deemed to be a party to the RGL NewCo Shareholders Agreement in its capacity as a holder of RGL NewCo Shares following the completion of the transactions contemplated by Section 4.3.

3.3 Application of Plan Distributions

Unless specified otherwise, all amounts paid or payable hereunder to a Secured Debtholder on account of the Secured Debtholder Claim owing to such Secured Debtholder (including, for greater certainty, any securities received hereunder) shall be applied in respect of the principal amount of such obligation. For greater certainty, no amount shall be paid or payable to a Secured Debtholder in respect of accrued and unpaid interest.

ARTICLE 4
THE ARRANGEMENT

4.1 Corporate Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under this Plan involving corporate action of any members of the RGL Parties will occur and be effective as of the Effective Date (or such other date as the Applicants and the Requisite Consenting Secured Debtholders may agree, each acting reasonably), and will be authorized and approved under this Plan and by the Court, where appropriate, as part of the Final Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of the RGL Parties. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of the RGL Parties, as applicable.

4.2 Fractional Interests

No certificates representing fractional New Shares or New Warrants shall be allocated under this Plan, and any fractional New Shares or New Warrants that would otherwise have been issued hereunder shall be rounded up to the nearest whole number.

4.3 Effective Date Transactions

Commencing at the Effective Time, the following events or transactions will occur, or be deemed to have occurred and be taken and effected, in the following order in five minute increments (unless otherwise indicated) and at the times set out in this Section 4.3 (or in such other manner or order or at such other time or times as the Applicants and the Requisite Consenting Secured Debtholders may agree, each acting reasonably), without any further act or formality required on the part of any Person, except as may be expressly provided herein:

(a) each Dissenting Share shall be deemed to be transferred by the holder thereof to RGL Group for cancellation without any further act or formality in consideration for a claim against the company in the amount to be determined in accordance with Section 2.3 of this Plan, and

  (i) such Dissenting Shareholder shall cease to be a holder of the Dissenting Share so transferred and to have any rights as a holder of such Dissenting Share other than the right to be paid by RGL Group the amount determined in accordance with Section 2.3 of this Plan; and

  (ii) the name of each such Dissenting Shareholder shall be removed from the register of holders of RGL Group Shares as it relates to the Dissenting Shares so transferred and cancelled;

(b) all Exercised Options shall be deemed to be exercised and exchanged for RGL Group Shares;

(c) RGL Management shall pay the Employee Bonuses to the employees entitled thereto (except such portion of the Employee Bonuses as have been paid prior to the Effective Date in accordance with the terms of the Recapitalization Term Sheet, as applicable), net of applicable taxes;

(d) the amount of all accrued and unpaid interest owing to the Secured Debtholders is forgiven, settled and extinguished in full;

(e) the outstanding principal amount of each Secured Debtholder's Secured Debtholder Claim is forgiven, settled and extinguished to the extent such principal amount exceeds the Secured Debtholder Exchange Consideration Value in respect of that Secured Debtholder (the remaining principal amounts following each such forgiveness, settlement and extinguishment being the "**Remaining Principal Amounts**");

(f) in exchange for the full and final settlement of all Remaining Principal Amounts and all remaining Secured Debtholder Claims, simultaneously:

(i) RGL NewCo shall issue (for the benefit of and on behalf of RGL Management) to each Secured Debtholder its Secured Debtholder Pro Rata Share of the Secured Debt Exchange Shares; and

(ii) RGL Management shall issue to each Secured Debtholder its Secured Debtholder Pro Rata Share of the Exchange Debt,

and immediately following the issuance of the Secured Debt Exchange Shares and the Exchange Debt, the Secured Debtholder Claims shall, and shall be deemed to be, irrevocably and finally extinguished and no Secured Debtholder shall have any further right, title or interest in and to the Secured Debt or its Secured Debtholder Claim;

(g) simultaneously with the step in Section 4.3(f):

(i) In consideration for the issuance and delivery by RGL NewCo, for the benefit of and on behalf of RGL Management, of the Secured Debt Exchange Shares, RGL Management shall issue 620,303,610 common shares in the capital of RGL Management (the "**New RGL Management Shares**") to RGL Holdings;

(ii) In consideration for the issuance of the New RGL Management Shares, RGL Holdings shall issue 620,303,610 common shares in the capital of RGL Holdings (the "**New RGL Holdings Shares**") to RGL Group; and

(iii) In consideration for the issuance of the New RGL Holdings Shares, RGL Group shall issue to RGL NewCo a demand non-interest-bearing promissory note with a principal amount equal to the fair market value of the New RGL Holdings Shares;

(h) the directors of RGL NewCo immediately prior to the Effective Time shall be deemed to have resigned and the RGL NewCo Board shall be deemed to have been appointed.

(i) each Affected Share (including, for greater certainty, each of the Affected Shares deemed to be issued in exchange for Existing Options in accordance with Section 4.3(b) of this Plan) will be transferred to RGL Newco, and in consideration therefor, RGL NewCo shall issue to each Affected Shareholder its Affected Shareholder Pro Rata Share of:

(i) the Shareholder Exchange Shares; and

(ii) the New Warrants;

(j) all of the Other Affected Equity shall be terminated and cancelled and shall be deemed to be terminated and cancelled without the need for any repayment of capital thereof or any other liability, payment or compensation therefor and, for greater certainty, no Other Affected Equity Holder shall be entitled to receive any interest, dividends, premium or other payment in connection therewith;

(k) the Shareholders Agreement shall be fully and finally cancelled and terminated and shall be deemed to be cancelled and terminated without any requirement act or formality;

(l) the RGL NewCo Shareholders Agreement will be entered into in a manner satisfactory to the Requisite Consenting Secured Debtholders and the RGL Parties, acting reasonably; and

(m) the releases referred to in Section 5.1 shall become effective.

ARTICLE 5
RELEASES

5.1 Release of Released Parties

At the Effective Time, each of the Released Parties shall be released and discharged from all present and future actions, causes of action, damages, judgments, executions, obligations, liabilities and claims of any kind or nature whatsoever (other than liabilities or claims attributable to any Released Party's gross negligence, fraud or wilful misconduct as determined by the final, non-appealable judgment of a court of competent jurisdiction) arising on or prior to the Effective Date in connection with the RGL Group Shares, the Other Affected Equity, the Secured Debt, the Secured Debt Documents, the Recapitalization Term Sheet, the CBCA Proceedings, this Plan, the transactions contemplated hereunder and any proceedings commenced with respect to or in connection with this Plan, the business and affairs of the RGL Parties, or any other actions or matters related directly or indirectly to the foregoing, provided that nothing in this paragraph shall release or discharge any of the Released Parties from or in respect of its obligations under this Plan or under any Order, or any document ancillary to the foregoing.

ARTICLE 6
CONDITIONS PRECEDENT AND IMPLEMENTATION

6.1 Conditions to Plan Implementation

The implementation of this Plan shall be conditional upon the fulfillment, satisfaction or waiver (to the extent permitted by Section 6.2) of the following conditions:

(a) the Plan shall have been approved at the Meetings in accordance with the terms of the Interim Order;

(b) the Court shall have granted the Final Order, the operation and effect of which shall not have been stayed, reversed or amended, and in the event of an appeal or application for leave to appeal, final determination shall have been made by the applicable appellate court;

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

(d) the Exchange Debt Credit Agreement, the New Warrant Certificates, the New Management Incentive Plan, and all related agreements and other documents necessary in connection therewith and with the implementation of this Plan, shall be in form and substance acceptable to the RGL Parties and the Requisite Consenting Secured Debtholders and shall have become effective, subject only to the implementation of the Plan;

(e) the Applicants shall have paid the reasonable and documented fees and expenses of the Secured Debtholder Advisors and any amounts owing to the Existing First Lien Agent under the Existing First Lien Credit Agreement, in each case up to and including the Effective Date;

(f) Dissent Rights shall not have been validly exercised and not withdrawn with respect to more than 10% of the RGL Group Shares;

(g) all required stakeholder, regulatory and Court approvals, consents waivers and filings shall have been obtained or made as applicable, on terms satisfactory to the RGL Parties and the Requisite Consenting Secured Debtholders;

(h) there shall not have occurred a Material Adverse Effect;

(i) the Effective Date shall have occurred on or before the Outside Date; and

(j) the Director shall have issued the Certificate of Arrangement.

6.2 Waiver of Conditions

The Applicants and the Requisite Consenting Secured Debtholders may at any time and from time to time waive the fulfillment or satisfaction, in whole or in part, of the conditions set out

herein, to the extent and on such terms as such parties may agree, each acting reasonably, provided however that the conditions set out in Sections 6.1(a) and 6.1(b) cannot be waived.

6.3 Effectiveness

This Plan will become effective in the sequence described in Section 4.3 on the filing of the Articles of Arrangement and the issuance of the Certificate of Arrangement, and shall be binding on and enure to the benefit of the RGL Parties, the Secured Debtholders, all Affected Equity Holders, the Released Parties, the directors and officers of the RGL Parties and all other Persons named or referred to in, or subject to, this Plan and their respective successors and assigns and their respective heirs, executors, administrators and other legal representatives, successors and assigns. The Articles of Arrangement shall be filed and the Certificate of Arrangement shall be issued in each case with respect to the Arrangement in its entirety. The Certificate of Arrangement shall be conclusive evidence that the Arrangement has become effective and that each of the provisions in Section 4.3 has become effective in the sequence set forth therein. No portion of this Plan shall take effect with respect to any party or Person until the Effective Time.

ARTICLE 7
GENERAL

7.1 RGL NewCo Matters

RGL NewCo shall hold its first meeting of shareholders no later than six months following completion of RGL NewCo's first fiscal year end.

7.2 Deemed Consents, Waivers and Agreements

At the Effective Time:

(a) each Secured Debtholder and Affected Equity Holder shall be deemed to have consented and agreed to all of the provisions of this Plan in its entirety;

(b) each RGL Party, Secured Debtholder and Affected Equity Holder shall be deemed to have executed and delivered to the other parties all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan in its entirety; and

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

7.3 Waiver of Defaults

From and after the Effective Time, all Persons shall be deemed to have consented and agreed to all of the provisions of this Plan in its entirety. Without limiting the foregoing, all Persons shall be deemed to have:

(a) waived any and all defaults or events of default or any non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, lease, licence, guarantee, agreement for sale or other agreement, written or oral, in each case relating to, arising out of, or in connection with, the Secured Debt or the Secured Debt Documents, the Shareholders Agreement, the Arrangement, the Arrangement Agreement, this Plan, the transactions contemplated hereunder and any proceedings commenced with respect to or in connection with this Plan and any and all amendments or supplements thereto. Any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection with any of the foregoing shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the RGL Parties and their respective successors from performing their obligations under this Plan; and

(b) agreed that, if there is any conflict between the provisions of any agreement or other arrangement, written or oral, existing between such Person and the Applicants and the provisions of this Plan, then the provisions of this Plan take precedence and priority and the provisions of such agreement or other arrangement are deemed to be amended accordingly.

7.4 Paramountcy

From and after the Effective Date, any conflict between this 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, by-laws or other agreement, written or oral, and any and all amendments or supplements thereto existing between one or more of the Secured Debtholders, Affected Equity Holders and any of the RGL Parties as at the Effective Date shall be deemed to be governed by the terms, conditions and provisions of this Plan and the Final Order, which shall take precedence and priority.

7.5 Deeming Provisions

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

7.6 Modification of Plan

(a) The Applicants reserve the right to amend, restate, modify and/or supplement this Plan at any time and from time to time, provided that (except as provided in subsection (c) below) any such amendment, restatement, modification or supplement must be contained in a written document that is (i) filed with the Court and, if made following the Meetings, approved by the Court, and (ii) approved by the Requisite Consenting Secured Debtholders and communicated to the Secured Debtholders and RGL Group Shareholders in the manner required by the Court (if so required).

(b) Any amendment, modification or supplement to this Plan may be proposed by the Applicants with the consent of the Requisite Consenting Secured Debtholders at any time prior to or at the Meetings, with or without any prior notice or communication (other than as may be required under the Interim Order), and if so proposed and accepted at the Meetings, shall become part of this Plan for all purposes.

(c) Any amendment, modification or supplement to this Plan may be made following the Meetings by the Applicants, without requiring filing with, or approval of, the Court, provided that it concerns a matter which is of an administrative nature and is required to better give effect to the implementation of this Plan and is not materially adverse to the financial or economic interests of any of the Secured Debtholders or RGL Group Shareholders.

7.7 Notices

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

(a) If to the Applicants, or any other of the RGL Parties, at:

RGL Reservoir Management Group Inc.
c/o Goodmans LLP
333 Bay Street, Suite 3400
Toronto, Ontario
M5H 2S7

Attention: Robert J. Chadwick and Brendan O'Neill
Email: rchadwick@goodmans.ca / boneill@goodmans.ca

(b) If to any of the Supporting Secured Debtholders:

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

Attention: Ryan Jacobs
Email: rjacobs@casselsbrock.com

or to such other address as any party above may from time to time notify the others in accordance with this Section 7.7. In the event of any strike, lock-out or other event which interrupts postal service in any part of Canada, all notices and communications during such interruption may only be given or made by personal delivery or by email and any notice or other communication given or made by prepaid mail within the five Business Day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been given or made. Any such notices and communications so given or made shall be

deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of emailing, provided that such day in either event is a Business Day and the communication is so delivered or emailed before 5:00 p.m. on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

7.8 Consent of Requisite Consenting Secured Debtholders

For the purposes of this Plan, any matter requiring the agreement, waiver, consent or approval of the Requisite Consenting Secured Debtholders shall be deemed to have been agreed to, waived, consented to or approved by such Requisite Consenting Secured Debtholders if such matter is agreed to, waived, consented to or approved in writing by Cassels Brock & Blackwell LLP, provided that Cassels Brock & Blackwell LLP expressly confirms in writing (which can be by way of e-mail) that it is providing such agreement, consent, waiver or approval on behalf of the Requisite Consenting Secured Debtholders.

7.9 Further Assurances

Notwithstanding that the transactions and events set out herein will occur and be deemed to occur in the order set out in this Plan without any further act or formality, each of the Persons named or referred to in, affected by or subject to, this Plan will make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by any of them to carry out the full intent and meaning of this Plan and to give effect to the transactions contemplated herein

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF RGL RESERVOIR MANAGEMENT INC. AND 10504360 CANADA INC.

Applicants

Court File No: CV-17-587401-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

FINAL ORDER

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
rchadwick@goodmans.ca
Brendan O'Neill LSUC#: 43331J
boneill@goodmans.ca
Ryan Baulke LSUC#: 66189O
rbaulke@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants

6761733

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Shermag Inc., Re | 2009 QCCS 537, 2009 CarswellQue 2487, [2009] R.J.Q. 1289, EYB 2009-156550, J.E. 2009-897, 51 C.B.R. (5th) 95 | (C.S. Qué., Mar 26, 2009)

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

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.c Appeal from refusal or granting of leave

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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Alabama, New Orleans, Texas & Pacific Junction Railway, Re (1890), [1891] 1 Ch. 213, 60 L.J. Ch. 221, [1886-90] All E.R. Rep. Ext. 1143, 64 L.T. 127, 7 T.L.R. 171, 2 Meg. 377 (Eng. C.A.) — referred to

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Algoma Steel Corp. v. Royal Bank (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.) — referred to

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 22 O.T.C. 247 (Ont. Gen. Div.) — referred to

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Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — referred to

Crabtree (Succession de) c. Barrette, 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, (sub nom. *Barrette v. Crabtree (Succession de)*) 53 Q.A.C. 279, (sub nom. *Barrette v. Crabtree (Succession de)*) 150 N.R. 272, (sub nom. *Barrette v. Crabtree Estate*) 101 D.L.R. (4th) 66, (sub nom. *Barrette v. Crabtree Estate*) [1993] 1 S.C.R. 1027 (S.C.C.) — referred to

Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 (B.C. S.C.) — referred to
First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.) — referred to
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Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4)*) 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4)*) 299 A.P.R. 246 (N.S. C.A.) — referred to
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Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — referred to
Repap British Columbia Inc., Re (1998), 1 C.B.R. (4th) 49, 50 B.C.L.R. (3d) 133 (B.C. S.C.) — considered
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Statutes considered:

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Generally — referred to

Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.)
Generally — referred to

Business Corporations Act, S.A. 1981, c. B-15
Generally — referred to

s. 167 [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1) [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1)(e) — considered

s. 167(1)(f) — considered

s. 167(1)(g.1) [en. 1996, c. 32, s. 1(4)] — considered

s. 183 — considered

s. 185 — considered

s. 185(2) — considered

s. 185(7) — considered

s. 234 — considered

Canada Transportation Act, S.C. 1996, c. 10

Generally — referred to

s. 47 — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

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

s. 5.1(1) [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

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

Generally — referred to

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 24th and April 7th 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]).

End of Document

2000 ABCA 238
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 919, 2000 ABCA 238, [2000] 10 W.W.R. 314, [2000] A.W.L.D. 655, [2000] A.J. No. 1028, 20 C.B.R. (4th) 46, 228 W.A.C. 131, 266 A.R. 131, 84 Alta. L.R. (3d) 52, 99 A.C.W.S. (3d) 533, 9 B.L.R. (3d) 86

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

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

And 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: August 3, 2000
Judgment: August 29, 2000
Docket: Calgary Appeal 00-08901

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.); affirmed (2000), 2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 3 W.W.R. 1 (Alta. C.A.)

Counsel: *D.R. Haigh*, *Q.C.*, *D.S. Nishimura*, and *A.Z.A. Campbell*, for Applicant.
H.M. Kay, *Q.C.*, *A.L. Friend*, *Q.C.*, and *L.A. Goldbach*, for Respondents.
S.F. Dunphy, for Air Canada.
F.R. Foran, *Q.C.*, for Monitor, Pricewaterhouse Coopers.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.c Appeal from refusal or granting of leave

2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, [2000] A.W.L.D. 655...

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 was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation brought application for leave to appeal — Leave to appeal refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppresive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public — 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.

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

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 was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation brought application for leave to appeal — Leave to appeal refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Plan was already partially implemented and certain steps could not be reversed, including issuance of articles of reorganization, changes in share structure and management, and implementation of restructuring plan — Appeal court could not rewrite plan, but only uphold it or set it aside — Since it was no longer possible to set plan aside, court could not grant any effective remedy — Appeal court could not grant declaration that investment corporation was unaffected unsecured creditor, nor could appeal on basis of oppression proceed for same reason — No special circumstances existed to warrant expenditure of judicial resources on appeal despite its mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppresive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public — 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. 4 — considered

s. 5 — considered

s. 6 — considered

s. 13 — considered

APPLICATION by investment corporation for leave to appeal from judgment reported at 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, [2000] 10 W.W.R. 269, 2000 ABQB 442, 20 C.B.R. (4th) 1 (Alta. Q.B.), approving airline's plan of arrangement under *Companies' Creditors Arrangement Act.*

***Wittmann J.A.* [In Chambers]:**

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, [reported 84 Alta. L.R. (3d) 9, [2000] 10 W.W.R. 269 (Alta. Q.B.)] pursuant to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, ("*CCAA*"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada

and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the *CCAA* on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

(a) To provide near term liquidity so that Canadian can sustain operations;

(b) To allow for the return of aircraft not required by Canadian; and

(c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;

(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;

(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;

(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the *CCAA*.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the *CCAA* and an order for reorganization pursuant to s. 185 of the *Business Corporations Act* (Alberta), S.A. 1981, c. B-15 as amended ("*ABCA*"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought 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 provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the *ABCA*.

15 The fairness hearing lasted two weeks during which *viva voce* evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the *ABCA* to reorganize the corporation.

LEAVE TO APPEAL UNDER THE *CCAA*

18 The *CCAA* provides for appeals to this Court 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 or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in *Re Canadian Airlines Corp.*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

(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.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:
>
> (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
>
> (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;
>
> (c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s.80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;
>
> (d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and
>
> (e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and
>
> (f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following *Norcan Oils Ltd.* have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: *Harris v. Universal Explorations Ltd.* (1982), 35 A.R. 71 (Alta. T.D.) and *Gibbex Mines Ltd. v. International Video Cassettes Ltd.*, [1975] 2 W.W.R. 10 (B.C. S.C.).

26 *Norcan* applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the *ABCA*, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ***ABCA*** for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a

restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.), to argue that leave to appeal can be granted after a *CCAA* plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the *CCAA* supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in *Norcan Oils Ltd.*, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the *ABCA*, cannot be allowed since that remedy must be granted within the context of the *CCAA* proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the *ABCA* requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of *CCAA* insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski*, *supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion

either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) and *Galcor*, *supra*.

39 In *Sparling*, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering *Borowski*, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In *Galcor*, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in *Borowski* were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established *prima facie* meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in *Resurgence No. 1*, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the *CCAA*? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a *prima facie* meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a *prima facie* meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a *prima facie* meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is *prima facie* meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the *CCAA* proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any *prima facie* error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

Application dismissed.

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Alberta Court of Appeal

Canadian Airlines Corp., Re

2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 4 W.W.R. 1, [2001] A.W.L.D. 132, 242 W.A.C. 179, 277 A.R. 179, 88 Alta. L.R. (3d) 8

Resurgence Asset Management LLC (Appellant)and Canadian Airlines Corporation and Canadian Airlines International Ltd. (Respondents)

Conrad, McFadyen, O'Leary JJ.A.

Judgment: December 15, 2000
Docket: Calgary Appeal 18901

Proceedings: affirming [2000] 10 W.W.R. 269 (Alta. Q.B.); refused leave to appeal [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers])

Counsel: *D.R. haigh*, *Q.C.*, *D.S. Nishimura* and *A. Campbell*, for Appellant.
A.L. Friend, *Q.C.*, *S. Dunphy (Air Canada)* and *L.A. Goldbach*, for Respondents.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.c Appeal from refusal or granting of leave

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 was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation's application for leave to appeal was refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and made no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppressive to minority

shareholders, did not violate s. 167 of Business Corporations Act and represented best option for all parties concerned, including Canadian public — Investment corporation appealed dismissal of application for leave to appeal on grounds that R. 516 of Alberta Rules of Court allowed variation of orders made by single judges on matters incidental to appeal — Appeal dismissed — Application for leave to appeal is not matter incidental to appeal — Alberta Rules of Court, Alta. Reg. 390/68, R. 516 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Practice --- Practice on appeal — Leave to appeal — Appeal from refusal or granting of leave

Application by airline for approval of plan of arrangement was granted and counter-application by investment corporation was dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation's application for leave to appeal was refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and made no error in her exercise of discretion in approving plan — Investment corporation appealed dismissal of application for leave to appeal on grounds that R. 516 of Alberta Rules of Court allowed variation of orders made by single judges on matters incidental to appeal — Appeal dismissed — Application for leave to appeal is not matter incidental to appeal — Alberta Rules of Court, Alta. Reg. 390/68, R. 516.

Table of Authorities

Statutes considered:

Court of Appeal Act, S.B.C. 1982, c. 7

Generally — referred to

s. 9(7) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 516 — considered

APPEAL by investment corporation from order reported at [2000] 10 W.W.R. 314, 84 Alta. L.R. (3d) 52, 20 C.B.R. (4th) 46, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 2000 ABCA 238 (Alta. C.A. [In Chambers]), dismissing application for leave to appeal judgment reported at [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, 2000 ABQB 442 (Alta. Q.B.), approving plan of arrangement of airline.

***Conrad J.A.* (orally):**

1 We have reached a decision in this matter. The decision is unanimous and will be delivered by Madam Justice McFadyen.

***McFadyen J.A.* (orally):**

2 In our view, the *Weststar* decision of the Supreme Court of Canada adopted the reasoning of Chief Justice McEachern. In turn, his decision was based on the provisions of the British Columbia *Court of Appeal Act* as they existed at the time. Section 9(7) permitted the Court to vary or discharge any order made by a single judge of the Court. In other words, the British Columbia legislation gave jurisdiction to the British Columbia Court of Appeal to review *all* decisions of the single judge, including leave orders.

3 In Alberta, Rule 516 provides that the Court may vary orders made by single judges on matters which are incidental to an appeal. Without commenting on the meaning of that phrase, we are of the view that matters incidental to an appeal do not include leave and our Court has consistently held that to be the case.

4 In our view, there is no jurisdiction in Alberta to review the decision of a single judge refusing leave to appeal.

***Conrad J.A.* (orally):**

5 In keeping with the practice that has developed with these parties, the Court orders that there will be no costs of this appeal.

Appeal dismissed.

2001 CarswellAlta 888
Supreme Court of Canada

Canadian Airlines Corp., Re

2001 CarswellAlta 888, 2001 CarswellAlta 889, [2001] S.C.C.A. No. 60, 257 W.A.C. 351 (note), 275 N.R. 386 (note), 293 A.R. 351 (note)

Resurgence Asset Management LLC v. Canadian Airlines Corporation and Canadian Airlines International Ltd.

Bastarache J., Iacobucci J., McLachlin C.J.C.

Judgment: July 13, 2001
Docket: 28388

Proceedings: Leave to appeal refused (2000), 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 3 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.); Affirmed 2000 ABCA 238, 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, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]); Leave to appeal refused 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.)

Counsel: None given.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
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Headnote

Corporations
Practice

Bastarache J., Iacobucci J., McLachlin C.J.C.:

1 The application for leave to appeal is dismissed with costs.

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TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Stelco Inc., Re | 2005 CarswellOnt 743, 7 C.B.R. (5th) 310, 137 A.C.W.S. (3d) 476, [2005] O.J. No. 730 | (Ont. S.C.J. [Commercial List], Feb 28, 2005)

1998 CarswellOnt 1145
Ontario Court of Justice, General Division [Commercial List]

Sammi Atlas Inc., Re

1998 CarswellOnt 1145, [1998] O.J. No. 1089, 3 C.B.R. (4th) 171, 59 O.T.C. 153, 78 A.C.W.S. (3d) 10

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

In The Matter of the Courts of Justice Act, R.S.O. 1990, c.C.43

In The Matter of a Plan of Compromise or Arrangement of Sammi Atlas Inc.

Farley J.

Heard: February 27, 1998
Judgment: February 27, 1998
Docket: 97-BK-000219, B230/97

Counsel: *Norman J. Emblem*, for the applicant, Sammi Atlas Inc.
James Grout, for Agro Partners, Inc.
Thomas Matz, for the Bank of Nova Scotia.
Jay Carfagnini and *Ben Zarnett*, for Investors' Committee.
Geoffrey Morawetz, for the Trade Creditors' committee.
Clifton Prophet, for Duk Lee.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
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XIX.3.b.iv Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues
Corporation brought motion for approval and sanctioning of plan of compromise and arrangement under Companies' Creditors Arrangement Act — There must be strict compliance with all statutory requirements and adherence to previous orders of court — All materials filed and procedures carried out must be examined to determine whether anything has been done or purported to be done which is not authorized by Act — Plan must be fair and reasonable — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Corporation and majority of creditors approved plan of compromise and arrangement under Companies' Creditors Arrangements Act providing for distribution to creditors on sliding scale based on aggregate of all claims held by each claimant — Corporation brought motion for approval and sanctioning of plan — Creditor by way of assignment brought motion for direction that plan be amended — Motion for approval and sanctioning was granted, and motion for amendment was dismissed — Court should be reluctant to interfere with business decisions of creditors reached as a body — No exceptional circumstances supported motion to amend plan after it was voted on — No jurisdiction existed under Act to grant substantive change sought by creditor — Creditor and all unsecured creditors were treated fairly and reasonably — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Farley J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) — applied

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — applied

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — applied

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — applied

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

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 (Ont. Gen. Div.) — applied

Statutes considered:

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

Generally — referred to

MOTION for approval and sanctioning of plan of compromise and arrangement under *Companies' Creditors Arrangement Act*; MOTION by creditor for amendment of plan.

***Farley J.*:**

1 This endorsement deals with two of the motions before me today:

1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and

2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

2 As to the Applicant's sanction motion, the general principles to be applied in the exercise of the court's discretion are:

1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act* ("CCAA"); and

3) the Plan must be fair and reasonable.

See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.); affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p.201; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p.506.

3 I am satisfied on the material before me that the Applicant was held to be a corporation as to which the CCAA applies, that the Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings, that the meetings were held in accordance with the directions of the court and that the Plan was approved by the requisite majority (in fact it was approved 98.74% in number of the proven claims of creditors voting and by 96.79% dollar value, with Argo abstaining). Thus it would appear that items one and two are met.

4 What of item 3 - is the Plan fair and reasonable? A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p.109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the Plan which a majority have approved - subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509. In the present case no one appeared today to oppose the Plan being sanctioned: Argo merely wished that the Plan be amended to accommodate its particular concerns. Of course, to the extent that Argo would be benefited by such an amendment, the other creditors would in effect be disadvantaged since the pot in this case is based on a zero sum game.

5 Those voting on the Plan (and I note there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p.510 of *Olympia & York Developments Ltd.*:

> As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests. The vote in the present case is even higher than in *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) where I observed at p.141:

> ... This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.
>
> The Courts should not second guess business people who have gone along with the Plan....

6 Argo's motion is to amend the Plan - after it has been voted on. However I do not see any exceptional circumstances which would support such a motion being brought now. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) the Court of Appeal observed at p.15 that the court's jurisdiction to amend a plan should "be exercised sparingly and in exceptional circumstances only" even if the amendment were merely technical and did not prejudice the interests of the corporation or its creditors and then only where there is jurisdiction under the CCAA to make the amendment requested, I was advised that Argo had considered bringing the motion on earlier but had not done so in the face of "veto" opposition from the major creditors. I am puzzled by this since the creditor or any other appropriate party can always move in court before the Plan is voted on to amend the Plan; voting does not have anything to do with the court granting or dismissing the motion. The court can always determine a matter which may impinge directly and materially upon the fairness and reasonableness of a plan. I note in passing that it would be inappropriate to attempt to

obtain a preview of the court's views as to sanctioning by brining on such a motion. See my views in *Central Guaranty Trustco Ltd., Re* at p.143:

> ... In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust *where no interest was adversely affected*. The same cannot be said here. FSTQ aside from s.11(c) of the CCAA also raised s.7. I am of the view that s.7 allows an amendment after an adjournment - *but not after a vote has been taken*. (emphasis in original)

What Argo wants is a substantive change; I do not see the jurisdiction to grant same under the CCAA.

7 In the subject Plan creditors are to be dealt with on a sliding scale for distribution purposes only: with this scale being on an aggregate basis of all claims held by one claimant:

> i) $7,500 or less to receive cash of 95% of the proven claim;
>
> ii) $7,501 - $100,000 to receive cash of 90% of the first $7,500 and 55% of balance; and;
>
> iii) in excess of $100,000 to receive shares on a formula basis (subject to creditor agreeing to limit claims to $100,000 so as to obtain cash as per the previous formula).

Such a sliding scale arrangement has been present in many proposals over the years. Argo has not been singled out for special treatment; others who acquired claims by assignment have also been affected. Argo has acquired 40 claims; all under $100,000 but in the aggregate well over $100,000. Argo submitted that it could have achieved the result that it wished if it had kept the individual claims it acquired separate by having them held by a different "person"; this is true under the Plan as worded. Conceivably if this type of separation in the face of an aggregation provision were perceived to be inappropriate by a CCAA applicant, then I suppose the language of such a plan could be "tightened" to eliminate what the applicant perceived as a loophole. I appreciate Argo's position that by buying up the small claims it was providing the original creditors with liquidity but this should not be a determinative factor. I would note that the sliding scale provided here does recognize (albeit imperfectly) that small claims may be equated with small creditors who would more likely wish cash as opposed to non-board lots of shares which would not be as liquidate as cash; the high percentage cash for those proven claims of $7,500 or under illustrates the desire not to have the "little person" hurt - at least any more than is necessary. The question will come down to balance - the plan must be efficient and attractive enough for it to be brought forward by an applicant with the realistic chance of its succeeding (and perhaps in that regard be "sponsored" by significant creditors) and while not being too generous so that the future of the applicant on an ongoing basis would be in jeopardy: at the same time it must gain enough support amongst the creditor body for it to gain the requisite majority. New creditors by assignment may provide not only liquidity but also a benefit in providing a block of support for a plan which may not have been forthcoming as a small creditor may not think it important to do so. Argo of course has not claimed it is a "little person" in the context of this CCAA proceeding.

8 In my view Argo is being treated fairly and reasonably as a creditor as are all the unsecured creditors. An aggregation clause is not inherently unfair and the sliding scale provisions would appear to me to be aimed at "protecting (or helping out) the little guy" which would appear to be a reasonable policy.

9 The Plan is sanctioned and approved; Argo's aggregation motion is dismissed.

Addendum:

10 I reviewed with the insolvency practitioners (legal counsel and accountants) the aspect that industrial and commercial concerns in a CCAA setting should be distinguished from "bricks and mortgage" corporations. In their reorganization it is important to maintain the goodwill attributable to employee experience and customer (and supplier) loyalty; this may very quickly erode with uncertainty. Therefore it would, to my mind be desirable to get down to

brass tacks as quickly as possible and perhaps a reasonable target (subject to adjustment up or down according to the circumstances including complexity) would be for a six month period from application to Plan sanction.

Motion for approval granted; motion for amendment dismissed.

TAB 6

2010 ONSC 4209
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5510, 2010 ONSC 4209, 191 A.C.W.S. (3d) 378, 70 C.B.R. (5th) 1

IN THE MATTER OF SECTION 11 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 AND THE OTHER APPLICANTS

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities
David Byers, Marie Konyukhova for Monitor
Robin B. Schwill, Vince Mercier for Shaw Communications Inc.
Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for Special Committee of the Board of Directors
Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Debtors were group of related companies that successfully applied for protection under Companies' Creditors Arrangement Act — Competitor agreed to acquire all of debtors' television broadcasting interests — Acquisition price was to be used to satisfy claims of certain senior subordinated noteholders and certain other creditors — All of television company's equity-based compensation plans would be terminated and existing shareholders would not receive any compensation — Remaining debtors would likely be liquidated, wound-up, dissolved, placed into bankruptcy, or otherwise abandoned — Noteholders and other creditors whose claims were to be satisfied voted overwhelmingly in favour of plan of compromise, arrangement, and reorganization — Debtors brought application for order sanctioning plan and for related relief — Application granted — All statutory requirements had been satisfied and no unauthorized steps had been taken — Plan was fair and reasonable — Unequal distribution amongst creditors was fair and reasonable in this case — Size of noteholder debt was substantial and had been guaranteed by several debtors — Noteholders held blocking position in any restructuring and they had been cooperative in exploring alternative outcomes — No other alternative transaction would have provided greater recovery than recoveries contemplated in plan — Additionally, there

had not been any oppression of creditor rights or unfairness to shareholders — Plan was in public interest since it would achieve going concern outcome for television business and resolve various disputes.

Table of Authorities

Cases considered by *Pepall J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to

A&M Cookie Co. Canada, Re (2009), 2009 CarswellOnt 3473 (Ont. S.C.J. [Commercial List]) — referred to

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — considered

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

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 3702 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — 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 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]) — referred to

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

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (C.S. Que.) — referred to

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

Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (C.S. Que.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 173 — considered

s. 173(1)(e) — considered

s. 173(1)(h) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — referred to

s. 36 — considered

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for related relief.

***Pepall J.*:**

1 This is the culmination of the *Companies' Creditors Arrangement Act* [1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based

on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and 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.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

> (a) there must be strict compliance with all statutory requirements;
>
> (b) 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
>
> (c) the Plan must be fair and reasonable.
>
> See *Canadian Airlines Corp., Re*[2]

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Canadian Airlines Corp., Re*[3].

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Canadian Airlines Corp., Re*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all 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. [4]

20 My discretion should be informed by the objectives of the CCAA, namely 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.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

> (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
>
> (b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
>
> (c) alternatives available to the plan and bankruptcy;
>
> (d) oppression of the rights of creditors;
>
> (e) unfairness to shareholders; and
>
> (f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Armbro Enterprises Inc., Re* [5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization." [6]

23 Similarly, in *Uniforêt inc., Re* [7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* [8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. 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.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they

are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Air Canada, Re* [10] and *Calpine Canada Energy Ltd., Re* [11] I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods Inc., Re* [12] and *Laidlaw, Re* [13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *A&M Cookie Co. Canada, Re* [14] and *MEI Computer Technology Group Inc., Re* [15]

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Application granted.

Footnotes

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

2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

3 Ibid,at para. 64 citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993] O.J. No. 545 (Ont. Gen. Div.) and *Cadillac Fairview Inc., Re*, [1995] O.J. No. 274 (Ont. Gen. Div. [Commercial List]).

4 Ibid, at para. 3.

5 (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.).

6 *Ibid*, at para. 6.

7 (2003), 43 C.B.R. (4th) 254 (C.S. Que.).

8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).

9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).

12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).

13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).

14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/

15 [2005] Q.J. No. 22993 (C.S. Que.) at para. 9.

TAB 7

2013 ONSC 2519
Ontario Superior Court of Justice [Commercial List]

SkyLink Aviation Inc., Re

2013 CarswellOnt 7670, 2013 ONSC 2519, [2013] O.J. No. 2664, 229 A.C.W.S. (3d) 24, 3 C.B.R. (6th) 83

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

In the Matter of a Plan of Compromise and Arrangement of Skylink Aviation Inc. Applicant

Morawetz J.

Heard: April 23, 2013
Oral reasons: April 23, 2013
Docket: CV-13-1003300CL

Counsel: Robert J. Chadwick, Logan Willis for SkyLink Aviation Inc.
Harvey Chaiton for Arbib, Babrar and Sunbeam Helicopters
Emily Stock for Certain Former and Current Directors, for Insured Claims
S.R. Orzy, Sean Zweig for Noteholders
Shayne Kukulowicz for Certain Directors and Officers
M.P. Gottlieb, A. Winton for Monitor, Duff & Phelps

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Debtor entered protection under Companies' Creditors Arrangement Act for purpose of recapitalization — Plan sought to refinance first lien debt, cancel secured notes in exchange for consideration including new common shares and new debt, and compromise of certain unsecured liabilities — Settlements were arranged with certain claimants, including releases regarding potential claims — Debtor brought application for extension of stay and sanctioning plan of arrangement and compromise — Application granted — Plan was not opposed and had strong support from creditors — Debtor complied with procedural requirements of Act, and orders including initial order — Debtor acted in good faith

and with due diligence — Plan was fair and reasonable — Releases were necessary part of plan and had been negotiated amongst appropriate parties.

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

Debtor entered protection under Companies' Creditors Arrangement Act for purpose of recapitalization — Plan sought to refinance first lien debt, cancel secured notes in exchange for consideration including new common shares and new debt, and compromise of certain unsecured liabilities — Settlements were arranged with certain claimants, including releases regarding potential claims — Debtor brought application for extension of stay and sanctioning plan of arrangement and compromise — Application granted — Plan was not opposed and had strong support from creditors — Debtor complied with procedural requirements of Act, and orders including initial order — Debtor acted in good faith and with due diligence — Plan was fair and reasonable — Releases were necessary part of plan and had been negotiated amongst appropriate parties.

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

Sealing confidential materials.

Table of Authorities

Cases considered by *Morawetz J.*:

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]) — considered

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

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 257 O.A.C. 400 (note), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 390 N.R. 393 (note) (S.C.C.) — 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.) — referred to

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]) — referred to

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

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

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

SkyLink Aviation Inc., Re (2013), 2013 CarswellOnt 2785, 2013 ONSC 1500 (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. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 19(2) — referred to

APPLICATION by debtor for approval of plan under *Companies' Creditors Arrangement Act* and to extend stay.

***Morawetz J.*:**

1 SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), seeks an Order (the "Sanction Order"), among other things:

> (a) sanctioning SkyLink Aviation's Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");
>
> (b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and
>
> (c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 [2013 CarswellOnt 2785 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 No party opposed the requested relief.

3 Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company's goal of a going-concern recapitalization transaction (the "Recapitalization") that minimizes any impact on operations and maximizes value for the Company's stakeholders.

4 Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company's stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

5 The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

The Facts

6 SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, "SkyLink"), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the "SkyLink Business").

7 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 conflict zones.

8 SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the "Monitor").

9 The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. 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' claim that is treated as unsecured under the Plan.

10 On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers. SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

11 Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately $123.4 million.

12 The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

(a) $28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the "Secured Noteholders Allowed Secured Claim"); and

(b) $94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the "Secured Noteholders Allowed Unsecured Claim").

13 The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the "Valuation") prepared by Duff & Phelps Canada Limited.

14 The Claims Procedure resulted in $133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of $94.9 million and other unsecured Claims of $38.8 million, being filed against the Company.

15 In addition, ten claims were filed against the Directors and Officers totalling approximately $21 million. Approximately $13 million of these claims were also filed against the Company.

16 Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the "Original Plan").

Purpose and Effect of the Plan

17 In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company's stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

18 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

19 Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

20 Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

21 The Plan provides for the release of a number of parties (the "Released Parties"), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising

from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

22 The Plan does not release: (i) the right to enforce SkyLink Aviation's obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

Meetings of Creditors

23 At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

24 Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for approval of the Plan under the CCAA would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

25 Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the "New Shareholders' Agreement"), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

Requirements for Approval

26 The general requirements for court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)).

Canadian Airlines Corp., Re, 2000 ABQB 442 (Alta. Q.B.), at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed (2000), 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.).

27 Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

28 With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

29 Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

(a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;

(b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;

(c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;

(d) the Affected Creditors voted to approve the Plan at the Meetings;

(e) the Plan is economically feasible;

(f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the goingconcern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

30 In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

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 the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]); affirmed 2008 ONCA 587 (Ont. C.A.) leave to appeal refused (2008), 257 O.A.C. 400 (note) (S.C.C.).

31 Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

32 Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and

the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

33 I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

(a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;

(b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;

(c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;

(d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;

(e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

34 I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

Sealing the Confidential Appendix

35 The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

36 The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

Extension of Stay Period

37 The Applicant also requests an extension of the Stay Period until May 31, 2013.

38 I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

Application granted.

TAB 8

2010 QCCS 4450
Quebec Superior Court

AbitibiBowater Inc., Re

2010 CarswellQue 10118, 2010 QCCS 4450, 193 A.C.W.S. (3d) 360, 72 C.B.R. (5th) 80, EYB 2010-179705

In The Matter of the Plan of Compromise or Arrangement of

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The Other Petitioners Listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor)

Clément Gascon, J.S.C.

Heard: September 20-21, 2010
Judgment: September 23, 2010
Docket: C.S. Montréal 500-11-036133-094

Counsel: Mr. Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors
Me Gilles Paquin, Me Avram Fishman, for the Monitor
Mr. Robert Thornton, for the Monitor
Me Bernard Boucher, for BI Citibank (London Branch), as Agent for Citibank, N.A.
Me Jocelyn Perreault, for Bank of Nova Scotia (as Administrative and Collateral Agent)
Me Marc Duchesne, Me François Gagnon, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Mr. Frederick L. Myers, Mr. Robert J. Chadwick, for the Ad hoc Committee of Bondholders
Mr. Michael B. Rotsztein, for Fairfax Financial Holdings Ltd.
Me Louise Hélène Guimond, for Syndicat canadien des communications, de l'énergie et du papier (SCEP) et ses sections locales 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 et 1455 and for Syndicat des employés(es) et employés(es) professionnels(-les) et de bureau - Québec (SEPB) et les sections locales 110, 151 et 526
Me Neil Peden, Mr. Raj Sahni, for The Official Committee of Unsecured Creditors of AbitibiBowater Inc. & al.
Me Sébastien Guy, for Cater Pillar Financial Services and Desjardins Trust inc.
Mr. Richard Butler, for Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of British Columbia
Me Louis Dumont, Mr. Neil Rabinovitch, for Aurelius Capital Management LLC and Contrarian Capital Management LLC
Mr. Christopher Besant, for NPower Cogen Limited
Mr. Len Marsello, for the Attorney General for Ontario
Mr. Carl Holm, for Bowater Canada Finance Company
Mr. David Ward, for Wilmington Trust US Indenture Trustee of Unsecured Notes issued by BCFC

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Headnote

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

Pulp and paper company experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — In order to complete its restructuring process, company prepared plan of arrangement — Under plan, company's secured debt obligations would be paid in full while unsecured debt obligations would be converted to equity of reorganized entity — Monitor as well as overwhelming majority of stakeholders strongly supported plan while only handful of stakeholders raised limited objections — Company brought motion seeking approval of plan by Court — Motion granted — Sole issue to be determined was whether plan was fair and reasonable — Here, level of approval by creditors was significant factor to consider — Monitor's recommendation to approve plan was another significant factor, given his professionalism, objectivity and competence — As most of objecting parties had agreed upon "carve-out" wording to be included in Court's order, only two creditors actually objected to plan and it was Court's view that their objections were either ill-founded or moot — Should Court decide to go against vast majority of stakeholders' will and reject plan, not only would those stakeholders be adversely prejudiced but company would also go bankrupt — Court should not seek perfection as plan was result of many compromises and of favourable market window — Court was of view that it was important to allow company to move forthwith towards emergence from 18-month restructuring process — Therefore, Court considered it appropriate and justified to approve plan of arrangement.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et équitable »

Compagnie papetière a connu des problèmes financiers et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Afin de compléter son processus de restructuration, la compagnie a préparé un plan d'arrangement — Dans le cadre du plan, les dettes de la compagnie faisant l'objet d'une garantie seraient payées au complet tandis que les dettes de la compagnie ne faisant pas l'objet d'une garantie seraient converties en actions de l'entité restructurée — Contrôleur de même que la vaste majorité des parties intéressées étaient fortement en faveur du plan tandis qu'une poignée seulement des personnes intéressées soulevaient des objections limitées — Compagnie a déposé une requête visant l'approbation du plan par le Tribunal — Requête accueillie — Seule question à trancher était de savoir si le plan était juste et raisonnable — En l'espèce, la proportion des créanciers s'étant prononcés en faveur du plan était un élément important à considérer — Recommandation du contrôleur d'approuver le plan était un autre élément important, compte tenu de son professionnalisme, de son objectivité et de sa compétence — Comme la majeure partie des parties s'étant prononcées contre le plan avaient donné leur accord à la rédaction d'une clause de « retranchement » destinée à faire partie de l'ordonnance du Tribunal, seuls deux créanciers s'objectaient au plan dans les faits et le Tribunal était d'avis que leurs objections étaient soient sans fondement ou sans objet — S'il fallait que le Tribunal décide d'aller à l'encontre de la volonté de la vaste majorité des personnes intéressées et de rejeter le plan, non seulement ces personnes subiraient-elles des impacts négatifs mais aussi la compagnie ferait-elle faillite — Tribunal ne devrait pas chercher la perfection puisque le plan était le fruit de plusieurs compromis et le résultat d'une fenêtre d'opportunité favorable en terme de marché — Tribunal était d'avis qu'il était important que la compagnie puisse dès à présent mener à son terme un processus de restructuration long de dix-huit mois — Par conséquent, de l'avis du Tribunal, il était approprié et justifié de sanctionner le plan d'arrangement.

Table of Authorities

Cases considered by *Clément Gascon, J.S.C.*:

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Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (C.S. Que.) — referred to

Charles-Auguste Fortier inc., Re (2008), 2008 CarswellQue 11376, 2008 QCCS 5388 (C.S. Que.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 375, 2003 CarswellBC 552, 41 C.B.R. (4th) 42 (B.C. S.C. [In Chambers]) — referred to
Hy Bloom inc. c. Banque Nationale du Canada (2010), 66 C.B.R. (5th) 294, 2010 QCCS 737, 2010 CarswellQue 1714, 2010 CarswellQue 11740, [2010] R.J.Q. 912 (C.S. Que.) — referred to
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T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — referred to
TQS inc., Re (2008), 2008 CarswellQue 5282, 2008 QCCS 2448 (C.S. Que.) — referred to
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Statutes considered:

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to
Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 191 — considered

s. 241 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 6 — considered

s. 9 — referred to

s. 10 — referred to
Corporations Tax Act, R.S.O. 1990, c. C.40
s. 107 — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
s. 270 [en. 1990, c. 45, s. 12(1)] — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 159 — referred to
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Retail Sales Tax Act, R.S.O. 1990, c. R.31
s. 22 — referred to
Taxation Act, 2007, S.O. 2007, c. 11, Sched. A
s. 117 — referred to

MOTION by debtor company seeking Court's approval of plan of arrangement.

***Clément Gascon, J.S.C.*:**

Introduction

1 This judgment deals with the sanction and approval of a plan of arrangement under the *CCAA* [1] . The sole issue to resolve is the fair and reasonable character of the plan. While the debtor company, the monitor and an overwhelming majority of stakeholders strongly support this sanction and approval, three dissenting voices raise limited objections. The Court provides these reasons in support of the Sanction Order it considers appropriate and justified to issue under the circumstances.

The Relevant Background

2 On April 17, 2009 [2009 CarswellQue 14194 (C.S. Que.)], the Court issued an Initial Order pursuant to the *CCAA* with respect to the Abitibi Petitioners (listed in Schedule A), the Bowater Petitioners (listed in Schedule B) and the Partnerships (listed in Schedule C).

3 On the day before, April 16, 2009, AbitibiBowater Inc., Bowater Inc. and certain of their U.S. and Canadian Subsidiaries (the "*U.S. Debtors*") had, similarly, filed Voluntary Petitions for Relief under Chapter 11 of the U.S. Bankruptcy Code.

4 Since the Initial Order, the Abitibi Petitioners, the Bowater Petitioners and the Partnerships (collectively, "*Abitibi*") have, under the protection of the Court, undertaken a huge and complex restructuring of their insolvent business.

5 The restructuring of Abitibi's imposing debt of several billion dollars was a cross-border undertaking that affected tens of thousands of stakeholders, from employees, pensioners, suppliers, unions, creditors and lenders to government authorities.

6 The process has required huge efforts on the part of many, including important sacrifices from most of the stakeholders involved. To name just a few, these restructuring efforts have included the closure of certain facilities, the sale of assets, contracts repudiations, the renegotiation of collective agreements and several costs saving initiatives [2] .

7 In a span of less than 18 months, more than 740 entries have been docketed in the Court record that now comprises in excess of 12 boxes of documents. The Court has, so far, rendered over 100 different judgments and orders. The Stay Period has been extended seven times. It presently expires on September 30, 2010.

8 Abitibi is now nearing emergence from this *CCAA* restructuring process.

9 In May 2010, after an extensive review of the available alternatives, and pursuant to lengthy negotiations and consultations with creditors' groups, regulators and stakeholders, Abitibi filed its Plan of Reorganization and Compromise in the *CCAA* restructuring process (the "*CCAA Plan* [3] "). A joint Plan of Reorganization was also filed at the same time in the U.S. Bankruptcy Court process (the "*U.S. Plan*").

10 In essence, the Plans provided for the payment in full, on the Implementation Date and consummation of the U.S. Plan, of all of Abitibi's and U.S. Debtors' secured debt obligations.

11 As for their unsecured debt obligations, save for few exceptions, the Plans contemplated their conversion to equity of the post emergence reorganized Abitibi. If the Plans are implemented, the net value would likely translate into a recovery under the *CCAA* Plan corresponding to the following approximate rates for the various Affected Unsecured Creditors Classes:

(a) 3.4% for the ACI Affected Unsecured Creditor Class;

(b) 17.1% for the ACCC Affected Unsecured Creditor Class;

(c) 4.2% for the Saguenay Forest Products Affected Unsecured Creditor Class;

(d) 36.5% for the BCFPI Affected Unsecured Creditor Class;

(e) 20.8% for the Bowater Maritimes Affected Unsecured Creditor Class; and

(f) 43% for the ACNSI Affected Unsecured Creditor Class.

12 With respect to the remaining Petitioners, the illustrative recoveries under the *CCAA* Plan would be nil, as these entities have nominal assets.

13 As an alternative to this debt to equity swap, the basic structure of the *CCAA* Plan included as well the possibility of smaller unsecured creditors receiving a cash distribution of 50% of the face amount of their Proven Claim if such was less than $6,073, or if they opted to reduce their claim to that amount.

14 In short, the purpose of the *CCAA* Plan was to provide for a coordinated restructuring and compromise of Abitibi's debt obligations, while at the same time reorganizing and simplifying its corporate and capital structure.

15 On September 14, 2010, Abitibi's Creditors' Meeting to vote on the *CCAA* Plan was convened, held and conducted. The resolution approving the *CCAA* Plan was overwhelmingly approved by the Affected Unsecured Creditors of Abitibi, save for the Creditors of one the twenty Classes involved, namely, the BCFC Affected Unsecured Creditors Class.

16 Majorities well in excess of the statutorily required simple majority in number and two-third majority in value of the Affected Unsecured Claims held by the Affected Unsecured Creditors were attained. On a combined basis, the percentages were 97.07% in number and 93.47% in value.

17 Of the 5,793 votes cast by creditors holding claims totalling some 8,9 billion dollars, over 8,3 billion dollars worth of claims voted in favour of approving the *CCAA* Plan.

The Motion [4] at Issue

18 Today, as required by Section 6 of the *CCAA*, the Court is asked to sanction and approve the *CCAA* Plan. The effect of the Court's approval is to bind Abitibi and its Affected Unsecured Creditors to the terms of the *CCAA* Plan.

19 The exercise of the Court's authority to sanction a compromise or arrangement under the *CCAA* is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that [5]:

a) There has been strict compliance with all statutory requirements;

b) Nothing has been done or purported to be done that was not authorized by the *CCAA*; and

c) The Plan is fair and reasonable.

20 Only the third condition is truly at stake here. Despite Abitibi's creditors' huge support of the fairness and the reasonableness of the *CCAA* Plan, some dissenting voices have raised objections.

21 They include:

a) The BCFC Noteholders' Objection;

b) The Contestations of the Provinces of Ontario and British Columbia; and

c) The Contestation of NPower Cogen Limited.

22 For the reasons that follow, the Court is satisfied that the *CCAA* Plan is fair and reasonable. The Contestations of the Provinces of Ontario and British Columbia and of NPower Cogen Limited have now been satisfactorily resolved by adding to the Sanction Order sought limited "carve-out" provisions in that regard. As for the only other objection that remains, namely that of some of the BCFC Noteholders, the Court considers that it should be discarded.

23 It is thus appropriate to immediately approve the *CCAA* Plan and issue the Sanction Order sought, albeit with some minor modifications to the wording of specific conclusions that the Court deems necessary.

24 In the Court's view, it is important to allow Abitibi to move forthwith towards emergence from the *CCAA* restructuring process it undertook eighteen month ago.

25 No one seriously disputes that there is risk associated with delaying the sanction of the *CCAA* Plan. This risk includes the fact that part of the exit financing sought by Abitibi is dependent upon the capital markets being receptive to the high yield notes or term debt being offered, in a context where such markets are volatile. There is, undoubtedly, continuing uncertainty with respect to the strength of the economic recovery and the effect this could have on the financial markets.

26 Moreover, there are numerous arrangements that Abitibi and their key stakeholders have agreed to or are in the process of settling that are key to the successful implementation of the *CCAA* Plan, including collective bargaining agreements with employees and pension funding arrangements with regulators. Any undue delay with implementation of the *CCAA* Plan increases the risk that these arrangements may require alterations or amendments.

27 Finally, at hearing, Mr. Robertson, the Chief Restructuring Officer, testified that the monthly cost of any delay in Abitibi's emergence from this *CCAA* process is the neighbourhood of 30 million dollars. That includes the direct professional costs and financing costs of the restructuring itself, as well as the savings that the labour cost reductions and the exit financing negotiated by Abitibi will generate as of the Implementation Date.

28 The Court cannot ignore this reality in dealing rapidly with the objections raised to the sanction and approval of the *CCAA* Plan.

Analysis

1. The Court's approval of the CCAA Plan

29 As already indicated, the first and second general requirements set out previously dealing with the statutory requirements and the absence of unauthorized conduct are not at issue.

30 On the one hand, the Monitor has reached the conclusion that Abitibi is and has been in strict compliance with all statutory requirements. Nobody suggests that this is not the case.

31 On the other hand, all materials filed and procedures taken by Abitibi were authorized by the *CCAA* and the orders of this Court. The numerous reports of the Monitor (well over sixty to date) make no reference to any act or conduct by Abitibi that was not authorized by the *CCAA*; rather, the Monitor is of the view that Abitibi has not done or purported to do anything that was not authorized by the *CCAA*[6].

32 In fact, in connection with each request for an extension of the stay of proceedings, the Monitor has reported that Abitibi was acting in good faith and with due diligence. The Court has not made any contrary finding during the course of these proceedings.

33 Turning to the fairness and reasonableness of a *CCAA* Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection [7].

34 Considering that a plan is, first and foremost, a compromise and arrangement reached, between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body [8].

35 In that regard, courts in this country have held that the level of approval by the creditors is a significant factor in determining whether a *CCAA* Plan is fair and reasonable [9]. Here, the majorities in favour of the *CCAA* Plan, both in number and in value, are very high. This indicates a significant and very strong support of the *CCAA* Plan by the Affected Unsecured Creditors of Abitibi.

36 Likewise, in its Fifty-Seventh Report, the Monitor advised the creditors that their approval of the *CCAA* Plan would be a reasonable decision. He recommended that they approve the *CCAA* Plan then. In its Fifty-Eighth Report, the Monitor reaffirmed its view that the *CCAA* Plan was fair and reasonable. The recommendation was for the Court to sanction and approve the *CCAA* Plan.

37 In a matter such as this one, where the Monitor has worked through out the restructuring with professionalism, objectivity and competence, such a recommendation carries a lot of weight.

38 The Court considers that the *CCAA* Plan represents a truly successful compromise and restructuring, fully in line with the objectives of the *CCAA*. Despite its weaknesses and imperfections, and notwithstanding the huge sacrifices and losses it imposes upon numerous stakeholders, the *CCAA* Plan remains a practical, reasonable and responsible solution to Abitibi's insolvency.

39 Its implementation will preserve significant social and economic benefits to the Canadian economy, including enabling about 11,900 employees (as of March 31, 2010) to retain their employment, and allowing hundreds of municipalities, suppliers and contractors in several regions of Ontario and Quebec to continue deriving benefits from a stronger and more competitive important player in the forest products industry.

40 In addition, the business of Abitibi will continue to operate, pension plans will not be terminated, and the Affected Unsecured Creditors will receive distributions (including payment in full to small creditors).

41 Moreover, simply no alternative to the *CCAA* Plan has been offered to the creditors of Abitibi. To the contrary, it appears obvious that in the event the Courtdoes not sanction the *CCAA* Plan, the considerable advantages that it creates will be most likely lost, such that Abitibi may well be placed into bankruptcy.

42 If that were to be the case, no one seriously disputes that most of the creditors would end up being in a more disadvantageous position than with the approval of the *CCAA* Plan. As outlined in the Monitor's 57th Report, the alternative scenario, a liquidation of Abitibi's business, will not prove to be as advantageous for its creditors, let alone its stakeholders as a whole.

43 All in all, the economic and business interests of those directly concerned with the end result have spoken vigorously pursuant to a well-conducted democratic process. This is certainly not a case where the Court should override the express and strong wishes of the debtor company and its creditors and the Monitor's objective analysis that supports it.

44 Bearing these comments in mind, the Court notes as well that none of the objections raised support the conclusion that the *CCAA* Plan is unfair or unreasonable.

2. The BCFC Noteholders' objections

45 In the end, only Aurelius Capital Management LP and Contrarian Capital Management LLC (the "*Noteholders*") oppose the sanction of the *CCAA* Plan [10] .

46 These Noteholders, through their managed funds entities, hold about one-third of some six hundred million US dollars of Unsecured Notes issued by Bowater Canada Finance Company ("*BCFC*") and which are guaranteed by Bowater Incorporated. These notes are BCFC's only material liabilities.

47 BCFC was a Petitioner under the *CCAA* proceedings and a Debtor in the parallel proceedings under Chapter 11 of the U.S. Bankruptcy Code. However, its creditors voted to reject the *CCAA* Plan: while 76.8% of the Class of Affected Unsecured Creditors of BCFC approved the *CCAA* Plan in number, only 48% thereof voted in favour in dollar value. The required majorities of the *CCAA* were therefore not met.

48 As a result of this no vote occurrence, the Affected Unsecured Creditors of BCFC, including the Noteholders, are Unaffected Creditors under the *CCAA* Plan: they will not receive the distribution contemplated by the plan. As for BCFC itself, this outcome entails that it is not an "Applicant" for the purpose of this Sanction Order.

49 Still, the terms of the *CCAA* Plan specifically provide for the compromise and release of any claims BCFC may have against the other Petitioners pursuant, for instance, to any inter company transactions. Similarly, the *CCAA* Plan specifies that BCFC's equity interests in any other Petitioner can be exchanged, cancelled, redeemed or otherwise dealt with for nil consideration.

50 In their objections to the sanction of the *CCAA* Plan, the Noteholders raise, in essence, three arguments:

> (a) They maintain that BCFC did not have an opportunity to vote on the *CCAA* Plan and that no process has been established to provide for BCFC to receive distribution as a creditor of the other Petitioners;
>
> (b) They criticize the overly broad and inappropriate character of the release provisions of the *CCAA* Plan;
>
> (c) They contend that the NAFTA Settlement Funds have not been appropriately allocated.

51 With respect, the Court considers that these objections are ill founded.

52 First, given the vote by the creditors of BCFC that rejected the *CCAA* Plan and its specific terms in the event of such a situation, the initial ground of contestation is moot for all intents and purposes.

53 In addition, pursuant to a hearing held on September 16 and 17, 2010, on an Abitibi's *Motion for Advice and Directions*, Mayrand J. already concluded that BCFC had simply no claims against the other Petitioners, save with respect to the Contribution Claim referred to in that motion and that is not affected by the *CCAA* Plan in any event.

54 There is no need to now review or reconsider this issue that has been heard, argued and decided, mostly in a context where the Noteholders had ample opportunity to then present fully their arguments.

55 In her reasons for judgment filed earlier today in the Court record, Mayrand J. notably ruled that the alleged Inter Company Claims of BCFC had no merit pursuant to a detailed analysis of what took place.

56 For one, the Monitor, in its Amended 49 th Report, had made a thorough review of the transactions at issue and concluded that they did not appear to give rise to any inter company debt owing to BCFC.

57 On top of that, Mayrand J. noted as well that the Independent Advisors, who were appointed in the Chapter 11 U.S. Proceedings to investigate the Inter Company Transactions that were the subject of the Inter Company Claims,

had completed their report in this regard. As explained in its 58th Report, the Monitor understands that they were of the view that BCFC had no other claims to file against any other Petitioner. In her reasons, Mayrand J. concluded that this was the only reasonable inference to draw from the evidence she heard.

58 As highlighted by Mayrand J. in these reasons, despite having received this report of the Independent Advisors, the Noteholders have not agreed to release its content. Conversely, they have not invoked any of its findings in support of their position either.

59 That is not all. In her reasons for judgment, Mayrand J. indicated that a detailed presentation of the Independent Advisors report was made to BCFC's Board of Directors on September 7, 2010. This notwithstanding, BCFC elected not to do anything in that regard since then.

60 As a matter of fact, at no point in time did BCFC ever file, in the context of the current *CCAA* Proceedings, any claim against any other Petitioner. None of its creditors, including the Noteholders, have either purported to do so for and/or on behalf of BCFC. This is quite telling. After all, the transactions at issue date back many years and this restructuring process has been going on for close to eighteen months.

61 To sum up, short of making allegations that no facts or analysis appear to support or claiming an insufficiency of process because the independent and objective ones followed so far did not lead to the result they wanted, the Noteholders simply have nothing of substance to put forward.

62 Contrary to what they contend, there is no need for yet again another additional process to deal with this question. To so conclude would be tantamount to allowing the Noteholders to take hostage the *CCAA* restructuring process and derail Abitibi's emergence for no valid reason.

63 The other argument of the Noteholders to the effect that BCFC would have had a claim as the holder of preferred shares of BCHI leads to similar comments. It is, again, hardly supported by anything. In any event, assuming the restructuring transactions contemplated under the *CCAA* Plan entail their cancellation for nil consideration, which is apparently not necessarily the case for the time being, there would be nothing unusual in having the equity holders of insolvent companies not receive anything in a compromise and plan of arrangement approved in a *CCAA* restructuring process.

64 In such a context, the Court disagrees with the Noteholders' assertion that BCFC did not have an opportunity to vote on the *CCAA* Plan or that no process was established to provide the latter to receive distribution as a potential creditor of the other Petitioners.

65 To argue that the *CCAA* Plan is not fair and reasonable on the basis of these alleged claims of BCFC against the other Petitioners has no support based on the relevant facts and Mayrand J.'s analysis of that specific point.

66 Second, given these findings, the issue of the breadth and appropriateness of the releases provided under the *CCAA* Plan simply does not concern the Noteholders.

67 As stated by Abitibi's Counsel at hearing, BCFC is neither an "Applicant" under the terms of the releases of the *CCAA* Plan nor pursuant to the Sanction Order. As such, BCFC does not give or get releases as a result of the Sanction Order. The *CCAA* Plan does not release BCFC nor its directors or officers acting as such.

68 As it is not included as an "Applicant", there is no need to provide any type of convoluted "carve-out" provision as the Noteholders requested. As properly suggested by Abitibi, it will rather suffice to include a mere clarification at paragraph 15 of the Sanction Order to reaffirm that in the context of the releases and the Sanction Order, "Applicant" does not include BCFC.

69 As for the Noteholders themselves, they are Unaffected Creditors under the *CCAA* Plan as a result of the no vote of their Class.

70 In essence, the main concern of the Noteholders as to the scope of the releases contemplated by the *CCAA* Plan and the Sanction Order is a mere issue of clarity. In the Court's opinion, this is sufficiently dealt with by the addition made to the wording of paragraph 15 of the Sanction Order.

71 Besides that, as explained earlier, any complaint by the Noteholders that the alleged inter company claims of BCFC are improperly compromised by the *CCAA* Plan has no merit. If their true objective is to indirectly protect their contentions to that end by challenging the wording of the releases, it is unjustified and without basis. The Court already said so.

72 Save for these arguments raised by the Noteholders that the Court rejects, it is worth noting that none of the stakeholders of Abitibi object to the scope of the releases of the *CCAA* Plan or their appropriateness given the global compromise reached through the debt to equity swap and the reorganization contemplated by the plan.

73 The *CCAA* permits the inclusion of releases (even ones involving third parties) in a plan of compromise or arrangement when there is a reasonable connection between the claims being released and compromised and the restructuring achieved by the plan. Amongst others, the broad nature of the terms "compromise or arrangement", the binding nature of a plan that has received creditors' approval, and the principles that parties should be able to put in a plan what could lawfully be incorporated into any other contract support the authority of the Court to approve these kind of releases [11] . In accordance with these principles, the Quebec Superior Court has, in the past, sanctioned plans that included releases of parties making significant contribution to a restructuring [12] .

74 The additional argument raised by the Noteholders with respect to the difference between the releases that could be approved by this Court as compared to those that the U.S. Bankruptcy Court may issue in respect of the Chapter 11 Plan is not convincing.

75 The fact that under the Chapter 11 Plan, creditors may elect not to provide releases to directors and officers of applicable entities does not render similar kind of releases granted under the *CCAA* Plan invalid or improper. That the result may be different in a jurisdiction as opposed to the other does not make the *CCAA* Plan unfair and unreasonable simply for that reason.

76 Third, the last objection of the Noteholders to the effect that the NAFTA Settlement Funds have not been properly allocated is simply a red herring. It is aimed at provoking a useless debate with respect to which the Noteholders have, in essence, no standing.

77 The Monitor testified that the NAFTA Settlement has no impact whatsoever upon BCFC. If it is at all relevant, all the assets involved in this settlement belonged to another of the Petitioners, ACCC, with respect to whom the Noteholders are not a creditor.

78 In addition, this apparent contestation of the allocation of the NAFTA Settlement Funds is a collateral attack on the Order granted by this Court on September 1, 2010, which approved the settlement of Abitibi's NAFTA claims against the Government of Canada, as well as the related payment to be made to the reorganised successor Canadian operating entity upon emergence. No one has appealed this NAFTA Settlement Order.

79 That said, in their oral argument, the Noteholders have finally argued that the Court should lift the Stay of Proceedings Order inasmuch as BCFC was concerned. The last extension of the Stay was granted on September 1, 2010, without objection; it expires on September 30, 2010. It is clear from the wording of this Sanction Order that any extension beyond September 30, 2010 will not apply to BCFC.

80 The Court considers this request made verbally by the Noteholders as unfounded.

81 No written motion was ever served in that regard to start with. In addition, the Stay remains in effect against BCFC up until September 30, 2010, that is, for about a week or so. The explanations offered by Abitibi's Counsel to leave it as such for the time being are reasonable under the circumstances. It appears proper to allow a few days to the interested parties to ascertain the impact, if any, of the Stay not being applicable anymore to BCFC, if alone to ascertain how this impacts upon the various charges created by the Initial Order and subsequent Orders issued by the Court during the course of these proceedings.

82 There is no support for the concern of the Noteholders as to an ulterior motive of Abitibi for maintaining in place this Stay of Proceedings against BCFC up until September 30, 2010.

83 All things considered, in the Court's opinion, it would be quite unfair and unreasonable to deny the sanction of the *CCAA* Plan for the benefit of all the stakeholders involved on the basis of the arguments raised by the Noteholders.

84 Their objections either reargue issues that have been heard, considered and decided, complain of a lack a clarity of the scope of releases that the addition of a few words to the Sanction Order properly addresses, or voice queries about the allocation of important funds to the Abitibi's emergence from the *CCAA* that simply do not concern the entities of which the Noteholders are allegedly creditors, be it in Canada or in the U.S.

85 When one remains mindful of the relative degrees of prejudice that would flow from granting or refusing the relief sought, it is obvious that the scales heavily tilt in favour of granting the Sanction Order sought.

3. The Contestations of the Provinces of Ontario and British Columbia

86 Following negotiations that the Provinces involved and Abitibi pursued, with the assistance of the Monitor, up to the very last minute, the interested parties have agreed upon a "carve-out" wording that is satisfactory to every one with respect to some potential environmental liabilities of Abitibi in the event future circumstances trigger a concrete dispute in that regard.

87 In the Court's view, this is, by far, the most preferred solution to adopt with respect to the disagreement that exists on their respective position as to potential proceedings that may arise in the future under environmental legislation. This approach facilitates the approval of the *CCAA* Plan and the successful restructuring of Abitibi, without affecting the right of any affected party in this respect.

88 The "carve-out" provisions agreed upon will be included in the Sanction Order.

4. The Contestation of NPower Cogen Limited

89 By its Contestation, NPower Cogen Limited sought to preserve its rights with respect to what it called the "Cogen Motion", namely a "*motion to be brought by Cogen before this Honourable Court to have various claims heard*" (para. 24(b) and 43 of NPower Cogen Limited Contestation).

90 Here again, Abitibi and NPower Cogen Limited have agreed on an acceptable "carve-out" wording to be included in the Sanction Order in that regard. As a result, there is no need to discuss the impact of this Contestation any further.

5. Abitibi's Reorganization

91 The Motion finally deals with the corporate reorganization of Abitibi and the Sanction Order includes declarations and orders dealing with it.

92 The test to be applied by the Court in determining whether to approve a reorganization under Section 191 of the *CBCA* is similar to the test applied in deciding whether to sanction a plan of arrangement under the *CCAA*, namely: (a)

there must be compliance with all statutory requirements; (b) the debtor company must be acting in good faith; and (c) the capital restructuring must be fair and reasonable [13].

93 It is not disputed by anyone that these requirements have been fulfilled here.

6. The wording of the Sanction Order

94 In closing, the Court made numerous comments to Abitibi's Counsel on the wording of the Sanction Order initially sought in the Motion. These comments have been taken into account in the subsequent in depth revisions of the Sanction Order that the Court is now issuing. The Court is satisfied with the corrections, adjustments and deletions made to what was originally requested.

For these Reasons, The Court:

1 *GRANTS* the Motion.

Definitions

2 *DECLARES* that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the *CCAA* Plan [14] and the Creditors' Meeting Order, as the case may be.

Service and Meeting

3 *DECLARES* that the notices given of the presentation of the Motion and related Sanction Hearing are proper and sufficient, and in accordance with the Creditors' Meeting Order.

4 *DECLARES* that there has been proper and sufficient service and notice of the Meeting Materials, including the *CCAA* Plan, the Circular and the Notice to Creditors in connection with the Creditors' Meeting, to all Affected Unsecured Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the *CCAA*, the Creditors' Meeting Order and all other applicable orders of the Court.

5 *DECLARES* that no meetings or votes of (i) holders of Equity Securities and/or (ii) holders of equity securities of ABH are required in connection with the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions as set out in the Restructuring Transactions Notice dated September 1, 2010, as amended on September 13, 2010.

CCAA Plan Sanction

6 *DECLARES* that:

a) the *CCAA* Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of Affected Unsecured Creditors in each of the following classes in conformity with the *CCAA*: ACI Affected Unsecured Creditor Class, the ACCC Affected Unsecured Creditor Class, the 15.5% Guarantor Applicant Affected Unsecured Creditor Classes, the Saguenay Forest Products Affected Unsecured Creditor Class, the BCFPI Affected Unsecured Creditor Class, the AbitibiBowater Canada Affected Unsecured Creditor Class, the Bowater Maritimes Affected Unsecured Creditor Class, the ACNSI Affected Unsecured Creditor Class, the Office Products Affected Unsecured Creditor Class and the Recycling Affected Unsecured Creditor Class;

b) the *CCAA* Plan was not approved by the Required Majority of Affected Unsecured Creditors in the BCFC Affected Unsecured Creditors Class and that the Holders of BCFC Affected Unsecured Claims are therefore deemed to be Unaffected Creditors holding Excluded Claims against BCFC for the purpose of the *CCAA* Plan and this Order, and that BCFC is therefore deemed not to be an Applicant for the purpose of this Order;

c) the Court is satisfied that the Petitioners and the Partnerships have complied with the provisions of the *CCAA* and all the orders made by this Court in the context of these *CCAA* Proceedings in all respects;

d) the Court is satisfied that no Petitioner or Partnership has either done or purported to do anything that is not authorized by the *CCAA*; and

e) the *CCAA* Plan (and its implementation, including the implementation of the Restructuring Transactions), is fair and reasonable, and in the best interests of the Applicants and the Partnerships, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

7 *ORDERS* that the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the *CCAA* and Section 191 of the *CBCA*, and, as at the Implementation Date, will be effective and will enure to the benefit of and be binding upon the Applicants, the Partnerships, the Reorganized Debtors, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

CCAA Plan Implementation

8 *DECLARES* that the Applicants, the Partnerships, the Reorganized Debtors and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Applicants, the Partnerships and the Reorganized Debtors in accordance with and subject to the terms of the *CCAA* Plan, to implement and effect the *CCAA* Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the *CCAA* Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

9 *AUTHORIZES* the Applicants, the Partnerships and the Reorganized Debtors to request, if need be, one or more order(s) from this Court, including *CCAA* Vesting Order(s), for the transfer and assignment of assets to the Applicants, the Partnerships, the Reorganized Debtors or other entities referred to in the Restructuring Transactions Notice, free and clear of any financial charges, as necessary or desirable to implement and effect the Restructuring Transactions as set forth in the Restructuring Transactions Notice.

10 *DECLARES* that, pursuant to Section 191 of the *CBCA*, the articles of AbitibiBowater Canada will be amended by new articles of reorganization in the manner and at the time set forth in the Restructuring Transactions Notice.

11 *DECLARES* that all Applicants and Partnerships to be dissolved pursuant to the Restructuring Transactions shall be deemed dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Applicants or the Partnerships or their respective securityholders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Applicants, the Partnerships and the Reorganized Debtors shall cause to be filed with the appropriate Governmental Entities articles, agreements or other documents of dissolution for the dissolved Applicants or Partnerships to the extent required by applicable Law.

12 *DECLARES* that, subject to the performance by the Applicants and the Partnerships of their obligations under the *CCAA* Plan, and in accordance with Section 8.1 of the *CCAA* Plan, all contracts, leases, Timber Supply and Forest Management Agreements ("TSFMA") and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements and other arrangements to which the Applicants or the Partnerships are a party and that have not been terminated including as part of the Restructuring Transactions or repudiated in accordance with the terms of the Initial Order will be and remain in full force and effect, unamended, as at the Implementation Date, and no Person who is a party to any such contract, lease, agreement or other arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such contract, lease, agreement or other arrangement and no automatic termination will have any validity or effect by reason of:

a) any event that occurred on or prior to the Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Applicants and the Partnerships);

b) the insolvency of the Applicants, the Partnerships or any affiliate thereof or the fact that the Applicants, the Partnerships or any affiliate thereof sought or obtained relief under the *CCAA*, the CBCA or the Bankruptcy Code or any other applicable legislation;

c) any of the terms of the *CCAA* Plan, the U.S. Plan or any action contemplated therein, including the Restructuring Transactions Notice;

d) any settlements, compromises or arrangements effected pursuant to the *CCAA* Plan or the U.S. Plan or any action taken or transaction effected pursuant to the *CCAA* Plan or the U.S. Plan; or

e) any change in the control, transfer of equity interest or transfer of assets of the Applicants, the Partnerships, the joint ventures, or any affiliate thereof, or of any entity in which any of the Applicants or the Partnerships held an equity interest arising from the implementation of the *CCAA* Plan (including the Restructuring Transactions Notice) or the U.S. Plan, or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

13 *DECLARES* that any consent or authorization required from a third party, including any Governmental Entity, under any such contracts, leases, TSFMAs and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements or other arrangements in respect of any change of control, transfer of equity interest, transfer of assets or transfer of any asset as part of or in connection with the Restructuring Transactions Notice be deemed satisfied or obtained, as applicable.

14 *DECLARES* that the determination of Proven Claims in accordance with the Claims Procedure Orders, the Cross-border Claims Protocol, the Cross-border Voting Protocol and the Creditors' Meeting Order shall be final and binding on the Applicants, the Partnerships, the Reorganized Debtors and all Affected Unsecured Creditors.

Releases and Discharges

15 *CONFIRMS* the releases contemplated by Section 6.10 of the *CCAA* Plan and *DECLARES* that the said releases constitute good faith compromises and settlements of the matters covered thereby, and that such compromises and settlements are in the best interests of the Applicants and its stakeholders, are fair, equitable, and are integral elements of the restructuring and resolution of these proceedings in accordance with the *CCAA* Plan, it being understood that for the purpose of these releases and/or this Order, the terms "Applicants" or "Applicant" are not meant to include Bowater Canada Finance Corporation ("*BCFC*").

16 *ORDERS* that, upon payment in full in cash of all BI DIP Claims and ULC DIP Claim in accordance with the *CCAA* Plan, the BI DIP Lenders and the BI DIP Agent or ULC, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the BI DIP Claims or the ULC DIP Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

17 *ORDERS* that, upon payment in full in cash of their Secured Claims in accordance with the *CCAA* Plan, the ACCC Administrative Agent, the ACCC Term Lenders, the BCFPI Administrative Agent, the BCFPI Lenders, the Canadian Secured Notes Indenture Trustee and any Holders of a Secured Claim, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the

Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the ACCC Term Loan Claim, BCFPI Secured Bank Claim, Canadian Secured Notes Claim or any other Secured Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

For the purposes of the present paragraph [17], in the event of any dispute as to the amount of any Secured Claim, the Applicants, Partnerships or Reorganized Debtors, as the case may be, shall be permitted to pay to the Monitor the full amount in dispute (as specified by the affected Secured Creditor or by this Court upon summary application) and, upon payment of the amount not in dispute, receive the releases, discharges, authorizations, directions, instruments notices or other documents as provided for therein. Any amount paid to the Monitor in accordance with this paragraph shall be held in trust by the Monitor for the holder of the Secured Claim and the payer as their interests shall be determined by agreement between the parties or, failing agreement, as directed by this Court after summary application.

18 *PRECLUDES* the prosecution against the Applicants, the Partnerships or the Reorganized Debtors, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged or terminated pursuant to the *CCAA* Plan.

Accounts with Financial Institutions

19 *ORDERS* that any and all financial institutions (the "Financial Institutions") with which the Applicants, the Partnerships and the Reorganized Debtors have or will have accounts (the "Accounts") shall process and/or facilitate the transfer of, or changes to, such Accounts in order to implement the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

20 *ORDERS* that Mr. Allen Dea, Vice-President and Treasurer of ABH, or any other officer or director of the Reorganized Debtors, is empowered to take all required acts with any of the Financial Institutions to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement CCAA Plan

21 *ORDERS* that, in the event that the Implementation Date does not occur, Affected Unsecured Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the *CCAA* Plan, the Claims Procedure Orders or the Creditors' Meeting Order. For greater certainty, nothing in the *CCAA* Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Applicants or the Partnerships, including in the *CCAA* Proceedings or any other proceeding or process, in the event that the Implementation Date does not occur.

Charges created in the CCAA Proceedings

22 *ORDERS* that, upon the Implementation Date, all *CCAA* Charges against the Applicants and the Partnerships or their property created by the *CCAA* Initial Order or any subsequent orders shall be determined, discharged and released, provided that the BI DIP Lenders Charge shall be cancelled on the condition that the BI DIP Claims are paid in full on the Implementation Date.

Fees and Disbursements

23 *ORDERS* and *DECLARES* that, on and after the Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants and the Partnerships, in

each case at their standard rates and charges and including any amounts outstanding as of the Implementation Date, in respect of the *CCAA* Plan, including the implementation of the Restructuring Transactions, shall become obligations of Reorganized ABH.

Exit Financing

24 *ORDERS* that the Applicants are authorized and empowered to execute, deliver and perform any credit agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents, as may be required in connection with the Exit Facilities.

Stay Extension

25 *EXTENDS* the Stay Period in respect of the Applicantsuntil the Implementation Date.

26 *DECLARES* that all orders made in the *CCAA* Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor and Chief Restructuring Officer

27 *DECLARES* that the protections afforded to Ernst & Young Inc., as Monitor and as officer of this Court, and to the Chief Restructuring Officer pursuant to the terms of the Initial Order and the other Orders made in the *CCAA* Proceedings, shall not expire or terminate on the Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

28 *ORDERS* and *DECLARES* that any distributions under the *CCAA* Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants for the purposes of section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 14 of the Act Respecting the Ministère du Revenu (Québec), 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) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a Disbursing Agent under the *CCAA* Plan, and the Monitor in making 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 it making any payments ordered or permitted hereunder, 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 *CCAA* Plan and this Order and any claims of this nature are hereby forever barred.

29 *ORDERS* and *DECLARES* that the Disbursing Agent, the Applicants and the Reorganized Debtors, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements, including withholding a number of shares of New ABH Common Stock equal in value to the amount required to comply with such withholding requirements from the shares of New ABH Common Stock to be distributed to current or former employees and making the necessary arrangements for the sale of such shares on the TSX or the New York Stock Exchange on behalf of the current or former employees to satisfy such withholding requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Unsecured Creditor in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Entity.

Claims Officers

30 *DECLARES* that, in accordance with paragraph [25] hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the *CCAA* Proceedings.

General

31 *ORDERS* that, notwithstanding any other provision in this Order, the *CCAA* Plan or these *CCAA* Proceedings, the rights of the public authorities of British Columbia, Ontario or New Brunswick to take the position in or with respect to any future proceedings under environmental legislation that this or any other Order does not affect such proceedings by reason that such proceedings are not in relation to a claim within the meaning of the *CCAA* or are otherwise beyond the jurisdiction of Parliament or a court under the *CCAA* to affect in any way is fully reserved; as is reserved the right of any affected party to take any position to the contrary.

32 *DECLARES* that nothing in this Order or the *CCAA* Plan shall preclude NPower Cogen Limited ("Cogen") from bringing a motion for, or this Court from granting, the relief sought in respect of the facts and issues set out in the Claims Submission of Cogen dated August 10, 2010 (the "Claim Submission"), and the Reply Submission of Cogen dated August 24, 2010, provided that such relief shall be limited to the following:

a) a declaration that Cogen's claim against Abitibi Consolidated Inc. ("Abitibi") and its officers and directors, arising from the supply of electricity and steam to Bridgewater Paper Company Limited between November 1, 2009 and February 2, 2010 in the amount of £9,447,548 plus interest accruing at the rate of 3% *per annum* from February 2, 2010 onwards (the "Claim Amount") is (i) unaffected by the *CCAA* Plan or Sanction Order; (ii) is an Excluded Claim; or (iii) is a Secured Claim; (iv) is a D&O Claim; or (v) is a liability of Abitibi under its Guarantee;

b) an Order directing Abitibi and its Directors and Officers to pay the Claim Amount to Cogen forthwith; or

c) in the alternative to (b), an order granting leave, if leave be required, to commence proceedings for the payment of the Claim Amount under s. 241 of the *CBCA* and otherwise against Abitibi and its directors and officers in respect of same.

33 *DECLARES* that any of the Applicants, the Partnerships, the Reorganized Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice to the Service List.

34 *DECLARES* that this Order shall have full force and effect in all provinces and territories in Canada.

35 *REQUESTS* the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

36 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

37 *WITHOUT COSTS.*

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Motion granted.

Footnotes

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

2 See Monitor's Fifty-Seventh Report dated September 7, 2010, and Monitor's Fifty-Ninth Report dated September 17, 2010.

3 This Plan of Reorganisation and Compromise (as modified, amended or supplemented by CCAA Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, CCAA Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) (collectively, the "*CCAA Plan*") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

4 Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief (the "Motion"), pursuant to Sections 6, 9 and 10 of the CCAA and Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (the "CBCA").

5 *Boutiques San Francisco Inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775 (S.C.); *Cable Satisfaction International Inc. v. Richter & Associés inc.*, J.E. 2004-907 (C.S. Que.) [2004 CarswellQue 810 (C.S. Que.)].

6 See Monitor's Fifty-Eight Report dated September 16, 2010.

7 *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]); *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]).

8 *Uniforêt inc., Re* (C.S. Que.) [2003 CarswellQue 3404 (C.S. Que.)], *TQS inc., Re*, 2008 QCCS 2448 (C.S. Que.), B.E. 2008BE-834; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.).

9 *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Boutiques San Francisco inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185 , B.E. 2004BE-775; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed 73 C.B.R. (N.S.) 195 (B.C. C.A.).

10 The Indenture Trustee acting under the Unsecured Notes supports the Noteholders in their objections.

11 See, in this respect, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Charles-Auguste Fortier inc., Re* (2008), J.E. 2009-9, 2008 QCCS 5388 (C.S. Que.); *Hy Bloom inc. c. Banque Nationale du Canada*, [2010] R.J.Q. 912 (C.S. Que.).

12 *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, N° 500-11-032338-085, 2009-06-30, Mongeon J.

13 *Raymor Industries inc. (Proposition de)*, [2010] R.J.Q. 608, 2010 QCCS 376 (C.S. Que.); *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, N° 500-11-032338-085, 2009-06-30, Mongeon J., at para. 7-8; *MEI Computer Technology Group Inc., Re* [2005 CarswellQue 13408 (C.S. Que.)], (S.C., 2005-11-14), SOQUIJ AZ-50380254, 2005 CanLII 54083; *Doman Industries Ltd., Re*, 2003 BCSC 375 (B.C. S.C. [In Chambers]); *Laidlaw, Re* (Ont. S.C.J.).

14 It is understood that for the purposes of this Sanction Order, the CCAA Plan is the Plan of Reorganisation and Compromise (as modified, amended or supplemented by CCAA Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, CCAA Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

End of Document

TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Magna International Inc., Re | 2010 ONSC 4123, 2010 CarswellOnt 5916, 72 B.L.R. (4th) 250, 192 A.C.W.S. (3d) 26, [2010] O.J. No. 3454, 101 O.R. (3d) 736 | (Ont. S.C.J., Aug 17, 2010)

1993 CarswellOnt 182
Ontario Court of Justice (General Division)

Olympia & York Developments Ltd. v. Royal Trust Co.

1993 CarswellOnt 182, [1993] O.J. No. 545, 12 O.R. (3d) 500, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re plan of arrangement of OLYMPIA & YORK DEVELOPMENTS LIMITED and all other companies set out in Schedule "A" attached hereto

R.A. Blair J.

Heard: February 1 and 5, 1993
Oral reasons: February 5, 1993
Written reasons: February 24, 1993
Judgment: February 24, 1993
Docket: Doc. B125/92

Counsel: [List of counsel attached as Schedule "A" hereto.]

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable"
Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Sanctioning of plan — Unanimous approval of plan by all classes of creditors not being necessary where plan being fair and reasonable.
Under the protection of the *Companies' Creditors Arrangement Act* ("CCAA"), O & Y negotiated a plan of arrangement. The final plan of arrangement was voted on by the numerous classes of creditors: 27 of the 35 classes voted in favour of the plan, eight voted against it. O & Y applied to the court under s. 6 of the CCAA for sanctioning of its final plan.
Held:
The application was allowed.
In considering whether to sanction a plan of arrangement, the court must consider whether: (1) there has been strict compliance with all statutory requirements; (2) all materials filed and procedures carried out are authorized by the CCAA; and (3) the plan is fair and reasonable.
The court found that the first two criteria had been complied with. O & Y met the criteria for access to the protection of the CCAA, the creditors were divided into classes for the purpose of voting and those classes had voted on the plan.

All meetings of creditors were duly convened and held pursuant to the court orders pertaining to them. Further, nothing had been done or purported to have been done that was not authorized by the CCAA.

In assessing whether a plan is fair and reasonable, the court must be satisfied that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders. One important measure of whether a plan is fair and reasonable is the parties' approval of the plan and the degree to which approval has been given. With the exception of the eight classes of creditors that did not vote to accept the plan, the plan met with the overwhelming approval of the secured creditors and unsecured creditors.

While s. 6 of the CCAA makes it clear that a plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class, the section does not make it clear whether the plan must be approved by *every* class of creditors before it can be sanctioned by the court. A court would not sanction a plan if the effect of doing so were to impose it upon a class or classes of creditors who rejected it and to bind them by it. However, in this case, the plan provided that the claims of the creditors who rejected the plan were to be treated as "unaffected claims" not bound by its provisions. Further, even if they approved the plan, secured creditors had the right to drop out at any time by exercising their realization rights. Finally, there was no prejudice to the eight classes of creditors that did not approve the plan because nothing was being imposed upon them that they had not accepted and none of their rights were being taken away.

Table of Authorities

Cases considered:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, 2 Meg. 377, [1886-90] All E.R. Rep. Ext. 1143, [1891] 1 Ch. at 231 (C.A.) — *referred to*

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — *referred to*

Canadian Vinyl Industries Inc., Re (1978), 29 C.B.R. (N.S.) 12 (C.S. Que.) — *referred to*

Dairy Corp. of Canada, Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — *referred to*

École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987), Inc. (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.) — *referred to*

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

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *referred to*

Multidev Immobilia Inc. v. S.A. Just Invest, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.) — *considered*

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

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *referred to*

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

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 193 (C.A.) [leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. xxxiii (note), 135 N.R. 317 (note)] — *considered*

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

Statutes considered:

Companies Act, The, R.S.O. 1927, c. 218.

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

s. 4

s. 5

s. 6

Joint Stock Companies Arrangements Act, 1870 (U.K.), 33 & 34 Vict., c. 104.

Application for sanctioning of plan under *Companies' Creditors Arrangement Act*.

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

1 On May 14, 1992, Olympia & York Developments Limited and 23 affiliated corporations ("the Applicants") sought, and obtained an Order granting them the protection of the *Companies' Creditors Arrangement Act* [R.S.C. 1985, c. C-36] for a period of time while they attempted to negotiate a Plan of Arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.

2 A Final Plan of Compromise or Arrangements has now been negotiated and voted on by the numerous classes of creditors. 27 of the 35 classes have voted in favour of the Final Plan; 8 have voted against it. The Applicants now bring the Final Plan before the Court for sanctioning, pursuant to section 6 of the *Companies' Creditors Arrangement Act*.

The Plan

3 The Plan is described in the motion materials as "the Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as "the Plan" or "the Final Plan". Its purpose, as stated in Article 1.2,

> ... is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

4 The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals — with some common themes — for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.

5 The contemplated O & Y restructuring has three principal components, namely:

> 1. The organization of O & Y Properties, a company to be owned as to 90% by OYDL and as to 10% by the Reichmann family, and which is to become OYDL's Canadian Real Estate Management Arm;
>
> 2. Subject to certain approvals and conditions, *and provided the secured creditors do not exercise their remedies against their security*, the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y properties, in exchange for shares; and,
>
> 3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

6 There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".

7 Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class by class basis, for dealing with the outstanding debt in question during the 5 year Plan period.

8 In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.

9 It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.

10 The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self-financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.

11 The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides,

> a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically lifted; and,
>
> b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders' Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, *and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan*.

12 Finally, I note that Article 1.3 Of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants."

The Principles to be Applied on Sanctioning

13 In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289 (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the *Companies' Creditors Arrangement Act*, with this overview, at pp. 308-309:

> 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 (No. 1)* (1989), 102 A.R. 161 (Q.B.), at p. 165.

14 Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a Plan.

15 Section 6 of the CCAA 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*; 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. (Emphasis added)

16 Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.

17 The general principles to be applied in the exercise of the Court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

> The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:
>
> (1) there must be strict compliance with all statutory requirements;
>
> (2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the C.C.A.A.;
>
> (3) The plan must be fair and reasonable.

18 In an earlier Ontario decision, *Re Dairy Corp. of Canada*, [1934] O.R. 436 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario *Companies Act*. The N.S.C.A. recently followed *Re Northland Properties Ltd.* in *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S.C.A.). Farley J. did as well in *Re Campeau Corp.*, [1992] O.J. No. 237 (Ont. Ct. of Justice, Gen. Div.) [now reported at 10 C.B.R. (3d) 104].

Strict Compliance with Statutory Requirements

19 Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: See *Re Campeau, supra*.

20 At the outset, on May 14, 1992 I found that the Applicants met the criteria for access to the protection of the Act — they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings Creditors' Committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.

21 With the consent, and at the request of, the Applicants and the Creditors' Committees, The Honourable David H.W. Henry, a former Justice of this Court, was appointed "Claims Officer" by Order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or The Honourable M. Craig or The Honourable W. Gibson Gray — both also former Justices of this Court — as his designees, presided over the meetings of the Classes of Creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his Report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the Court Orders pertaining to them and the CCAA.

22 I am quite satisfied that there has been strict compliance with the statutory requirements of the *Companies' Creditors Arrangement Act*.

Unauthorized conduct

23 I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.

24 Since May 14, the court has been called upon to make approximately 60 Orders of different sorts, in the course of exercising its supervisory function in the proceedings. These Orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" Orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring costs throughout the "stay" period; they involved the confirmation of the sale of certain of the Applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of Creditors' Committees, the classification of creditors for purposes of voting, the creation and defining of the role of "Information Officer" and, similarly, of the role of "Claims Officer". They involved the endorsement of the information circular respecting the Final Plan and the mailing and notice that was to be given regarding it. The Court's Orders encompassed, as I say, the general supervision of the negotia tion and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the Applicants and the creditors along the way.

25 While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of Compromise, I have, with one exception, been the Judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA.

26 In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.

27 This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

28 The Plan must be "fair and reasonable". That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. "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 make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

29 From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs whose decision in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) contains much

helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 116, that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

30 If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced — or, "reasonable" — manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it — technical and procedural compliance with the Act aside — the plan should be sanctioned if it is "fair and reasonable".

31 When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be addressed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.

32 On the appeal in *Re Northland Properties Ltd., supra*, at p. 201, Chief Justice McEachern made the following comment in this regard:

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

33 In *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. at 231 (C.A.), a case involving a scheme and arrangement under the *Joint Stock Companies Arrangements Act, 1870* [(U.K.), 33 & 34 Vict., c. 104], Lord Justice Bowen put it this way, at p. 243:

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

Again at p. 245:

> It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

34 Is the Final Plan presented here by the O & Y Applicants "fair and reasonable"?

35 I have reviewed the Plan, including the provisions relating to each of the Classes of Creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian — if not, worldwide — corporate history. It would be folly for me to suggest that I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.

36 One important measure of whether a Plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

37 As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

38 This point has been made in numerous authorities, of which I note the following: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175, at p. 184 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195, at p. 205 (B.C.C.A.); *Re Langley's Ltd.*, [1938] O.R. 123 (C.A.), at p. 129; *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245; *École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987) Inc.* (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.).

39 In *Re Keddy Motors Inns Ltd., supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

40 In *École Internationale, supra* at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.

41 In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take and compromise on the part of the participants in the negotiating and bargaining process." The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of may 14, 1992." Each creditors' committee had the benefit of independent and experienced legal counsel.

42 With the exception of the 8 classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the Applicants. This level of approval is something the court must acknowledge with some deference.

43 Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of 5 years.

44 The claims of creditors — in this case, secured creditors — who did not approve the Plan are specifically treated under the Plan as "unaffected claims" i.e. claims not compromised or bound by the provisions of the Plan. Section 6.2(C) of the Final Plan states that the applicants may apply to the court for a sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.

45 The claims of unsecured creditors under the Plan are postponed for 5 years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least annually, an amount out of OYDL's cash

on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.

46 Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the Applicants are able to become the "self-sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan."

47 Speaking as co-chair of the Unsecured Creditors' Committee at the meeting of that Class of Creditors, Mr. Ed Lundy made the following remarks:

> Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.
>
> The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.
>
> In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.
>
> The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.
>
> After such consideration, the members have indicated their intentions as follows ...
>
> Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

48 After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26% of the creditors represented and voting at the meeting and 93.37% in value of the Claims represented and voting at the meeting.

49 As for the O & Y Applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.

50 In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover,

consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible.

51 I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e. as much as they would have received had there not been a reorganization: See *Re NsC Diesel Power Inc.* (1990), 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.

52 The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contemplated arrangement under the OBCA. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the Court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.

53 For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".

54 Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

55 As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In 8 of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50%/75% test of section 6.

56 The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:

Class 2 — First Canadian Place Lenders

Class 8 — Fifth Avenue Place Bondholders

Class 10 — Amoco Centre Lenders

Class 13 — L'Esplanade Laurier Bondholders

Class 20 — Star Top Road Lenders

Class 21 — Yonge-Sheppard Centre Lenders

Class 29 — Carena Lenders

Class 33a — Bank of Nova Scotia Other Secured Creditors

57 While section 6 of the CCAA makes the mathematics of the approval process clear — the Plan must be approved by at least 50% of the creditors of a particular class representing at least 75% of the dollar value of the claims in that class — it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:

> 6. *Where a majority* in number representing three-fourths in value *of the creditors, or class of creditors* ... agree to any compromise or arrangement ... the compromise or arrangement may be sanctioned by the court. (Emphasis added)

58 What does "a majority ... of the ... class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?

59 This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the Applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.

60 At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See *Re Keddy Motor Inns Ltd., supra*, at p. 20. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

61 In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this ... purpose": *Elan Corp. v. Comiskey, supra*, per Doherty J.A., at p. 307. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297:

> 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 ... are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

62 Approaching the interpretation of the unclear language of section 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.

63 Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of section 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:

> 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 ... order a meeting of the creditors or class of creditors ... (Emphasis added)

64 It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or *any* class — as opposed to *all classes* — of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.

65 Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in *all* classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.

66 In *Re Wellington Building Corp.*, [1934] O.R. 653 (S.C.), Mr. Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth

mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

> I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value *of each class* should be obtained in support of the scheme before the Court could or should approve of it. (Emphasis added)

67 This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 600):

> Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

68 Thus, the plan in *Re Wellington Building Corp.* went unsanctioned, both because the bondholders had unfairly been deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

69 On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in *Multidev Immobilia Inc. v. Société Anonyme Just Invest* (1988), 70 C.B.R. (N.S.) 91 (C.S. Que.). There, the arrangement had been accepted by all creditors except one secured creditor, Société Anonyme Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal was unconcerned because it had struck a separated agreement; and three classes of which Just Invest was a member, opposed.

70 The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the Court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved *as regards the other creditors who voted in favour of the Plan*. The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

71 While it might be said that *Multidev, supra*, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to sanction.

72 I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.

73 By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the

Plan, secured creditors have the right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different affect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not ac cepted and none of their rights are being "confiscated".

74 From this perspective it could be said that the parties are merely being held to — or allowed to follow — their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: See *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (C.S. Que.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.

75 In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is nothing unfair in sanctioning the Final Plan without unanimity, in my view.

76 I am prepared to do so.

77 A draft Order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semi-colon, and capital letter has been vigilantly examined by the creditors and a battalion of advisors. I have been told by virtually every counsel who rose to make submissions, that the draft as is exists represents a very "fragile consensus", and I have no doubt that such is the case. It's wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan — The First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.

78 Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning Order should state this clearly and in a positive way. Paragraph 9 of his Factum states the argument succinctly. It says:

> 9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.

79 The basis for the concern of these "No" creditors is set out in the next paragraph of the Factum, which states:

> 10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.

80 The provision in the proposed draft Order which is the most contentious is paragraph 4 thereof, which states:

> 4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

81 Mr. Barrack seeks to have a single, but much debated word — "only" — inserted in the second line of that paragraph after the word "will", so that it would read "and will *only* be binding on .... the Applicants and the Creditors Holding Claims in Classes" [which have approved the Plan]. On this simple, single, word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.

82 In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:

> 35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:
>
> 4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.
>
> 36. It is also submitted that an additional paragraph should be added if any provisions of the proposed Sanction Order are granted beyond paragraph 4 thereof as follows:
>
> This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

83 These suggestions are vigorously opposed by the Applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed Order is necessary in order to provided those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise — if arise they do.

84 The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate re-structuring. It may be, or it may not be, that the objecting Project Lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a re-organization and corporate re-structuring of this dimension it may simply not be realistic to expect that the world of the secured creditor, which became not-so-perfect with the onslaught of the Applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.

85 I do, however, agree with the thrust of Mr. Barrack's submissions that the Sanction Order and the Plan can be binding only upon the Applicants and the creditors of the Applicants in respect of claims in classes which have approved the Plan, and trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in section 6.2(C), it stipulates that, where classes of creditors do not agree to the Plan,

> (i) the Applicants shall treat such Class of Claims to be an Unaffected Class of Claims; and,
>
> (ii) the Applicants *shall* apply to the Court "for a Sanction Order which sanctions the Plan *only insofar as it affects the Classes which have agreed to the Plan*.

86 The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft Order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.

87 In terms of the court's jurisdiction, section 6 directs me to sanction the Order, if the circumstances are appropriate, and enacts that, once I have done so, the Order "is binding ... on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors ... and on the company". As I see it, that is exactly what the draft Order presented to me does.

88 Accordingly, an order will go in terms of the draft Order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.

89 These reasons were delivered orally at the conclusion of the sanctioning Hearing which took place on February 1 and February 5, 1993. They are released in written form today.

Application allowed.

APPENDIX "A" — Counsel for Sanctioning Hearing Order

David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland	--	For the Olympia & York Applicants
Ronald N. Robertson, Q.C.	--	For Hong Kong & Shanghai Banking Corporation
David E. Baird, Q.C., and Ms Patricia Jackson	--	For Bank of Nova Scotia
Michael Barrack and S. Richard Orzy	--	For the First Canadian Place Bondholders, the Fifth Avenue Place Bondholders and the L'Esplanade Lauriere Bondholders
William G. Horton	--	For Royal Bank of Canada
Peter Howard and Ms J. Superina	--	For Citibank Canada
Frank J. C. Newbould, Q.C.	--	For the Unsecured/Under-Secured Creditors Committee
John W. Brown, Q.C., and J.J. Lucki	--	For Canadian Imperial Bank of Commerce
Harry Fogul and Harold S. Springer	--	For the Exchange Tower Bondholders
Allan Sternberg and Lawrence Geringer	--	For the O & Y Eurocreditco Debenture Holders
Arthur O. Jacques and Paul M. Kennedy	--	For Bank of Nova Scotia, Agent for Scotia Plaza Lenders
Lyndon Barnes and J.E. Fordyce	--	For Credit Lyonnais, Credit Lyonnais Canada
J. Carfagnini	--	For National Bank of Canada
J.L. McDougall, Q.C.	--	For Bank of Montreal
Carol V.E. Hitchman	--	For Bank of Montreal (Phase I First Canadian

		Place)
James A. Grout	--	For Credit Suisse
Robert I. Thornton	--	For I.B.J. Market Security Lenders
Ms C. Carron	--	For European Investment Bank
W.J. Burden	--	For some debtholders of O & Y Commercial Paper II Inc.
G.D. Capern	--	For Robert Campeau
Robert S. Harrison and A.T. Little	--	For Royal Trust Co. as Trustee

TAB 10

2004 CarswellOnt 469
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 469, [2004] O.J. No. 303, 128 A.C.W.S. (3d) 1067, 47 C.B.R. (4th) 169

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

AND IN THE MATTER OF SECTION 191 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

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

Farley J.

Heard: January 16, 2004
Judgment: January 16, 2004
Docket: 03-CL-4932

Counsel: Sean F. Dunphy, Ashley John Taylor for Air Canada
Peter J. Osborne, Peter H. Griffin for Monitor
Howard Gorman for Ad Hoc Unsecured Creditors Committee
Aubrey Kauffman for Ad Hoc Committee of Various Creditors
Jay Swartz for Deutsche Bank
Mark Gelowitz for Trinity Time Investments
Robert Thornton, Gregory Azeff for GE Capital Aviation Services Inc.
J. Porter for Cerberus
Kevin McElcheran for CIBC
Murray Gold for CUPE
Ian Dick for AG Canada
James Tory for Air Canada Board
Joseph J. Bellissimo for Aircraft Lessor/Lender Group
Terri Hilborn for Unionized Retiree Committee
William Sasso, Sharon Strosberg for Mizuho International, PLC
Jim Dube for Deutsche Lufthansa A.G.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

2004 CarswellOnt 469, [2004] O.J. No. 303, 128 A.C.W.S. (3d) 1067, 47 C.B.R. (4th) 169

Headnote

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

Debtor applied for approval of indemnity, amendments to equity plan, and global restructuring agreements — Application granted — Indemnity was customary and not opposed — Amendments were recommended by monitor and opposed by only one interested party — Board, in exercising its fiduciary duties, properly considered alternative proposal before choosing equity programme sponsor — Restructuring agreement was fair and reasonable and on balance beneficial to debtor and interested parties generally — Court must look at interests of creditors generally and objecting creditors specifically — Rights may be compromised but not confiscated in attempt to balance interests — Agreement had to be either taken as package or rejected — Delay and uncertainty resulting from rejection of agreement would likely be devastating for debtor.

Table of Authorities

Cases considered by *Farley J.*:

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

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — followed

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142 (Ont. Gen. Div.) — referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — referred to

Statutes considered:

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

Generally — considered

APPLICATION for approval of various agreements under *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

(1) the Merrill Lynch (ML) indemnity;

(2) the entering into the amendments to the Trinity Agreement; and

(3) the Global Restructuring Agreements (GRA).

ML Indemnity

2 There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

3 As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

4 I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

5 I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 123, aff'd (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.).

6 There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis) relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

7 At paragraph 71 of its 19th report, the Monitor stated:

> 71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

8 I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

9 As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 201. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), Blair J. at p. 316 adopted the principles in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

10 The Monitor's 19th report at paragraphs 20-21 indicates that:

> 20. The GRA provides the following benefits for Air Canada:
>
> • The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
>
> • The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;
>
> • Exit financing of approximately US$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;
>
> • Aircraft financing up to a maximum of US$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
>
> • The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.
>
> 21. In return for these restructuring and financing commitments, the GRA provides for the following:
>
> • Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;

> • The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring) including one note convertible into equity of the restructured Air Canada at GECC's option;
>
> • The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and
>
> • The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

> 70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US $585 million of exit financing and US$950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

11 The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

12 I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of $1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its $2 billion claim for existing commitments down to $1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

13 With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected

that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests - and that everyone should focus on that and give every reasonable assistance and cooperation.

14 With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it *as a side note* that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality - and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

15 I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in *Trinity Amendments*.

16 Orders accordingly.

Application granted.

TAB 11

2016 ABQB 419
Alberta Court of Queen's Bench

Lutheran Church - Canada, Re

2016 CarswellAlta 1484, 2016 ABQB 419, [2016] A.W.L.D. 3664,
[2016] A.W.L.D. 3694, 269 A.C.W.S. (3d) 218, 38 C.B.R. (6th) 36

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

In the Matter of Lutheran Church - Canada, the Alberta - British Columbia District,
Encharis Community Housing and Services, Encharis Management and Support Services,
and Lutheran Church - Canada, The Alberta - British Columbia District Investments Ltd.

B.E. Romaine J.

Heard: July 15, 2016
Judgment: August 2, 2016
Docket: Calgary 1501-00955

Counsel: Francis N.J. Taman, Ksena J. Court for District Group
Jeffrey L. Oliver, Frank Lamie for Monitor
Chris D. Simard, Alexis E. Teasdale for District Creditors' Committee
Douglas S. Nishimura for DIL Creditors' Committee
Errin A. Poyner for Elvira Kroeger and Randall Kellen
Allan A. Garber for Marilyn Huber and Sharon Sherman
Dean Hutchison for Concentra Trust
Christa Nicholson for Francis Taman, Bishop and McKenzie LLP

Subject: Churches and Religious Institutions; Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.g Monitor
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.d Monitors and consultants

Headnote

Debtors and creditors --- Receivers — Appointment — Monitors and consultants

Creditors asserted monitor in proceedings under Companies' Creditors Arrangement Act ("CCAA") was acting as advocate of debtor without sufficient degree of neutrality — Creditors asserted that monitor had conflict of interest because in pre-filing report monitor disclosed that it provided consulting services to District between specified date and date of initial order; Monitor advised that it recently determined that related professional accounting firm DTL acted as auditor for District; and Monitor advised that DTL completed DIL audit for years — Requisite double majority, after significant disclosure and opportunities to review and question plans, voted in favour of plans — Creditors' Committees of DIL and District, who had duty to act in best interests of body of creditors, supported plans — Creditors asserted monitor breached its fiduciary duty by failing to disclose municipal planning documents — Creditors applied to replace

monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors — Application dismissed — There was no reason arising from conflict or breach of duty to do so — Previous services did not on their face disqualify monitor from acting as monitor — It was not unusual for proposed monitor to be involved with debtor companies for period of time prior to CCAA filing — There was no realistic conflict arising from allegations — Monitor made full disclosure — Monitor went to great lengths to inform great number of creditors of ongoing proceedings, and to give its well-reasoned and measured opinion on myriad of issues in this complex proceeding — In retrospect, it may have been prudent for monitor to reference master-site development plan and approved area structure plan earlier, in substantially way it was later referenced in Monitor's QFA on development, but that was hindsight observation and unlikely to resolve other than one of complaints — Timing of application was strategic — Proposed plans were within court's jurisdiction to sanction, were fair and reasonable, and were to be sanctioned — Monitor supported plans, and there was no reason to give monitor's opinion less than usual deference and weight — Plans provided greater benefit to creditors than forced liquidation in depressed real estate market — Balance of interests favoured approval of plans.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

Table of Authorities

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

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

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 390 N.R. 393 (note), (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 257 O.A.C. 400 (note) (S.C.C.) — referred to

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

Canadian Airlines Corp., Re (2000), 2000 ABCA 238, 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, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

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

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

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139, 1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List]) — referred to

Contech Enterprises Inc., Re (2015), 2015 BCSC 129, 2015 CarswellBC 170, 21 C.B.R. (6th) 107, 3 P.P.S.A.C. (4th) 180 (B.C. S.C.) — referred to

Gold Texas Resources Ltd., Re (1989), 1989 CarswellBC 1397 (B.C. S.C. [In Chambers]) — considered

Moffat v. Wetstein (1996), 135 D.L.R. (4th) 298, 29 O.R. (3d) 371, 5 C.P.C. (4th) 128, 4 O.T.C. 364, 1996 CarswellOnt 2148 (Ont. Gen. Div.) — considered

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

Nelson Financial Group Ltd., Re (2011), 2011 ONSC 2750, 2011 CarswellOnt 3100, 79 C.B.R. (5th) 307 (Ont. S.C.J.) — referred to

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

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171, 59 O.T.C. 153 (Ont. Gen. Div. [Commercial List]) — followed

Target Canada Co., Re (2016), 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

Statutes considered:

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

s. 38 — considered

Class Proceedings Act, S.A. 2003, c. C-16.5

Generally — referred to

Class Proceedings Act, R.S.B.C. 1996, c. 50

Generally — referred to

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 6(1) — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

s. 23(1) — considered

Financial Institutions Act, R.S.B.C. 1996, c. 141

Generally — referred to

Securities Act, R.S.A. 2000, c. S-4

Generally — referred to

APPLICATION by creditors to replace monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors.

***B.E. Romaine J.*:**

I. Introduction

1 This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately $95.7 million, plus 12 trade creditors with claims of approximately $957,000. There are 896 investors in the Church investment corporation with outstanding claims of $22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

2 A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so. I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

II. Factual Overview

A. Background

3 On January 23, 2015, the Lutheran Church — Canada, the Alberta — British Columbia District (the "District"), Encharis Community Housing and Services ("ECHS"), Encharis Management and Support Services ("EMSS") and Lutheran Church — Canada, the Alberta — British Columbia District Investment Ltd. ("DIL", collectively the "District Group") obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. Deloitte Restructuring Inc. was appointed as Monitor and a CRO was appointed for the District and DIL.

4 The District is a registered charity that includes the Church Extension Fund ("CEF"), which was created to allow District members to lend money to what are characterized as faith-based developments. Through the CEF, the District borrowed approximately $96 million from corporation, churches and individuals. These funds were invested by the District in a variety of ways, including loans and mortgages available to congregations to build or renovate churches and schools, real estate investments, and a mortgage on a real estate development known as the Prince of Peace Development.

5 CEF was managed by the District's Department of Stewardship and Financial Ministries and was not created as a separate legal entity. As such, District members who loaned funds to CEF are creditors of the District (the "District Depositors").

6 ECHS owned land and buildings within the Prince of Peace Development, including the Manor and the Harbour, senior care facilities managed by EMSS. EMSS operated the Manor and Harbour for the purpose of providing integrated supportive living services at the Manor and the Harbour to seniors.

7 The Prince of Peace Development also included a church, a school, condominiums, lands known as the Chestermere lands and other development lands.

8 DIL is a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for annuitants. Concentra Trust acted as the trustee with respect to these investments. Depositors to DIL are referred to as the "DIL Investors". The District Depositors and the DIL Investors will collectively be referred to as the "Depositors".

9 Soon after the initial order, the District and the Monitor received feedback that the District Depositors and the DIL Investors wanted to have a voice in the *CCAA* process. Thus, on February 13, 2015, Jones, J granted an order creating creditors' committees for the District (the "District Creditors' Committee") and DIL (the "DIL Creditors' Committee"), tasked with representing the interests of the District Depositors and DIL Investors. The members of the committees were elected from among the Depositors. By the order that created them, they must act in a fiduciary capacity with respect to their respective groups of creditors. The committees were authorized to engage legal counsel, who have represented them throughout the *CCAA* process, and the committees and their counsel have been active participants in the process.

10 ECHS and EMSS prepared plans of compromise and arrangement that were approved by creditors and sanctioned by the Court in January 2016. Pursuant to those plans, ECHS' interest in the condominiums was transferred to a new corporation that is to be incorporated under the District Plan ("NewCo"). The Chestermere lands were sold. The remainder of the lands and buildings (the "Prince of Peace properties") are dealt with in the District Plan.

11 On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church — Canada, Lutheran Church — Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

12 On March 3, 2016, DIL submitted a plan of arrangement that had been approved by creditors for sanction by the Court. I deferred the decision on whether to sanction the DIL plan until the District plan had been finalized, presented to District creditors, and, if approved, submitted for sanctioning. At the same time, I stayed the class action proceedings. The DIL and District plans contain similar provisions that are subject to controversy among some Depositors. There is considerable overlap among the DIL Investors and the District Depositors.

13 On July 15, 2016, the District applied for an order sanctioning the District plan. On the same day, the Depositors who commenced the class action proceedings applied for an order replacing the Monitor.

B. The District Plan

14 The District plan has one class of creditors. Pursuant to the claims process, there were 2,638 District Depositors. An emergency fund was implemented prior to the filing date and approved by the Court as part of the initial order, to ensure that District Depositors, many of whom are seniors, would have sufficient funds to cover their basic necessities. Taking into account those payments, District Depositors had proven claims of approximately $96.2 million as at December 31, 2015.

15 Under the plan, each eligible affected creditor will be paid the lesser of $5,000 or the total amount of their claim (the "Convenience Payment(s)") upon the date that the District plan takes effect. This will result in 1,640 District Depositors (approximately 62%) and 10 trades creditors (approximately 77%) being paid in full. The Convenience Payments are estimated to total $6.3 million.

16 The District plan contemplates the liquidation of certain non-core assets. Each time the quantum of funds held in trust from the liquidation of these assets, net of the "Restructuring Holdback" and the "Representative Action Holdback" referred to later in this decision, reaches $3 million, funds will be distributed on a pro-rata basis to creditors.

17 If the District plan is approved, a private Alberta corporation ("NewCo") will be formed following the effective date of the plan. NewCo will purchase the Prince of Peace properties from ECHS in exchange for the NewCo shares. The value of the NewCo shares would be based on the following:

a) the forced sale value of the Harbour and Manor seniors' care facilities based on an independent appraisal dated November 30, 2015;

b) the forced sale value of the remaining Peace of Peace properties, based on an independent appraisal dated October 15, 2015;

c) the estimated value of the assets held by ECHS that would be transferred to NewCo pursuant to the ECHS plan; and

d) the estimated value of the assets held by EMSS that would be transferred to NewCo pursuant to the EMSS plan.

18 ECHS will then transfer the NewCo shares to the District in partial satisfaction of the District — ECHS mortgage. The NewCo shares will be distributed to eligible affected creditors of the District on a pro-rata basis. The Monitor currently estimates that creditors remaining unpaid after the Convenience Payment will receive NewCo shares valued at between 53% and 60% of their remaining proven claims. The cash payments arising from liquidation of non-core assets and the distribution of shares are anticipated by the Monitor to provide creditors who are not paid in full by the Convenience Payments with distributions valued at between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. Non-resident creditors (8 in total) will receive only cash.

19 Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and

b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

20 The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

21 NewCo's bylaws will include a clause requiring that 50% of the board of directors must be comprised of District Depositors or their nominees. Although NewCo is being created with the object of placing the NewCo assets in the hands of a professional management team with appropriate business and real estate expertise, the District Creditors' Committee wanted to ensure that affected Creditors will have representation equal to that of the professional management team on the NewCo board. The members of the NewCo board may change prior to NewCo being formed, subject to District Creditors' Committee approval. Subsequent changes to the NewCo board would be voted on at future shareholder meetings.

22 The articles of incorporation for NewCo will be created to include the following provisions, which are intended to provide additional protection for affected creditors:

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;

b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;

c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;

d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and

e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

23 The District plan establishes a Representative Action process whereby a future legal action or actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those District Depositors who elect or are deemed to elect to participate. The Representative Action would include only claims by District Depositors who are not fully paid under the District plan and specifically includes the following:

a) claims related to a contractual right of one or more of the District Depositors;

b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;

c) claims for breach of any legal, equitable, contractual or other duty;

d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and

e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

24 District Depositors may opt-out of the Representative Action process, in which case they would be barred from further participation. Evidently, some Depositors are precluded by their religious beliefs from participating in this type of litigation.

25 The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, the estimated amount of the Representative Action Holdback, the commencement date of the representative action, the deadline for opting out of the Representative Action and instructions on how to opt out of the Representative Action should they choose to do so.

26 A Subcommittee will be established to choose legal counsel to represent the participating District Depositors. The Subcommittee will include between three and five individuals and all members of the Subcommittee will be appointed by the District Creditors' Committee. The Subcommittee is not anticipated to include a member of the District Committee.

27 The duties and responsibilities of the Subcommittee will include the following:

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;

b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;

c) remaining in place throughout the Representative Action with its mandate to include:

(i) assisting in maximizing the amount available for distribution;

(ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;

(iii) replacing counsel;

(iv) serving in a fiduciary capacity on behalf of the participating District Depositors;

(v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and

(vi) bringing any matter before the Court by way of an application for advice and direction.

28 The Representative Action process will be the sole recourse available to District Depositors with respect to the Representative Action claims.

29 The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any

actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and

b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

30 The following claims are specifically excluded from being released by the District plan:

a) claims against directors that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors as set out in Section 5.1(2) of the *CCAA*;

b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;

c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and

d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

C. The District Meeting

31 On March 21, 2016, I granted an order authorizing the District to file the District plan of compromise and arrangement and present it to the creditors. A draft version of the Monitor's Report to District Creditors was provided to both the Court and counsel for the class action plaintiffs ahead of the District meeting order being granted. Neither class action counsel voiced specific concerns with the disclosure provided therein.

32 The first meeting of District creditors was held on May 14, 2016. Counsel for the BC and Alberta class action plaintiffs were in attendance and able to make submissions to the meeting and to question the Monitor. A number of attendees made submissions and asked questions. Certain documents that had been referenced in a Monitor's FAQ report on the issue of future potential development of the Prince of Peace properties (described later in this decision) were discussed in detail and questions with respect to these documents were answered by the Monitor. The meeting lasted approximately six hours. It was adjourned at the request of the representative of a Depositor who wanted more time to consider the Prince of Peace development disclosure and obtain further instructions from his congregation.

33 After making inquiries and being satisfied that congregations who wished further consultation had time to do so, the Monitor posted a notice on its website on May 20, 2016 that the reconvened meeting was to be held on June 10, 2016. The notice was sent by email to those creditors who are congregations on May 20, 2016 and sent by regular mail to all creditors on May 24, 2016. The notice advised creditors that they had additional time to change their vote on the District plan, should they choose to do so. Four congregations asked the Monitor for further information before the reconvened meeting.

34 The Monitor received a total of 1,294 votes on the District plan from eligible affected creditors with claims totalling approximately $85.1 million. Of these votes, 1,239 were received by way of election letters and 55 were received by way of written ballots submitted in person or by proxy at the District meeting. In total, 50% of eligible affected creditors voted and the claims of those creditors who voted represented 88% of the total proven claims of eligible affected creditors.

35 Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore,

the District plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting eligible affected creditors.

D. The DIL Plan

36 The DIL plan includes only one class of affected creditors consisting of DIL Investors. The DIL Investors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts held by DIL Investors are RRSP and RRIF accounts.

37 Following the release of the original DIL package of meeting materials, based on discussions with DIL Investors, the Monitor prepared two documents entitled "Answers to frequently asked questions" (the "FAQs"), one of which was dated December 24, 2015 and the other dated January 18, and amended January 20, 2015.

38 The DIL plan contains provisions for the orderly transition of the registered accounts from Concentra to a replacement trustee and administrator. As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlines in the DIL plan, to the replacement fund manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the fund manager.

39 Pursuant to previous order, DIL was authorized to distribute up to $15 million to the DIL Investors. For those DIL Investors who held registered retirement savings plan, tax free savings accounts or locked-in retirement accounts with DIL, their pro-rate share of the first DIL Distribution was transferred into accounts that had been established with the replacement fund manager. For those DIL Investors who held RRIFs or LIFs, their pro-rate share of the first DIL distribution was transferred upon their request, to an alternate registered account of their choosing. A second distribution of up to $7.5 million was made in April, 2016.

40 In addition to this these interim distribution, statutory annual minimum payment to RRIF holders were made for 2015. Selected DIL Investors also received payments pursuant to the emergency fund. Taking into account these payments, pre-filing distributions to DIL Investors totalled approximately $15.6 million, 41% of their original investment without taking into account any estimated write-downs on the value of the assets held by DIL.

41 The DIL plan contains substantially the same provisions with respect to limited releases and a Representative Action process as the District plan.

42 The Monitor estimates that, prior to any recovery under the Representation Action, DIL Investors will recover between 77% and 83% of their original investment as of the filing date.

E. The DIL Meeting

43 The DIL meeting of creditors was held on January 23, 2016.

44 There were 87 attendees at the DIL meeting. The Monitor received a total of 472 votes from DIL Investors with claims totalling approximately $14.5 million. In total, 53% of DIL Investors voted and the claims of those DIL Investors who voted represented 65% of the total proven claims of DIL Investors.

45 Of the 472 DIL Investors who voted, 434, or approximately 92%, voted in favour of the DIL plan and 38 DIL Investors, or approximately 8%, voted against the DIL plan. Those DIL Investors who voted in favour of the DIL plan had claims totalling approximately $12.7 million, or approximately 87% of the claims, and those DIL Investors who voted against the DIL plan had claims totalling approximately $1.8 million, or approximately 13% of the claims and a majority in number of voting DIL Investors. Therefore, the DIL plan was approved by the required double majority.

III. The Applications

A. Application to Remove the Monitor

46 The Depositors who commenced the British Columbia class action proceedings, Elvira Kroeger and Randall Kellen, apply:

a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively

b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;

c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and

d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

47 They are supported in their application by the Alberta class action plaintiffs, collectively the "opposing Depositors". The opposing Depositors submit that the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion with respect to the Representative Action provisions of the District plan. They also submit that the Monitor has breached its fiduciary duty to the Court and to the District creditors by failing to disclose certain municipal planning documents relating to the Prince of Peace Development.

1. Overview

48 It is trite law that the Monitor in *CCAA* proceedings is an officer of the Court and that its duty is to act in the best interests of all stakeholders. Monitors are required to act honestly and fairly and to provide independent observation and oversight of the debtor company.

49 The Monitor is expected and required to report regularly to the Court, creditors and other stakeholders, and has a statutory obligation to advise the Court on the reasonableness and fairness of any plan of arrangement proposed between the debtor and its creditors: section 23(1) of the *CCAA*. Courts accord a high level of deference to decisions and opinions of the Monitor.

50 The opposing Depositors submit that the Monitor is acting as an advocate of the debtor, without a sufficient degree of neutrality. They submit, by implication, that I should give the Monitor's recommendations on the plans little or no deference for that reason.

51 An attack on the Monitor is an attack on the integrity of the *CCAA* process, and must be taken seriously.

2. Conflict of Interest

52 The opposing Depositors allege that the Monitor has a conflict of interest on the following bases:

a) In its Pre-Filing Report to the Court, the Monitor disclosed that it had provided consulting services to the District between February 6, 2014 and the date of the initial order, including:

(i) on February 6, 2014; to provide an independent evaluation of the potential options relating to the Prince of Peace Development and to create a plan for executing the option that was ultimately chosen;

(ii) on June 30, 2014; to provide an evaluation of the debt structure of the CEF as it related to the District, the members of the District, ECHS, EMSS and the Prince of Peace Development; and

(iii) on July 25, 2014; to act as a consultant regarding the informal or formal restructuring of the District Group.

b) In its Fourth Report dated June 24, 2015, the Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. While the Monitor had performed a conflicts check prior to agreeing to act as Monitor, this check failed to flag the previous audit engagement. The Monitor further stated that, while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might be precluded from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development for the period during which it had acted as auditor. However, as the District had been unable to produce supporting documentation with respect to funds expended on the Prince of Peace development prior to 2006, and Deloitte did not act as auditor subsequent to 1999, the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available".

c) On March 8, 2016, the Monitor advised the Court and the parties that Deloitte & Touche had completed the DIL audit for the years ended January 31, 1998 and January 31, 1999, the first two years during which DIL operated the registered fund. Again, the reason for the late disclosure appears to be that the engagements were recorded under different names those now used by the District.

53 These previous services do not, on their face, disqualify the Monitor from acting as Monitor. With respect to the audit services, it is not a conflict of interest for the auditor of a debtor company to act as Monitor in *CCAA* proceedings. In this case, the sister company of the Monitor has not been the auditor of either the District or DIL for over 16 years, The Monitor does not suffer from any of the restrictions placed on who may be a Monitor by Section 11.7(2) of the *Act*. While the late disclosure of the historical audits was unfortunate, audits performed more than 16 years ago by a sister corporation raise no reasonable apprehension of bias, either real or perceived.

54 It is also not a conflict of interest, nor is it unusual, for a proposed Monitor to be involved with the debtor companies for a period of time prior to a *CCAA* filing. The Monitor made full disclosure of that involvement prior to being appointed, more than a year before this application was brought.

55 This is not a case where a Monitor was involved in or required to give advice to the Court on the essential issue before it, such as a pre-filing sales process. The issues with respect to the plans before the Court arise from details of the plans that have been the subject of negotiation and consultation among the District Group, the Creditors' Committees and the Monitor post-filing.

56 The opposing Depositors, however, point to certain representations that were made by the District in letters to some of Depositors in the months prior to the *CCAA* filing, which they say were untrue and misleading. They submit that the Monitor must have known about these letters, and thus condoned, if not participated in, misrepresentations made to the Depositors.

57 The Monitor responds that it did not act in a management capacity with respect to the District nor did it prepare or issue communications pre-filing. It did not control the District Group.

58 There is no realistic indication of conflict arising from these allegations. The attempt to taint the Monitor with knowledge of letters sent by the District to the Depositors is speculation unsupported by any evidence.

59 The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that the District commence legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

60 It is not appropriate for this Court to determine or to speculate on whether the Depositors have a realistic cause of action against an auditor sixteen years after the final audit engagement, but assuming that the Representative Action provisions of the plans could result in an action against a sister corporation of the Monitor, the proposed ongoing role of the Monitor in those proceedings should be examined to determine whether such role could give rise to a real or perceived conflict of interest.

61 As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of the Subcommittees, the name of the representative counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting out of the Representative Action, and instructions on how to opt-out of the Representative Action should Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

62 The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be, and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

63 In the circumstances, the Monitor is the most appropriate party to be involved in communication with Depositors in the early stages of the Representative Action process, as it has the information and experience necessary to ensure that such communication is done quickly, effectively, and at the lowest possible expense.

64 The mere possibility of a decision to proceed against the Monitor's sister corporation does not justify the expense and disruption of bringing in a new Monitor to perform these administrative tasks. If the Subcommittees determine that an action can be commenced against the historical auditors that is not barred by limitations considerations, the issue of a real, rather than a speculative conflict, can be raised before the Court for advice and direction in accordance with the plans. The possibility that the Subcommittees may decide not to proceed against the historical auditors does not imply undue influence from the Monitor. The members of the Subcommittees will be fiduciaries, bound to act in the best interests of the remaining creditors.

65 There is no persuasive argument nor any evidence that they would act other than in those best interests.

66 The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

67 The opposing Depositors submit that there are "substantive and procedural benefits" from its continuing position that the Monitor may take advantage of. On closer examination, those alleged advantages are insignificant.

68 In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit

relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

69 A more serious charge against the Monitor than conflict of interest is the opposing Depositors' allegation that the Monitor breached its fiduciary duty to the Court and to District Depositors by failing to disclose certain municipal planning documents.

70 The documents at issue are:

> a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and
>
> b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

71 The MSDP identifies several prerequisites to development of the Prince of Peace properties, including a connection to the municipal water supply, the upgrading of the sanitary sewer lift station and work on a storm water management infrastructure. The Monitor notes the MSDP was prepared specifically for the development contemplated by EHSS in 2012, being medium density residential and additional assisted living capacity, ground floor retail and a parkade structure. As such, it is likely outdated and may not align with future development. A more recent appraisal of the properties in 2015 assumed low density development. The 2015 appraisal of the properties takes into account the work that would need to be undertaken by any third party who wished to further develop the Prince of Peace properties.

72 The opposing Depositors submit that the infrastructure projects identified by the MSDP would be costly and would likely pose barriers to development. They presented hearsay evidence of a conversation Mr. Kellen had with a Rocky View official that is of limited relevance apart from its hearsay nature, because future development would likely be different from what was contemplated in 2012.

73 The Conrich ASP stipulates that no development may occur within the Hamlet of Conrich until the kinds of infrastructure requirements identified in the MSDP are met. The ASP is being appealed by the City of Chestermere.

74 The Monitor became aware of these documents during its pre-filing services to the District Group. When a Depositor raised a question about these reports on April 28, 2016 at an information meeting, the Monitor prepared a QFA document dated April 29, 2016 regarding the future subdivision and development of the Prince of Peace properties and referencing the documents. This QFA was posted on the Monitor's website on April 29, 2016 and mailed to all affected creditors with claims over $5,000 on May 3, 2016, more than a month before the meeting at which the District plan was approved.

75 The issue is whether the Monitor breached its duty to the Court and creditors by failing to disclose these reports earlier. The answer to this question must take into account the context of the District plan and the nature of the Monitor's recommendations.

76 The District plan does not contemplate that any further development of the Prince of Peace properties would occur pursuant to the *CCAA* proceedings. The possibility that NewCo shareholders would pursue further development is one of the options available to NewCo or to a third party purchaser of the Prince of Peace properties if NewCo shareholders decide to sell the properties, as recognized in the plan materials. The plan gives NewCo shareholders the opportunity to consider their options.

77 As the Monitor notes, a vote on the District plan is not a vote in favour of any particular mandate for NewCo. The District plan contemplates that a NewCo shareholders' meeting will be held within six months of the District plan taking effect, at which time the NewCo shareholders will vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation of all or a portion of the assets held by NewCo, a joint venture to further develop the Prince of Peace properties or other options. These options will need to be investigated and reported on by NewCo's management team ahead of the NewCo shareholders' meeting.

78 It was in this context that the Monitor considered the content of its reports to Depositors on the District plan and did not disclose the two plans, which in any event may be dated and of little relevance to a future development. I do not accept the opposing Depositors' allegation that the Monitor "concealed" this information.

79 In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

80 A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit from the ability to liquidate the Prince of Peace Properties at a time when market conditions are more favourable or the ability to benefit from potential upside opportunities that may be available such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture to further develop the Prince of Peace Properties or through other options
>
> (emphasis added).

81 Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

82 The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

83 The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

84 As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

85 The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

86 The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

87 They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

88 A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

89 The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

90 One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

91 The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

92 The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

93 The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor.

A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

94 These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

95 The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote. It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

96 The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

97 I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

98 The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

99 The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

100 Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

101 The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

102 It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffat v. Wetstein*, [1996] O.J. No. 1966 (Ont. Gen. Div.) at para 131.

103 While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

104 I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

105 Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

106 I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

107 At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

108 I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

109 The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

110 The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

111 There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

112 I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

113 As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

114 The general requirements for court approval of a *CCAA* plan are well established:

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

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at para 17; *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 14.

115 It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

116 They submit:

> (a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;
>
> (b) the plans compromise third party claims;
>
> (c) the plans provide no benefit to Depositors within the purpose of the CCAA;
>
> (d) the plans contravene section 5.1(2) of the *CCAA*;
>
> (e) the plans have not been advanced in good faith, with due diligence and full disclosure; and
>
> (f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the CCAA?

117 The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

118 The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

119 The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

120 This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

121 The opposing Depositors cite *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 240 O.A.C. 245, 2008 ONCA 587 (Ont. C.A.) (CanLii); leave dismissed [2008] SCC No. 32765 [2008 CarswellOnt 5432 (S.C.C.)] for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

122 The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

123 The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA*. That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

124 Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church — Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

125 There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of

multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

126 The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

127 The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

128 The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

129 If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

130 It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

131 While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

132 The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

(a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;

(b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

(c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and

(d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

133 The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA*. As noted by the Supreme Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services], the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

134 The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

135 The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the CCAA?

136 Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

137 As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

138 As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

139 The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

140 The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

141 Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

142 Farley, J. in *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> ... is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved — subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will involve pain — if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

143 The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

144 Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para 18 commented:

> 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.

145 The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Gold Texas Resources Ltd., Re*, [1989] B.C.J. No. 167 (B.C. S.C. [In Chambers]) at page 4, to the effect that the

court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority.... (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

146 The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

147 I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly $1\ ^1/_2$ months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

148 The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

149 As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

150 I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

151 The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

152 Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

153 Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the

Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

154 Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

155 The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contech Enterprises Inc., Re*, 2015 BCSC 129 (B.C. S.C.); *Target Canada Co., Re*, 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]); *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750 (Ont. S.C.J.).

156 As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

157 The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

158 This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

159 The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

160 The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option

available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

161 The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

162 This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

163 In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

164 The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty Trustco Ltd., Re* [1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List])] at paras 3&4; *Muscletech* at para 18.

165 The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

166 However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

167 It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

168 The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

169 Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

170 As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

171 The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

> 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.

7. Conclusion

172 As noted at para 18 of *Metcalfe*:

> 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 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.

173 In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

174 The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

175 Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

176 The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

177 The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* "in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

178 The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Application dismissed.

End of Document

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Ontario v. Canadian Airlines Corp. | 2001 ABQB 983, 2001 CarswellAlta 1488, 96 Alta. L.R. (3d) 1, 306 A.R. 124, [2001] A.J. No. 1457, 29 C.B.R. (4th) 236, 110 A.C.W.S. (3d) 238, 98 Alta. L.R. (3d) 277, [2002] 3 W.W.R. 373, [2002] A.W.L.D. 43 | (Alta. Q.B., Nov 16, 2001)

1993 CarswellOnt 241
Ontario Court of Justice (General Division), In Bankruptcy

Armbro Enterprises Inc., Re

1993 CarswellOnt 241, [1993] O.J. No. 4482, 22 C.B.R. (3d) 80

Re ARMBRO ENTERPRISES INC.

R.A. Blair J.

Judgment: November 1, 1993

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court
Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Court approval of plan — Landlord opposing sanctioning of plan — Landlord not taking advantage of opportunities to make its opposition to classification of creditors known and waiting until sanctioning hearing to oppose — Landlord's opposition being unwarranted and too late — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Court approval of plan — Landlord opposing sanctioning of plan and arguing that court not having power to sanction plan terminating lease — Nothing under CCAA precluding court from sanctioning such a plan — Plan sanctioned — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
A company applied for the sanction and approval of its plan of arrangement and compromise. The creditors had voted on the plan and, after requiring certain amendments, approved it. One creditor, a landlord, opposed the sanctioning of the plan.
The landlord argued that: (1) it should have been placed in a separate class of creditors instead of being grouped with the unsecured creditors, and (2) the plan purported to terminate the tenancy, and that the court had no power to sanction a plan that purported to do so.
Held:
The plan was sanctioned and approved.

The landlord's claim was based on a default judgment for arrears of rent and on a contingent claim for unliquidated damages arising out of the termination of the lease. Therefore, the landlord was not in a different position than that of other unsecured creditors. There was a sufficient community of interest and rights among the landlord and the other unsecured creditors to warrant their being placed in the same class. Further, the creation of one class of unsecured creditors would avoid the unnecessary fragmentation of creditors. While the landlord's claim was large, it was relatively insignificant with respect to the overall indebtedness.

The landlord had been given notice of the application for a stay of proceedings and of the order sought. It did not attend or make submissions regarding its classification with the other unsecured creditors. It did not avail itself of the "come back" clause in the stay order, nor did it appeal. As there was no "substantial injustice", it was too late to oppose at the sanctioning hearing.

With respect to the termination of the tenancy, the landlord's argument was unacceptable. Under the *Companies' Creditors Arrangement Act*, there is nothing that precludes a court from interfering with the rights of a landlord under a lease, any more than the Act precludes a court from interfering with the rights of a secured creditor under a security document. Such interferences may be justified by the circumstances of a reorganization.

Table of Authorities

Cases considered:

Ayer's Ltd., Re (December 9, 1991), (Nfld. T.D.) [unreported] — *referred to*

Dairy Corp. of Canada Ltd., Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (S.C.) — *referred to*

Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce (1992), 11 C.B.R. (3d) 161, 90 D.L.R. (4th) 285 (Ont. Gen. Div.) — *considered*

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

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

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

Northland Properties Ltd., Re, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (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*) 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *referred to*

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (S.C.) — *referred to*

Silcorp Ltd. v. Canadian Imperial Bank of Commerce (June 26, 1992), Doc. B152/92 (Ont. Gen. Div.) — *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*

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

Statutes considered:

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

s. 6

Motion for order sanctioning and approving plan of compromise and arrangement.

R.A. Blair J. **(Endorsement):**

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

2 The Plan has now been negotiated and put to meetings of the classes of creditors established under the Sept. 24th Order. With certain amendments it has been voted on and approved by creditors of sufficient numbers and in sufficient

value amounts in each class to meet the requirements of s. 6 of the Act. One creditor, a landlord — 803774 Ontario Limited — opposes the sanctioning and approval of the Plan.

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

1) whether there has been complete compliance with all statutory requirements;

2) whether any material filings or procedures have been done or are purported to have been done otherwise than as authorized by the CCAA; and,

3) whether the proposed Plan is fair and reasonable.

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

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

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

a) that the landlord ought to have been placed in a separate class of creditors, and ought not to have been grouped with the unsecured creditors, generally; and,

b) that the Plan purports to terminate the tenancy, and there is no power in the Court under the CCAA to sanction a Plan which purports to do so.

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

Classification

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

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

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

Termination of Leases within CCAA Proceedings

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

11 I do not accept this submission.

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

13 It is true that there is no specific provision in the CCAA which states openly that the Court has the power to sanction the termination of leases. This, I think, is what Houlden J.A. must have been contemplating when he noted, in *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce* (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.) [at p. 287], that "[i]t is difficult to make a plan of compromise for such a company (a chain of retail clothing stores in rented premises) under the C.C.A.A., because there is no way ... to terminate leases and to limit the amount of the claims of landlords." Section 6 of the Act is discretionary, however, and provides that "the compromise or arrangement *may be sanctioned* by the court" — assuming the statutory requirements respecting voting have been met, as they have here. There are a number of examples where the Courts have granted their approval to arrangements which involve the repudiation, surrender and ultimate termination of leases — including, incidentally, *Re Grafton-Fraser* itself in its ultimate disposition. See also: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra; Re Ayer's Ltd.* (unreported, December 9, 1991, Nfld. T.D.); *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.); *Silcorp Ltd. v. Canadian Imperial Bank of Commerce* (June 26, 1992), Doc. B152/92 (Ont. Gen. Div.) (unreported). I see nothing in principle which precludes a Court from interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices.

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

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

Motion allowed.

End of Document

TAB 13

2003 CarswellQue 3404
Cour supérieure du Québec

Uniforêt inc., Re

2003 CarswellQue 3404, [2003] Q.J. No. 9328, 43 C.B.R. (4th) 254, J.E. 2003-1408, REJB 2003-42346

In the matter of the arrangement of: Uniforêt Inc., Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc. (collectively, Uniforêt), and Richter & Associés (Monitor), Monitor/mis en cause and Jolina Capital Inc. (Jolina), mise en cause c. Highland Capital Management, L.P. (Highland), ML CBO IV (Cayman) Ltd., Pamco Cayman, Ltd., Highland Legacy, Ltd., Pam Capital Funding, L.P., Prospect Street High Income and Portfolio Inc. (Prospect), Opposing creditors

Tingley J.C.S.

Heard: March 3 - May 9, 2003
Judgment: May 16, 2003
Docket: C.S. Qué. Montréal 500-05-064436-015

Counsel: Me Sylvain Rigaud, Me Louis Gouin, Me Bernard Quinn, for Petitioners
Me Denis Ferland, Me Philippe Buist, for the Monitor
Me Jean Fontaine, Me Simon Richard, for Jolina Capital Inc.
Me George Hendy, Me Martin Desrosiers, Me David Tardif-Latourelle, for the Opposing Creditors

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.D Miscellaneous cases
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
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Headnote

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

Forestry corporation made plan of arrangement under Companies' Creditors Arrangement Act — Plan contemplated seven classes of creditors with potential claims aggregating in excess of CAN$250,000,000 — Class 2 was composed of creditors holding CAN$195,000,000 of secured U.S. Notes, including J Inc. which was major shareholder of corporation

and held more than two-thirds of U.S. Notes — Plan offered class 2 creditors US$25,000 cash and exchange of notes' balance for two new notes: CAN$60 millions of A notes due in 2009 and CAN$40 million of convertible B notes due in 2008 — All classes of creditors voted in favour of plan — Corporation brought motion to sanction plan — Minority creditors of class 2 opposed plan's approval, claiming plan was unfair for them as plan treated unsecured creditors, including J Inc., more favourably and was confiscatory — Motion allowed — Plan of arrangement can be more generous to some creditors and still be fair to all creditors — J Inc. was corporation's White Knight as it stepped in on several occasions to keep corporation afloat, by way of loans and purchases of U.S. Notes, and such creditor warranted special treatment — In view of several factors, it was folly to attempt to sell corporation's businesses almost two years after first plan was filed for so small possible yet unlikely gain — Corporation managed to survive under Act's protection in weak and difficult market conditions and deserved chance to prove it could survive and be profitable, which was in accordance with intent of Act — Only four minority creditors, speculators, would sustain legitimate loss under plan and loss would be much more in bankruptcy — Absent bad faith, Act should not be employed to permit cranky minority creditor to frustrate feasible and fair plan blessed by overwhelming majority of all creditors of debtor — Plan's offer of equity was not overly generous but was nevertheless adequate and fair — Minority creditors failed to show oppression by majority — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Compagnies --- Arrangements et compromis — En vertu de la Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et équitable »

Compagnie forestière a présenté un plan d'arrangement en vertu de la Loi sur les arrangements avec les créanciers des compagnies — Plan envisageait sept catégories de créanciers dont les réclamations potentielles excédaient 250 000 000 $CAN — Catégorie 2 était composée des créanciers détenteurs de billets libellés en dollars américains, valant 195 000 000 $CAN, et l'un d'entre eux, J inc., était actionnaire majoritaire de la compagnie et détenteur de plus des deux tiers des billets — Plan offrait aux créanciers de la catégorie 2 un paiement de 25 000 $US et l'échange du solde des billets pour deux nouveaux billets: 60 millions $CAN de billets A échéant en 2009 et 40 millions $CAN de billets convertibles B échéant en 2008 — Toutes les catégories de créanciers ont voté en faveur du plan — Compagnie a présenté une requête pour obtenir l'approbation du plan — Créanciers minoritaires de la catégorie 2 se sont opposés à l'approbation du plan, soutenant qu'il était injuste pour eux puisqu'il traitait plus favorablement des créanciers garantis, dont J inc., et qu'il était confiscatoire — Requête accueillie — Plan d'arrangement peut être plus généreux envers certains créanciers et être néanmoins équitable pour tous les créanciers — J inc. a été le sauveur de la compagnie parce qu'elle est intervenue à plusieurs reprises pour la maintenir à flot, grâce à des prêts et l'achat de billets, et, à ce titre, elle méritait un traitement spécial — À cause de plusieurs facteurs, il serait fou d'essayer de vendre les affaires de la compagnie plus de deux ans après le dépôt du premier plan pour un si petit et peu probable profit — Compagnie a réussi à survivre sous la protection de la Loi alors que le marché était faible et difficile et elle méritait d'avoir la chance de démontrer qu'elle pouvait survivre et être rentable, ce qui était conforme à l'objet de la Loi — Seulement quatre des six créanciers minoritaires, des spéculateurs, subirait des pertes légitimes en vertu du plan et leurs pertes seraient plus importantes dans le cadre d'une faillite — En l'absence de mauvaise foi, un créancier minoritaire grincheux ne devrait pas pouvoir utiliser la Loi pour faire échouer un plan faisable et juste qui a été accepté par une majorité écrasante de tous les créanciers du débiteur — Paiement offert par le plan n'était certes pas généreux, mais il était néanmoins juste et adéquat — Créanciers minoritaires n'ont pas réussi à prouver l'existence d'une oppression par la majorité — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Daniel H. Tingley J.C.S.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 1992 CarswellOnt 163 (Ont. C.A.) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

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

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

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Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139, 1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List]) — considered
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Generally — considered

s. 6 — referred to
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s. 7 — referred to

MOTION by corporation to sanction plan of arrangement under *Companies' Creditors Arrangement Act*.

***Tingley J.C.S.*:**

The Issues

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

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

The Facts

3 Uniforêt first obtained protection under the Act on April 17, 2001. It filed an amended plan of arrangement (First Plan) with the Court on July 23, 2001 contemplating seven classes of creditors with potential claims aggregating in excess of $250,000,000. This Plan proposed the following arrangements:

Class	Description	Plan of Arrangement
1	The Municipalities of Port-Cartier and of l'Ascension (for Municipal taxes)	Pursuant to existing agreements
2	US Noteholders [which include the Opposing creditors and Jolina]	First US $25,000 cash with remaining balance, if any, exchanged for two new US Secured Notes: Note "A" 9% due on March 15, 2009; Note "B" convertible due on September 15, 2008; the whole for a total of $100,000,000 CDN
3	Holders of Capital Leases	Pursuant to existing agreements and contracts
4	Forestry Contractors	75% of proven claims
5	Unsecured Creditors	The lesser of $2,500 and the proven claim or a prorata share of a fund of $5,000,000
6	Canadian Debentureholders	Choice of receiving 8% of face value in cash or conversion into voting common shares of Uniforêt at a conversion rate of $6.00 per share
7	[Jolina]'s unsecured shareholder loan	Repayable on March 15, 2009 without interest

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

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

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

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

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

Cat.	Montant total en capital des réclamations (US$)		% en nombre		% en valeur	
	Oui	Non	Oui	Non	Oui	Non
2	87,918,000.00	33,505,000.00	95.21	4.79	72.41	27.59

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

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

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

> **Article 2Purpose and Effect of Plan**
>
> ***2.1 Purpose***
>
> The purpose of this Plan is to effect a reorganization of the liabilities, business and affairs of Uniforêt in order to enable its business to continue, in the expectation that all Persons with an interest in Uniforêt will derive a greater benefit from its continued operation than would result from the immediate forced liquidation of Uniforêt's assets and business.
>
> ***2.2 Joint Plan***
>
> As explained in Uniforêt's Petition for the issuance of the Initial Order pursuant to the [Act], most of the financing of Uniforêt's business is with Uniforêt Inc., while the operations and fixed assets are with Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc. who, in many instances, guaranteed the debts and obligations of Uniforêt Inc. Therefore, the related operations of Petitioners justify [...] presenting a joint Plan, the whole as permitted by the CCAA and the Initial Order. None of Uniforêt's Creditors will be prejudiced by such a joint Plan.
>
> ***2.3 Persons Affected***
>
> This Plan shall become effective on the Plan Implementation Date and shall, on and after the Plan Implementation Date, bind Uniforêt and all Uniforêt's Creditors affected by the Plan.
>
> ***2.4 Obligations Not affected***
>
> This Plan shall not affect any Unaffected Obligations. [6]
>
> **Article 3Classification of Creditors, Valuation of Claims and Procedural Matters**
>
> ***3.1 Classification of Creditors***

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

Class 1	The Cities of Port-Cartier and l'Ascension (municipal taxes);
Class 2	US Noteholders;
Class 3	Holders of Capital Leases;
Class 4	Forestry Contractors;
Class 5	Unsecured Creditors;
Class 6	Canadian Debentureholders; and
Class 7	Jolina Capital Inc.'s unsecured shareholder loan.

3.2 Creditors Meetings

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

3.3 Creditors Votes Required

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

3.4 Valuation of Claims for Voting and Distribution Purposes

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

3.5 Participation in Different Capacities

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

3.6 Confirmation of Plan by the Final Order

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

Article 4The Compromise and Arrangement

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

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

4.2 Class 2 : Treatment of US Noteholders

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

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

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

9% Notes "A":

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

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

Convertible Notes "B":

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

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

amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholder; [8]

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

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

4.3 Class 3 : Treatment of Holders of Capital Leases

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

4.4 Class 4 : Treatment of Forestry Contractors

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

4.5 Class 5 : Treatment of Unsecured Creditors

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

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

or

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

4.6 Class 6 : Treatment of Canadian Debentureholders

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

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

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

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

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

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

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

E) Analyse de Plan

23. L'acceptation du Plan par toutes les catégories de créanciers permettra à Uniforêt de restructurer son endettement ainsi que de poursuivre ses activités.

24. Le Contrôleur est d'avis que les Débitrices ont agi et continuent d'agir de bonne foi, avec toute la diligence voulue dans les circonstances. Aussi, le Contrôleur n'a constaté aucun fait qui nous porterait à croire que la conduite des Débitrices est ou a été répréhensible.

25. Le Contrôleur est d'avis que le Plan proposé fut préparé de façon sérieuse et diligente par Uniforêt.

26. Le Contrôleur est d'avis que le Plan d'Uniforêt est juste et raisonnable envers les créanciers en général et envers chacune des catégories de créanciers.

27. Le Contrôleur est d'avis que le Plan tient compte de la capacité financière d'Uniforêt de respecter les termes dudit Plan advenant son homologation par la Cour et sa mise en oeuvre.

28. Le Contrôleur, avec l'assistance d'autres conseillers professionnels et en se basant sur son expérience, a procédé à une analyse de la valeur probable des éléments d'actif d'Uniforêt dans un contexte de liquidation ordonnée.

29. Tel que déclaré dans le Premier Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, la valeur estimative des immobilisations d'Uniforêt pourrait se situer entre 60 000 000 $ et 80 000 000 $ après déduction des coûts de liquidation et des charges prioritaires (employés, droits de coupe impayés, etc.). Le montant ainsi réalisé ne serait suffisant pour assurer le remboursement intégral des sommes dues aux créanciers garantis qui totalisent 125 000 000 $ US (approximativement 200 000 000 $ CDN).

30. Tel que déclaré dans le Second Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, même en considérant la valeur aux livres en date du 30 septembre 2002, de l'encaisse, des comptes à recevoir, ainsi que des inventaires totalisant approximativement 43 000 000 $ la valeur des éléments d'actif d'Uniforêt ne s'est pas améliorée depuis juillet 2001. En fait, en tenant compte de l'état actuel du marché, des conditions de l'industrie ainsi que des facteurs externes qui sont hors du contrôle d'Uniforêt, nous sommes d'avis que les chances d'obtenir la valeur nette de réalisation estimative discutée au paragraphe 29 ont diminué.

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

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

	Montant dû	Plan d'arrangement		Liquidation ordonnée (Valeur nette de réalisation estimée (a)		Liquidation ordonnée (Valeur nette de réalisation estimée (b)	
1	298 971 $	298 271 $	100%	300 000 $	100%	300 000 $	100%
2	195 337 500 (c)	100 000 000	51%	65 000 000	33%	30 000 000	15%
			(e)	16 000 000	8% (e)	16 700 000	9%
3	5 135 924	5 135 924	100% (d)	5 150 000	100% (d)	5 100 000	100%
4	2 534 190 (f)	1 900 642	75% (e)	300 000	12% (e)	250 000	10%
5	24 849 498 (g)	5 700 000	23% (e)	3 000 000	12% (e)	2 500 000	10%
6	16 554 904 (h)	1 324 392	8%	néant	--%	néant	--%
7	5 405 000 (i)	1 104 858	20% (e)	650 000	12% (e)	550 000	10%
	250 115 987 $	115 464 087 $	46%	90 400 000 $	36%	55 400 000 $	22%

(a) Assumant une valeur de liquidation de 20 000 000 $ pour les comptes à recevoir et les stocks et une valeur nette de 70 000 000 $ pour les immobilisations.

(b) Assumant une valeur de liquidation de 20 000 000 $ pour l'encaisse, les comptes à recevoir et les stocks et une valeur nette de 35 000 000 $ pour les immobilisations.

(c) Excluant le montant du premier 38 500 $ (25 000 US) à être reçu par chaque Porteur de Billets Américains.

(d) En assumant que les créanciers de premier rang paient les soldes dus en vertu des Contrats de Location-Acquisition afin de libérer les actifs visés.

(e) Calculé en partageant la valeur estimée de liquidation des comptes clients et des stocks entre les créanciers des catégories 2 (perte excédentaire seulement), 4, 5 et 7, sur la base *prorata et pari passu*.

(f) 75% du montant dû.

(g) Incluant un estimé des créanciers qui choisiront de recevoir le paiement comptant de 2 500 $.

(h) Assumant que la totalité de la catégorie choisit de recevoir un paiement comptant.

(i) Valeur actualisée du montant dû à un taux d'escompte de 18%.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• The Plan consolidates all U.S. Noteholders in Class 2 for voting purposes. The purported holder of approximately 66.9% of the Class 2 Claims (Jolina Capital) is also a holder of a majority of the Class 3 Claims,

> certain Class 5 Claims, 100%, 100% of the Class 7 Claims and is also the largest shareholder of [Uniforêt]. [Thus], Jolina will recover a portion of the value that the Plan transfers from the Class 2 Claimholders to holders of Class 3, Class 5 and Class 7 Claims as well as the equity. Accordingly, Jolina has a different recovery profile than other Class 2 Claimholders and an economic conflict of interest with respect to voting as a Class 2 Claimholder. **This is unfair to the non-Jolina Class 2 Claimholders**.

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

> [72] Houlihan's first report, of May 15, 2000, assesses the value of the assets of Uniforêt at **U.S. $123 to $134** million, excluding the assets of Tripap, but including the Port Cartier pulpmill whose assets are therein evaluated at U.S. $38 to 41 million. On that basis, the report and Mr. Slonecker concluded that the recovery rate relative to the face value of the notes is approximately **49 to 56%**, compared to the current market trading price between 27 to 30%.
>
> [73] Houlihan's second report, of October 8, 2001, was prepared by Houlihan at Petitioner's request as a reply to the Report of the Monitor on the Debtor's financial affairs and on the fairness of the plan. Mr. Slonecker and the report re-evaluate the assets of Uniforêt at **CND $90** million. No value whatsoever is attributed to the assets of the Port Cartier pulpmill because it was not operating. Mr. Slonecker in his report, then evaluates the new securities, redeemable or convertible at a future date being provided to the Class 2 noteholders under the plan, at CDN $56.4 million, which implies a recovery rate of **51.2%** of the total face value of the Class 2 claims. After discounting for the delay in payment, he concludes that this implies a real recovery rate of only 28.9%. He adds that the trading value of the Class A notes is 74% of face value, whereas the trading value of the class B notes is 31% of face value.
>
> [74] Jolina, as a Class 2 creditor is affected by the same determinations as to its potential recovery on its U.S. notes. In addition, Houlihan and Mr. Slonecker evaluate the trading value of Jolina's new note under the plan in payment of its claim for its shareholder loan of CND $5.4 million at 18.8% of face value, i.e. worth approximately $1 million Canadian when discounted, for the delay in payment.
>
> [75] Thus, Houlihan and Mr. Slonecker conclude on the basis of two completely different scenarios as set forth in the two reports, that the recovery rate on the U.S. notes is approximately the same: 49 to 56% on the first report and 51.2% on the second report, without attributing any value to the Port Cartier pulpmill, absent any discount for delays in payment. Similarly, the Monitor concludes that the recovery rate for Class 2 claimants is 51% under the plan, or 33% on a forced liquidation. Thus it appears that Petitioners will gain more under the plan and less on liquidation.

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

> 141. In summary, in our view, the Plan:
>
> (i) Does not treat secured creditors in accordance with their existing rights and priorities;
>
> (ii) Provides significantly higher recoveries to certain unsecured creditors than is being offered to the secured US Noteholders, including the ultimate payment of 100¢ on the dollar in respect of Jolina's unsecured shareholder loan;
>
> (iii) Requires Class 5 creditors to make an election in respect of their treatment under the Plan without being able to assess the economic impact of the alternatives available;
>
> (iv) Provides for a recovery to Class 6 creditors, notwithstanding that such creditors have contractually subordinated themselves to all other creditors;

> (v) Treats the claim of Bank of Montreal (BoM) as an Unaffected Obligation,[9] with no benefit or advantage to [Uniforêt or its] arms-length creditors, but with the significant disadvantage that $4 million that would otherwise be available for the purposes of making additional payments to Affected Creditors, funding operations or servicing debt will be paid to this unsecured creditor; and;
>
> (vi) Contrary to established practice in CCAA restructurings, leaves substantially all of the post-restructuring equity in [Uniforêt] in the hands of the existing shareholders without any additional funding or support being provided by such shareholders, with the result that the consequences of [Uniforêt's involvency] are being suffered by the creditors, while the benefits of the compromises by creditors and a successful restructuring will accrue to the existing shareholders.

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

143. The sale of the business as a going concern appears to be a commercially viable alternative to the Plan that could improve overall recoveries available to creditors by approximately $26.4 million to $42.4 million, representing an increase of approximately 31.7% to 50.6%.

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

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

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

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

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

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

Legal Principles

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

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

Discussion

A. The Plan is prejudicial to the Class 2 Creditors

1. Two Fundamental Reasons

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

2. Too fair to other creditors, especially Jolina

20 There is no doubt Jolina has been relatively well treated under both the First Plan and the Plan. Jolina is Uniforêt's White Knight. [26] It has been a shareholder and involved in the affairs of Uniforêt since 1994. It financed a new planer for the Péribonka sawmill in late 1999. It ultimately provided the funding to acquire the majority of the U.S. Notes in Uniforêt's initial attempt to rationalize its debt through a public offering for all the U.S. Notes at 30% of their principal amount in early 2000. This initiative attracted about 50% of the U.S. Notes at a cost of $33 million, or 53¢. Jolina then

acquired another 16% of the U.S. Notes in the market, enough to control the outcome of the vote by the Class 2 creditors. It helped to backstop an $11M short term or bridge loan from the Bank of Montreal to pay wages and other pressing payables. Uniforêt repaid over $6 million of this loan and shortly thereafter applied to the Court for relief under the C.C.A.A. The balance due on this loan is treated as an "unaffected obligation. [27] Accordingly, the White Knight's several claims have received generous treatment under the Plan, as well they should. After all, Jolina is Uniforêt's largest and most important creditor, quite apart from being a major shareholder. Plans of arrangement cannot hope to succeed without the approval of such a creditor. The Plan proposes, in effect, to make Jolina more or less whole, at least eventually. [28]

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

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

3. Unfair to Class 2 Creditors

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

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

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

26 The experts further agree that the orderly liquidation values of the assets of Uniforêt in a bankruptcy scenario will not realize more than $90.4 million at best. [35] Most estimates are well below this figure, including that of PWC. The one area where the experts differ is what they think might be realized, and when, if the enterprise were offered for sale "as a going concern" while under the protection of the CCAA. The Monitor and Mr. Roberts of CIB World Markets doubt such a sale would attract a price any more favourable than what is offered in the Plan anytime sooner than 18 months, if ever. Mr. Meakin of PWC thinks a carefully orchestrated sale culminating in an auction while under the umbrella of the CCAA could result in a return to the Class 2 creditors in the next 6 months of up to $42 million more than what they are to receive under the Plan. The Monitor views any such result as entirely "illusoire, irréaliste et utopique". His views are

shared by Mr. Moreau, the president and chief executive officer of Uniforêt, expressed even more succinctly. Mr. Roberts observed that ever since Uniforêt applied for relief from the Court, competitors in the industry have considered it to be "for sale", yet no serious buyer has as yet surfaced. He suggests that competitors are waiting to acquire a bargain in an industry beset with overcapacity compounded by punishing countervailing duties imposed by our southern neighbours. Worse, one such competitor holds a right of first refusal affecting a key asset.

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

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

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

B. Who really gets hurt

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

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

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

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

C. The Equity Issue

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

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

D. Bad Faith

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

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

38 Aggressive behaviour is to be expected in proceedings of this kind. [46] The CCAA favours the survival of businesses and the jobs that go with them. Where, as here, it has been amply demonstrated that the creditors as a whole will fare much better under the Plan than in a liquidation, the solution is obvious. The issue in this case was to decide if a minority group of secured creditors has been materially oppressed by the behaviour of the majority. That case has not been made

out. The U.S. noteholders are offered the entire enterprise value of Uniforêt in the form of reconstituted notes and they will receive annual yields on these notes for the next five years varying between some 10% and 17%.

E. The Alternate Plan

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

For these Reasons, The Court:

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

42 *DISMISSES* the Opposing Creditors Re-Amended Particularized Contestation;

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

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

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

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

a) that Petitioners have obtained relief under the CCAA;

b) the effect on Petitioners of the completion of any one of the transactions contemplated by the Plan;

c) any compromises or arrangements effected pursuant to the Plan;

d) any default with respect to such a contract by Petitioners prior to the Plan Implementation Date; or

e) any automatic termination of any such contract or any purported termination thereof by any Person other than Petitioners

the whole in conformity with paragraph 6.7 of the Plan.

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

a) of any event that occurred on or prior to the Plan Implementation Date which would have entitled such party to accelerate Petitioners' obligations under such Executory Contract;

b) that Petitioners have obtained relief under the CCAA;

c) of the effect on Petitioners of the completion of any of the transactions contemplated by the Plan; or

d) of any compromises or arrangements effected pursuant to the Plan.

the whole in conformity with paragraph 6.7 of the Plan.

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

49 *EXEMPTS* Petitioners from furnishing any security;

50 *ORDERS* provisional execution of this judgment notwithstanding appeal;

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

Motion allowed.

Solicitors of record:
Ogilvy Renault, for Petitioners.
Davies Ward Phillips & Vineberg, for the Monitor.
Stikeman Elliott, for Jolina Capital Inc..
Osler Hoskin Harcourt, for the Opposing Creditors.

Footnotes

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

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

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

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

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

6 Defined in the Plan as: *a. Interim Period Debts, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the respective Interim Creditors; b. Uniforêt Scierie-Pâte Inc.'s obligations towards the Municipalité Régionale de Comté de Sept-Rivières to build and maintain roads, as provided in the agreement dated April 3, 2001, and the related Hydro-Québec's claim in the amount of $5,000,000 referred to therein; c. Claims of legal, accounting and financial advisors to Uniforêt, including the Monitor and its counsel, in respect of any debt incurred or to be incurred by Uniforêt for the purposes of reorganizing Uniforêt's liabilities, business and affairs including, without limitation, pursuant to the Plan, which monies shall be paid by Uniforêt in accordance with the Initial Order; d. Claims for indemnity pursuant to the indemnities provided by Uniforêt to directors or officers of Uniforêt; e. Claims of Employee Creditors, which monies shall be paid by Uniforêt in the ordinary course of business; f. [...] g. Dues owing to the Quebec Minister of Natural Resources pursuant to the Forests Act, R.S.Q., c. F-4.1, which shall be paid*

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

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

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

9 Supra, Note 6, paragraph (h).

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

11 (2000) 20 C.B.R. (4th) 1, at page 36: *Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company*: Royal Oak Mines Ltd., supra, *para. 4.*, *Re Cadillac Fairview Inc.* (*March 7, 1995*), *Doc. B28/95* (*Ont. Gen. Div. [Commercial List]*), *and* T. Eaton Company, supra. *To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of its constituents. It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner*.

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

13 Supra, Note 8.

14 Supra, Note 4.

15 Supra, Note 11, and see *Re Central Capital Corp.*, 38 C.B.R. (3rd) 1 (Ont. C.A.), at page 37, paragraph 90 where Mr. Justice Finlayson observed that: *In the case of an insolvency where the debts to creditors clearly exceed the assets of the company, the policy of federal insolvency legislation appears to be clear that shareholders do not have the right to look to the assets of the corporation until the creditors have been paid.*; *Re T. Eaton Co.*, 15 C.B.R. (4th) 311 (Ont. S.C.J.), at page 314, paragraphs 9 to 13 inclusive and *Re Royal Oak Mines Inc.*, 14 C.B.R. (4th) 279 (Ont. S.C.J.), at page 281, paragraph 2 where Mr. Justice Farley, prior to approving a proposal contemplating the sale of a business, observed that: *[...] the shareholders would have to appreciate that, when viewed as to the hierarchy of interests to receive value in a liquidation related transaction, they are at the bottom. Further in these particular circumstances there are, in relation to the available tax losses (which is in itself a conditional asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation achieving a turnaround to profitability without restructuring, would have to wait a long while before their interests saw the light of day*.

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

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

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

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

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

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

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

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

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

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

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

27 Supra, Note 6 (h).

28 Ignoring any discount for projected delays in payment.

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

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

31 That is, the proverbial "reasonable person".

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

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

34 Supra, Note 3.

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

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

37 In most cases, much less.

38 Supra, Note 24.

39 Supra, Note 8.

40 Supra, Note 12.

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

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

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

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

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

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

End of Document

TAB 14

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])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee
Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.
Peter F.C. Howard, 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, UBS AG
Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.
Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)
Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
Mario J. Forte for Caisse de Dépôt et Placement du Québec
John B. Laskin for National Bank Financial Inc., National Bank of Canada
Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.
Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank
Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
Neil C. Saxe for Dominion Bond Rating Service
James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., 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., Jazz Air LP
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.
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.

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.D Miscellaneous cases
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
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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Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — considered

Royal Penfield Inc., Re (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (C.S. Que.) — referred to

Skydome Corp., Re (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — 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 (C.A. Que.) — referred to

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

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 (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

T&N Ltd., Re (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

s. 182 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 192 — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to
Companies Act, 1985, c. 6
s. 425 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 4 — considered

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

s. 6 — considered
Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 91 ¶ 21 — referred to

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 25 th . 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 (C.S. Que.) 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 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES
(Plan Sanction Order)
VOLUME I OF II

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

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

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

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

Lawyers for the Applicants