TAB 6

Case Name:

1078385 Ontario Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of 1078385 Ontario Limited, Island Cove Development Ltd., 1128625 Ontario Limited, 1362317 Ontario Limited, 1164801 Ontario Limited, 1099164 Ontario Limited, O.B. Properties Canada Ltd., Jam Sound Specialists Canada Ltd., and O.B. Properties Limited Partnership, (applicants)

[2004] O.J. No. 6050

206 O.A.C. 17

16 C.B.R. (5th) 152

144 A.C.W.S. (3d) 209

2004 CarswellOnt 8034

Docket: M32003

Ontario Court of Appeal
Toronto, Ontario

J.M. Simmons J.A.
(In Chambers)

Heard: December 14, 2004.
Judgment: December 22, 2004.

(46 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Motion by Oram for leave to appeal an order sanctioning a plan of arrangement under the Companies' Creditors Arrangement Act and a related vesting order implementing the plan of arrangement dismissed.

Creditors & debtors law -- Payment of debt -- Unsecured debt v. secured debt -- Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that the debt of the secured creditors exceeded the equity in the debtor companies' property.

Motion by Oram, the applicant, for leave to appeal an order sanctioning a plan of arrangement under the Companies' Creditors Arrangement Act (CCAA) and a related vesting order implementing the plan of arrangement. Pursuant to the terms of those orders, the assets of the applicants (debtor companies) were vested in a new company owned by an affiliate of Amico Contracting & Engineering, the secured creditor that proposed the plan of arrangement. The debtor companies were the developers of Bob-Lo Island, which was a relatively small island located in the Detroit River. Oram was a shareholder of at least one of the debtor companies as well as an unsecured creditor. Under the agreement of purchase and sale forming part of the plan of arrangement, the assets of the debtor companies were sold for approximately $11,500,000 in satisfaction of secured creditors' claims totalling $19,219,744. Oram argued that the motion judge erred by allowing the secured creditors to use the CCAA procedure as a shortcut for liquidating secured assets and by failing to require the secured creditors to proceed with enforcing their security in the ordinary course.

HELD: Motion dismissed. Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that the debt of the secured creditors exceeded the equity in the debtor companies' property. Oram did not therefore establish any reasonable possibility that he had an economic interest in the assets forming the subject matter of the proposed appeal. In addition, to the extent there might be any arguable merit in the issue of whether the proposed plan of arrangement was contrary to the purposes of the CCAA, Oram failed to demonstrate that there was sufficient merit in that issue to justify granting leave to appeal in the circumstances of the case.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13

Appeal From:

Motion for leave to appeal from the orders made by Justice Joseph G. Quinn of the Superior Court of Justice dated November 22, 2004 and November 25, 2004, [2004] O.J. No. 6101.

Counsel:

William V. Sasso and Evlynn Lipton for the moving party, Randy Oram

Richard B. Jones and Tiffany Little for Amico Contracting & Engineering (1992) Inc., Amicone Design Build Inc., Amicone Holdings Limited and Boblo Property Finance Inc.

John D. Leslie and Angela D'Alessandro for Monitor G.S. MacLeod & Associates Inc., as Receiver and Manager and for New Century Bank, assignee Pramco, IL, LLC and Bank One (Michigan)

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1 **J.M. SIMMONS J.A.**:-- Randy Oram requests leave to appeal an order of Quinn J. dated November 22, 2004, [2004] O.J. No. 6101, sanctioning a plan of arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), and a related vesting order dated November 25, 2004, implementing the plan of arrangement. Pursuant to the terms of those orders, the assets of the applicants (the "debtor companies") were vested in a new company owned by an affiliate of Amico Contracting & Engineering (1992) Inc., the secured creditor that proposed the plan of arrangement.

2 The debtor companies are the developers of Bob-Lo Island, which is a relatively small island located in the Detroit River. Randy Oram is a shareholder of at least one of the debtor companies as well as an unsecured creditor. Under the agreement of purchase and sale forming part of the plan of arrangement, the assets of the debtor companies were sold for approximately $11,500,000 in satisfaction of secured creditors' claims totalling $19,219,744.

3 Randy Oram raises a number of proposed grounds of appeal. However, the focus of his objections is that the plan of arrangement is a secured-creditor-led plan that excludes the unsecured creditors from any realistic prospect of recovery, without requiring the secured creditors to go through the formal process of enforcing their security and without exposing the secured assets to the market.

4 Randy Oram submits that the significant issue raised for consideration on appeal is a review of the factors that should guide a court's exercise of discretion when considering secured-creditor-led plans of arrangement. He contends that, in this case, the motion judge erred by allowing the secured creditors to use the CCAA procedure as a shortcut for liquidating secured assets and by failing to require the secured creditors to proceed with enforcing their security in the ordinary course.

5 Before hearing this matter on the merits, I dismissed a preliminary motion by Amico to transfer this motion to a panel of this court. Following that ruling (which was released orally), no requests were made to adjourn this motion. However, I permitted the responding parties to file copies of various orders and reports during the course of the hearing without objection from Randy Oram.

6 For the reasons that follow, the motion for leave to appeal is dismissed.

Background

7 In November 2003 Randy Oram commenced an oppression application against several of the debtor companies (the "respondent companies") and two shareholders of the respondent companies (John Oram and Gary Oram). On May 3, 2004, within the context of the oppression application, the court appointed KPMG Inc. as receiver of the assets of the respondent companies. However, in early June 2004, KPMG applied to be removed as receiver due to a lack of available funding for operations and costs. As a result of KPMG's application, on June 15, 2004, the court appointed G.S. MacLeod & Associates Inc. as the replacement receiver.

8 On June 25, 2004, an Initial Order was made with respect to the debtor companies under the CCAA. That order stayed proceedings against the debtor companies, authorized G. S. MacLeod & Associates to continue to act as receiver of the debtor companies, and also appointed G.S. MacLeod & Associates as the Monitor for purposes of the CCAA proceeding.

9 In its Seventh Report dated October 25, 2004, the Monitor described the assets and holdings of the debtor companies as follows:

Applicant	General Description of Property
1078385 Ontario Limited	Certain unsold lots and undeveloped lands on Boblo Island
Island Cove Development Ltd.	Certain lands held for future development on Boblo Island
1128625 Ontario Limited	Marina and facilities on Boblo Island
1362317 Ontario Limited	Property on the mainland adjacent to ferry dock
1168401 Ontario Limited	Ferries "Crystal O" and "Courtney O" and related assets
1099164 Ontario Limited	Construction Barge used at Boblo Island
O.B. Properties Canada Ltd.,	
JAM Sound Specialists Canada Ltd.,	
OB Properties Limited Partnership	No identified assets

10 In the same report, the Monitor outlined the status of development on Bob-Lo Island in the period leading up to the CCAA application:

> 7. Property development activity had ceased on the island well prior to the appointment of the Receiver. Ferry service had been interrupted for many weeks as a result of the ferries having been taken out of service for exten-

sive repairs. No repair work had been commenced at the time of the Receiver's appointment. The water plants and sewage treatment plant on the island were being operated and maintained by the Township of Amherstburg. The provincial government and the Township had been delayed in starting a contract for the construction of a watermain to the island, to replace the plant that was in a hazardous state of repair, due to the inability to secure certain land easements from 1078385 Ontario Limited.

8. The Township had made interim arrangements for emergency services to the island while the ferries remained out of service, but residents remained concerned about health and safety issues surrounding the island. Many expressed concern that, unless the [debtor companies] could restructure with fresh investment capital, their property values would erode rapidly.
9. On the island there was a partially completed 5-storey, 39-unit condominium on which work had effectively ceased in mid-2003. Although a number of units had been pre-sold, the agreements of purchase and sale had expired and purchasers were seeking the return of deposits. There were substantial liens registered by construction contractors.
10. The Receiver was given authority from the Court to borrow funds to take steps that it considered necessary and desirable to protect and preserve the value of the assets of the [debtor companies]. The Receiver was permitted to ask the Court for any directions that were required to fulfil its mandate.

11 In addition to the Initial Order, a Claims Procedure Order was made on June 25, 2004, setting out a procedure for creditors to file Proofs of Claim with the Monitor and for the Monitor to assess those claims. Further, paragraph 15 of the June 25, 2004 Claims Procedure Order permitted any creditor to appeal the Monitor's assessment of any Proof of Claim by filing a notice of motion with the court.

12 Subsequent to June 25, 2004, several additional orders were made in the CCAA proceeding that are relevant for the purposes of this leave application. On August 31, 2004, an order was made setting out timelines for the Claims Appeal Procedure and directing the Monitor to advise all creditors who had filed claims that the appeal procedure was intended to resolve voting and distribution rights. The timeline set out in the August 31, 2004 order provided that claims appeals would be heard during the week of October 4, 2004.

13 On October 4, 2004, an order was made authorizing and approving the activities of the Monitor as outlined in its Sixth Report dated September 30, 2004. In its Sixth Report, the Monitor indicated that there had been no cross examinations scheduled in respect of any unsecured claims appeals. In addition, the Monitor stated that Amico's legal counsel had expressed the opinion that the value of the lands and operations was "such that recovery for unsecured creditors is unlikely under any scenario". The Monitor indicated that it would support a motion to adjourn the hearing of appeals on unsecured claims "until such time as it is clear that they will be called to vote on a Plan of Arrangement".

14 On October 14, 2004, an order was made directing that a meeting of secured creditors be held on November 1, 2004 to consider a plan of arrangement proposed by Amico. Further, in an order dated November 22, 2004 (not the order that Randy Oram seeks leave to appeal), the court au-

thorized and approved the activities of the Monitor as outlined in its Seventh Report dated October 25, 2004 and as outlined in its Eighth Report dated November 4, 2004.

15 In its Seventh Report dated October 25, 2004, the Monitor described Amico's plan of arrangement and the process for approving it, set out the Monitor's valuation analysis of the debtor companies' assets and opined that the plan of arrangement was favourable to the interests of the secured creditors.

16 The Monitor's Seventh Report set out the stated purpose of the Amico plan of arrangement as being "to effect a reorganization of the secured creditors of the [debtor companies] in a manner that provides consistent and equitable treatment among Secured Creditors and maintains the business and assets of the [debtor companies] as a going concern".

17 The Monitor indicated that the proposed purchase price for the debtor companies' assets was $11,500,000. The cash component of the purchase price would be distributed by the Monitor to repay the Receiver's borrowings, outstanding fees and disbursements of the Receiver and Monitor, and unremitted payroll source deductions of the debtor companies. The balance of the purchase price would be debt instruments issued in final satisfaction of secured creditors' claims. In addition to the $11,500,000 purchase price, Amico would assume the existing obligations of the debtor companies with respect to the statutory liens of the Township of Amherstburg for municipal taxes and the construction liens on the condominium property.

18 As part of its valuation analysis, the Monitor outlined the allocation of the $11,500,000 purchase price in the proposed agreement of purchase and sale, explained that it (the Monitor) had obtained independent property valuations disclosing a total value for the debtor companies' assets of $11,997,182, and provided its assessment of how certain of the asset valuations compared to the purchase price of those assets in the proposed agreement of purchase and sale. Further, the Monitor indicated that the valuation that it had obtained of the island lands was based on a "Development Approach", while the appraisal of the mainland properties was based on the "Direct Comparison Approach".

19 Turning to liabilities, the Monitor stated that it had accepted secured claims totalling $19,219,744[1] and lien claims of $692,011. The Monitor also noted that there was a further lien claim in excess of $5 million yet to be assessed by the court. The Monitor expressed the view that "the assets of the [debtor companies] are of insufficient value to generate any recovery for unsecured creditors".

20 In addition, the Monitor opined that if the plan of arrangement fails "it would be very difficult to maximize value on a forced realization basis". Further, the Monitor indicated that it would be very difficult, in a liquidation scenario, "to realize values that compare to those attainable on a going concern basis".

21 Among other reasons for recommending the plan of arrangement, the Monitor referred to having discussions with Amico indicating that Amico "has long term residential development plans for the island which would benefit the island residents compared to a forced realization scenario". The Monitor described the plan of arrangement as being advantageous because "[i]t is a going concern solution that generates higher overall returns than would be achieved in a forced realization".

22 In its Eighth Report dated November 4, 2004, the Monitor reported that a majority in number (13 of 17) of eligible Secured Creditors representing 89.6% of the value of such secured claims voted to approve the plan of arrangement as amended at the November 1, 2004 meeting.

The Motion Judge's Reasons

23 In oral reasons, the motion judge noted that there are three criteria for assessing whether a plan of arrangement should be sanctioned:

i) there must be strict compliance with all statutory requirements;
ii) all materials filed and procedures carried out must be examined to determine if anything has been done, or purported to be done, that is not authorized by the CCAA; and
iii) the Plan must be fair and reasonable.

24 The motion judge stated that he was satisfied that the first two criteria were met as he had supervised the proceedings from their commencement. In deciding to approve the plan, he referred to the following seven factors:

i) A majority of the secured creditors has approved the Plan.
ii) The Monitor has recommended that the Plan be sanctioned.
iii) There was only one Plan before the court. Mr. John Oram filed a Plan at the opening of court on this day. This Plan has not complied with the CCAA rules and cannot be considered.
iv) Next, the alternative to the Amico Plan is bankruptcy; substantial, additional legal costs; and delay.
v) Next, I find that the debt of the secured creditors exceeds the equity.
vi) Next, the unsecured creditors will not recover under the proposed Plan, and will not recover if the Plan is not approved.
vii) The Plan proposes to develop the island as originally proposed. There are no guarantees it will be successful. If the proposed Plan is successful, it will limit the losses of the secured creditors and will maintain the equities of the existing residential owners.

25 The motion judge reviewed Randy Oram's objections and rejected them. First, while acknowledging that the proposed Plan benefited the secured creditors only, the motion judge found that "there is no equity in the island to satisfy any claims of the unsecured creditors". Second, although he agreed that the Plan does not maintain the debtor companies as going concerns, the motion judge noted that the Plan does propose to continue their enterprise. Third, although he accepted that, to a certain extent, the Plan permits shortcuts in the realization of assets, the motion judge found that to be the nature of the CCAA. He noted that there were provisions in place to safeguard the creditors and that any issues with regard to any debt or asset could have been raised during the course of the proceeding. Finally, the motion judge disagreed that there had been no effort to expose the assets to the marketplace. He said that the principal of Amico had offered to assign his position but that no one was willing to accept it, that no one had made an alternate proposal and that valuations of the property had been filed.

Analysis

26 Although section 13 of the CCAA does not particularize the grounds upon which leave to appeal may be granted, this court will grant leave "only sparingly", when satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": Re Air Canada (2003), 45 C.B.R. (4th) 163 at para. 2 (Ont. C.A.); Re Country Style Food Services Inc. (2002), 158 O.A.C. 30; Re Blue Range Resources Corporation (1999), 12 C.B.R. (4th) 186 (Ont. C.A.); and Re Canadian Red Cross Society, [2003] O.J. No. 5669 (C.A.).

27 In this case, Randy Oram submits that there are serious and arguable grounds for suggesting that, by sanctioning Amico's Plan and granting a vesting order to a non-arm's length purchaser, the motion judge erred in the application of the legal principles for determining if a CCAA plan is fair and reasonable. In particular, the Randy Oram contends that the plan:

i) is contrary to the broad, remedial purpose of the CCAA, namely to give debtor companies an opportunity to find a way out of financial difficulties short of other drastic remedies;
ii) is a proposal by the secured creditors for the exclusive benefit of the secured creditors, designed to liquidate the property of the debtor companies without regard to the interests of the debtor companies, their lien claimants, unsecured creditors or shareholders;
iii) does not provide for the continued operation of the debtor companies as going concerns;
iv) does not provide for the marketing and sale of the property to maximize its value for all of the debtor companies' stakeholders;
v) rather than leaving unsecured creditors as an unaffected class, releases their claims against the property, the debtor companies, Amico, and the purchaser;
vi) eliminates any right of the debtor companies or their other creditors or shareholders to recover anything in the event of the profitable development of Bob-Lo Island; and
vii) is a secured creditor only plan in circumstances where the intended beneficiaries of the Plan may have security of questionable validity and priority.

28 In addition, Randy Oram contends that, in the specific circumstances of this case, rather than approving the proposed Plan, the motion judge should have required the secured creditors to proceed with enforcing their security in the ordinary course. He relies, in particular, on the following comments of Ground J. in Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999), 10 C.B.R. (4th) 133 at 142-143 (S.C.J.):

> The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case ...
>
> In the absence of any indication that Enterprise [secured creditor] proposes a plan which would consist of some compromise or arrangement between Semi-Tech [the Company] and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the CCAA. If the Noteholders in-

tended simply to liquidate the assets of Semi-Tech and distribute the proceeds, it would appear that they could do so by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes by the appointment of a receiver or otherwise.

If any such steps were taken by the Noteholders, Semi-Tech could at that time bring its own application pursuant to the CCAA outlining a restructuring plan which would permit the continued operation of the company and its subsidiaries and be in conformity with the purpose and intent of the legislation.

29 I reject Randy Oram's submission that the proposed appeal raises serious and arguable grounds that satisfy the test for granting leave to appeal for nine reasons.

30 First, although the question of whether a plan of arrangement under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern is contrary to the purposes of the CCAA may not have been resolved by this court, contrary to Randy Oram's written submissions, this is not the first time a secured-creditor-led plan, which operates exclusively for the benefit of secured creditors and under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern, has received court approval: see Re Anvil Range Mining Corp. (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (C.A.). (See also the discussion of the purposes of the CCAA in the cases referred to in Re Anvil Range Mining Corp., supra, at para. 11 (S.C.J.)).

31 Moreover, the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement[2] does not, of itself, negate the fairness and reasonableness of a plan of arrangement: Re Anvil Range Mining Corp., supra, at para. 31 (C.A.).

32 Second, this case is distinguishable from Enterprise Capital Management and, in any event, the comments from Enterprise Capital Management on which Randy Oram relies are obiter. In this case, the issue to be decided by the motion judge was not whether the CCAA procedure should be invoked by a secured creditor proposing nothing more than a liquidation of a debtor company's assets, but rather it was whether a proposed plan of arrangement put forward in the context of an ongoing CCAA proceeding was fair and reasonable. In my view, while not irrelevant to determining whether the plan of arrangement was fair and reasonable, the comments in Enterprise Capital Management (which were made after Ground J. had decided that the CCAA did not apply to the debtor company) were not made in the same context and cannot be read as determining that issue.

33 Third, although there was evidence before the motion judge of prior valuations indicating a substantially higher value for the debtor companies' assets than the valuations obtained by the Monitor, only one of the prior valuations was actually filed before the motion judge.[3] That valuation projected gross profits of US $37,400,000 for the development of the island, based on 607 lots, 160 boat docks and a budget of US $80,100,000. As there was no proposal before the motion judge to provide a budget of US $80,100,000, the valuation evidence before the motion judge did not undermine the Monitor's conclusion that "the assets of the [debtor companies] are of insufficient value to generate any recovery for unsecured creditors".

34 Fourth, there was no valuation evidence before the motion judge to support Randy Oram's position that requiring the secured creditors to enforce their security in the ordinary course would

produce a level of recovery in excess of that generated by the plan of arrangement. In particular, apart from the evidence referred to in paragraph 33 of these reasons, Randy Oram did not file valuation evidence indicating the likely return in the event of creditor realizations in the ordinary course.

35 Fifth, there was no valuation evidence before the motion judge capable of undermining the Monitor's conclusion that if the plan of arrangement failed "it would be very difficult to maximize value on a forced realization basis" and that it would be very difficult, in a liquidation scenario, "to realize values that compare to those attainable on a going concern basis". As already noted, apart from the evidence referred to in paragraph 33 of these reasons, Randy Oram did not file valuation evidence indicating the likely return in the event of creditor realizations in the ordinary course. Moreover, particularly because the assets of the debtor companies were held in different names and were subject to the claims of different secured creditors, the Monitor's conclusions are consistent with common sense.

36 Sixth, apart from the valuation evidence referred to in paragraph 33 of these reasons and a general assertion that the valuation reports obtained by the Monitor did not account for the value of the secured claims, before me, Randy Oram did not advance specific criticisms of the valuation evidence obtained by the Monitor. In fact, the valuation report obtained by the Monitor was not even filed on the leave motion.

37 In my view, it is not the function of a valuator to account for monies invested in an asset. Moreover, the secured creditors' approval of a plan of arrangement that did not provide them with full recovery, the absence of conflicting valuation evidence, and the fact that no alternative plan was forthcoming belie Randy Oram's suggestion that some more favourable option was available.

38 Seventh, although Randy Oram contends that G.S. MacLeod & Associates failed to fulfill the obligation imposed on it in the receivership order to evaluate all options for maximizing the value of the debtor companies' assets and to report to the court concerning its findings, G.S. MacLeod & Associates contests the existence of that obligation, and the receivership order is not before me. Even if G.S. MacLeod & Associates had the obligation that Randy Oram relies on, it was open to Randy Oram to seek an order in the CCAA proceeding compelling G.S. MacLeod & Associates to fulfill that obligation. Randy Oram did not do so.

39 Eighth, although Randy Oram submits that the validity of many of the secured creditors' claims is suspect, in my view, the fact that the claims procedure permitted any creditor to challenge the Monitor's determination of a particular claim by appealing to the court is a complete answer to this proposed ground of appeal.

40 I am aware that Randy Oram contends that the Monitor has acknowledged that, for a variety of reasons (including the short time for reviewing creditors' claims, the incomplete records of the debtor companies and the complexity of certain claims), its analysis of the creditors' claims was limited. In addition, he submits that the principal development company was insolvent as of 2000, therefore calling into question the validity of any security granted after that date. However, given that Randy Oram and the other unsecured creditors had the opportunity to raise any and all such concerns in court, within the context of the CCAA claims procedure, I fail to see how this submission raises a serious issue on appeal.

41 Ninth, although the plan of arrangement did not provide for the debtor companies to continue as going concerns, it did propose continuing their enterprise, including the aspects of the en-

terprise that would provide continuing benefits to the existing residents of the island e.g. the ferry service.

42 Based on the foregoing reasons, I conclude that Randy Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that "the debt of the secured creditors exceeds the equity [in the debtor companies' property]". Randy Oram has not therefore established any reasonable possibility that he has an economic interest in the assets forming the subject matter of the proposed appeal. In addition, I conclude that to the extent there may be any arguable merit in the issue of whether the proposed plan of arrangement was contrary to the purposes of the CCAA, Randy Oram failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case.

43 As I have concluded that Randy Oram did not meet the test for granting leave to appeal, it is not necessary that I determine whether registration of the vesting order on November 25, 2004 renders the proposed appeal moot. However, I do not accept Randy Oram's submission that the fact that the recipient of the vesting order was a non-arm's length party somehow changes the considerations leading to the conclusion that, following registration, a vesting order is no longer subject to appeal: see Re Regal Constellation Hotel Ltd., [2004] O.J. No. 2744 (C.A.). I also note that Randy Oram did not provide an explanation for failing to seek terms that would have permitted him to appeal the vesting order. Both of these factors militate against the viability of the proposed appeal.

Disposition

44 Based on the foregoing reasons, the motion for leave to appeal is dismissed.

45 The parties agreed that $10,000 was a reasonable figure for costs of the leave motion. However, Randy Oram did not agree that Amico and the Monitor should each be entitled to costs in that amount. I agree.

46 In my view, since Amico did not file a factum addressing the merits of the leave motion, and since the Monitor did not file a factum at all, a global award of $10,000 would be excessive. In the circumstances, costs of the leave motion are awarded to Amico and the Monitor on a partial indemnity basis, fixed at $4,000 in favour of Amico and $2,500 in favour of the Monitor, both inclusive of disbursements and applicable G.S.T.

J.M. SIMMONS J.A.

cp/e/qw/qlmxt

e/drs/qlls/qljal

1 The November 22, 2004 order lists secured claims totalling $17,688,663.16. However, as noted in paragraph 17 of these reasons, under the plan of arrangement, Amico assumed the obligations of the debtor companies for municipal taxes owing to the Town of Amherstburg and for the construction liens on the condominium property.

2 As I read paragraph 7.6 of the plan of arrangement in this case, it does not provide a formal release of the debtor companies by the unsecured creditors. However, the practical effect of

the plan of arrangement is that the unsecured creditors have no realistic prospect of recovery against the debtor companies.

3 None of the valuation evidence that was before the motion judge appears to be included in the materials filed with this court. The evidence relied upon by Randy Oram is referred to in paras. 30-33 of the Goodwyn affidavit. However, the one valuation that was appended as an exhibit to that affidavit was not included in the material filed on this motion. Moreover, the valuation report obtained by the Monitor is not in the material filed on this motion. However, there is an executive summary of the valuation attached to the Monitor's Fifth Report and the valuation results are summarized in the Monitor's Seventh Report.

TAB 7

Indexed as:

Anvil Range Mining Corp. (Re)

IN THE MATTER OF Anvil Range Mining Corporation
AND IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990 c. C-43, as amended
AND IN THE MATTER OF The Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as amended
AND IN THE MATTER OF A Plan of Compromise or Arrangement of Anvil Range Mining Corporation, applicants

[2001] O.J. No. 1453

25 C.B.R. (4th) 1

104 A.C.W.S. (3d) 812

Court File No. 98-BK-001208

Ontario Superior Court of Justice

Farley J.

Heard: March 22, 2001.
Judgment: March 29, 2001.

(22 paras.)

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

Application by the interim receiver of Anvil Range Mining for approval of its plan of arrangement pursuant to the Companies' Creditors Arrangement Act. The value of the assets on a salvage basis was a maximum of $19 million. This was insufficient for the claims of the unsecured creditors and the major shareholder of Anvil. The plan was unanimously approved by three classes of secured creditors. The unsecured creditors and the major shareholder objected to the plan. They claimed that the secured debt was not as large as previously stated, and that the assets were worth more than $19 million.

HELD: Application allowed. The plan was approved. It complied with all the statutory requirements. The Act did not allow a plan to be advanced by an interim receiver. The interim receiver did not lose his neutrality when he filed this plan. The alternative proposed by the unsecured creditors and major shareholder was unrealistic. The secured claims greatly exceeded the value of the assets. The interim receiver exercised its judgment in a reasoned, practical and functional way. The approval of this plan allowed the creditors and shareholders to move on with their lives and activities. The mining properties would be under proper stewardship.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act.

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

Counsel:

Kenneth D. Kraft and George J. Karayannides, for Deloitte & Touche Inc. in its capacity as Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.
Tony Reyes, for Golden Hills Ventures Ltd., MacMillan Mining Contractors Ltd., and Vortex Mining Inc.
John T. Porter, for Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development.
Kevin R. Aalto and David Estrin, for Cumberland Asset Management, Berner Company Inc., Global Securities Corporation, Peel Brooke Inc., Robert N. Granger, Adrian M.S. White, and Hyundai Corporation.
Derek T. Ground, for Ross River Dena Council and Ross River Development Corporation.
Richard B. Jones, for Rose Creek Vangorda Mines and Pelly River Mines Limited (NPL).
David Hager, for Cominco Ltd.
Geoffrey B. Morawetz, for Yukon Energy Corporation and as agent for James Grout representing the "Leitch Lien Claimants".
Frederick L. Myers, for Government of Yukon.

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1 **FARLEY J.** (endorsement):-- This hearing involved the return of the motion of the Interim Receiver ("IR") which I adjourned on February 21, 2001 as a result of the Cumberland Group's complaint that the IR had not provided a "valuation" pursuant to Cameron J.'s Order of January 16, 2001 [properly December 19, 2000] required the IR's "report to include and updated valuation of the assets". The IR's motion was for the sanctioning of a plan of arrangement (the "Plan") of Anvil Range Mining Corporation and Anvil Mining Properties Inc. (collectively, "Anvil") as approved by certain classes of creditors of Anvil pursuant to the Companies' Creditors Arrangement Act ("CCAA") or in the alternative, the approval of a sale of the assets of Anvil on terms substantially similar to those provided in the Plan. The IR's further motion record served on March 14th, contained a March 12, 2001 Anvil Range Mining Corporation Valuation Assessment of Strathcona Mineral Services Limited prepared by Graham Farquharson, together with a March 13, 2001 valuation of the assets of Anvil Range Mining Corporation of Deloitte & Touche Corporate Finance Canada Inc. prepared by Jim Horvath and Mark Keuleman. The Strathcona and Deloitte & Touche

reports were advanced by the IR in satisfaction of its obligations to provide the updated valuation of assets.

2 The IR also sought approval of its budgets and authorization for expenditures for the operating period April 1, 2001 - March 31, 2002 and authorization for the funding of special environmental projects for the period January 1 - March 31, 2001. This aspect was not opposed. This request appears reasonable in the circumstances and is therefore approved.

3 As I expressed in my February 21st reasons:

> Certainly, the cited paragraphs in Farquharson's letter would point it to being unlikely that there was any significant value for the assets in question. Certainly Mr. Farquharson's letter is a gloomy one as to the prospect for the mining operations. (emphasis in original)

It should not come as a surprise to anyone then that the updated valuation of Strathcona and Deloitte & Touche do not present a rosy picture. Farquharson concludes:

> Consequently, for Anvil Range the Plimsoll Line as a continuing mining operation is well below the current water level. It is most unlikely that any mining company would purchase the property on the basis of obtaining value from the resumption of mining operations and without considering the assumption of any portion of the environmental liabilities. Anvil Range, therefore, has no value to the beneficiaries of the estate under this scenario. ...
>
> The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of $10 - $15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

The Deloitte & Touche report concluded:

> Based on the scope of our review, assumptions and analysis, the estimated fair market value of all the assets of Anvil Range is in the range of $11.1 million - $19.9 million (Schedule 1), as at January 31, 2001. If asked to be more specific, we would suggest the mid-point of the foregoing range being $15.5 million. Based on the above, there is no value remaining for the unsecured creditors as the amount owed to secured creditors of over $90.0 million exceeds the value of the assets of Anvil Range.

4 This was not good news for the Cumberland Group as unsecured creditors nor for Hyundai Corporation as a holder of more than 20% of the shares of Anvil. Certainly it cannot have been unexpected news although one can readily appreciate that human nature may often lead those who

have suffered great losses (as the unsecured creditors and shareholders of Anvil certainly have) to hope for a miracle to happen or to present hope as fact and speculation as a firm foundation and to ignore probability in opting for (remote) possibility.

5 The Plan was unanimously approved by the three classes of secured creditors of Anvil on February 2, 2001. Given the Strathcona and Deloitte & Touche valuations, it was concluded that there was no material change to the circumstances under which these three classes voted and therefore it would be redundant to hold a fresh vote. The unsecured creditors were not part of the Plan and were not eligible pursuant to the Plan to vote.

6 The Cumberland Group and Hyundai urged that the Plan should not be approved by this Court for a variety of reasons. Chief among these was the proposition that the secured debt really ahead of the unsecured may not be great as $90 million and that under certain scenarios there may be more value in the Anvil assets than the range of $10 - $19.9 million. However, what must be appreciated is that one has to look at the situation based upon what is currently known as to existing facts and what is realistic in the foreseeable future.

7 On December 7, 1999, Blair J. granted leave to the IR or the secured creditors to file a plan of arrangement. The decision amongst them eventually was made amongst all the secured creditors was that the IR should prepare such a plan, with the costs being shared among the secured creditors including DIAND.

8 The three general criteria which must be met for the Court to sanction a plan of arrangement under the CCAA are:

1. Has there been compliance with all statutory requirements and with all Court orders?
2. To determine, based on all materials filed and procedures carried out, if anything has been done or purported to be done that is not authorized by the CCAA; and
3. Is the Plan fair and reasonable?

See Re Olympia & York Developments Ltd. (1993), 12 O.R. (3rd) 500 (Gen. Div.) at p. 506; Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) at p. 201.

9 Dealing with the first two elements, it appears that the meetings called for voting on the Plan were held pursuant to an order of the Court with the classification of creditors being as approved by this Court. The voting was as contemplated and the Plan was unanimously approved. However, an objection was raised by Messrs. Jones and Aalto that the CCAA did not allow a plan of arrangement to be advanced by an interim receiver and further according to Mr. Aalto that this role being assumed by the IR destroyed the neutrality of the IR. However I would note that similarly there is no provision specifically in the Bankruptcy and Insolvency Act for an interim receiver to file a proposal under that legislation. Notwithstanding that in Re JS McMillan Fisheries Ltd. (1998), 1 C.B.R. (4th) 226 (B.C.S.C.), Tysoe J. stated at p. 231:

> As the Company had no management, the Order appointing Ernst & Young Inc. as Interim Receiver authorized it to negotiate and file a Proposal in relation to the Company.

Further, Blair J. authorized the filing of a Plan by either the IR or the secured creditors and there was no appeal of his order. See the Court of Appeal decision in Ontario (Registrar of Mortgage Brokers) v. Matrix Financial [1993] O.J. No. 2102 (C.A.). I would further point out that while the secured creditors had the opportunity of filing a Plan, they did not do so but rather they agreed amongst themselves that the authorized alternate, the IR, do so. The IR is an officer of the Court and pursuant to this court appointment, it owes a duty to be objective and neutral as amongst all of the affected parties in this insolvency, including the unsecured creditors and the shareholders. Given where the Plimsoll Line is in this situation, it is extremely inappropriate for the objectors to assert, without any evidence of substance, that the IR has adopted an adversarial role. Given my reasons of February 21, I would not have expected that barrage to have been repeated. That is not to say that, merely because the IR files a Plan, it should be taken by this Court as being fair and reasonable and further that objections not be received on this point. However, merely because the objectors (Cumberland Group) were advocating an alternative plan (a plan which in my view is unrealistic in the circumstances in light of the unsecureds being so far under water, the unworkability of this alternate, the concerns for remediation and the retention of $600,000 as working capital out of the purse of those who have a look at the Plimsoll Line) does not mean that the IR has lost its neutrality. Rather, this demonstrates in my view that the IR has exercised its judgment in a reasoned, practical and functional way, as it should.

10 The Plan as presented is a compromise of the creditor claims of those creditors who have now (on a foreseeable future and realistic basis) a true or "actual" stake in Anvil - as opposed to those claims of the unsecured creditors and shareholders who unfortunately have only a chimera. Therefore although in Northland McEachern C.J.B.C. at p. 205, was not dealing with a situation where a class of creditors, as here, the unsecured, were not participating, when he observed:

> First, the authorities warn us against second-guessing businessmen (see Re Alabama, supra at p. 244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, all voted for the Plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

it would seem to me that his observation would hold true in these circumstances.

11 While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company - or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at p. 32; Re Olympia & York Developments (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

12 The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors. See Re Olympia & York (1993), supra at pp. 513-8; Re Philip Services Corp. [1999] O.J. No. 4232 at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is be-

ing imposed upon the unsecureds; none of their rights are being confiscated. See Re Olympia & York (1993), supra at pp. 508, 517-8.

13 I have concluded that the secured claims are far in excess of the value of the assets. That value has to be determine on a current basis. See Re Kostiuk [2000] Carswell B.C. 1523, 2000 B.C.S.C. 1115 at paras. 38-41. It is inappropriate to value the assets on a speculative or (remote) possibility basis. The Strathcona report used reasonable assumptions as to future metal prices. This should be contrasted to the Cumberland Group's assertions that it is possible that prices may spike at some future time. What must be appreciated is that the Anvil ore body as developed presently has a very short life but that the prices must be viewed as sustainable over that period. See my views about spike prices in New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div.).

14 The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions - but not to discredit them. In fact in numerous instances letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

15 It appears that Mr. Aalto's clients have accepted the Cominco secured claim of $24 million. The Miners Lien Act ("MLA") claims of $18 million appear also to be undisputed. There was argument as to the DIAND claims since part of DIAND's claim is and always has been acknowledged as contingent since it relates to reclamation costs in the future. However, it has approximately $6 million of claims as to monies already expended. As a side note, I would observe there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent. If one were to ignore any future remediation costs, the secured creditors in all three classes would have claims in excess of $50 million. This is 2 1/2 times the highest value of the assets. The Cumberland Group in another tack then asserts that DIAND and any other governmental authorities should not look to settle the remediation costs onto these assets at the present time based upon the recognized philosophy of "polluter pays" present in the environmental legislation. Ralph Sultan, a former director of Anvil, swore a March 21, 2001 affidavit (i.e. the day before this hearing) that:

> 11. Prior to Anvil Range, which operated the Faro Mine for approximately 3 years, there had been a number of operators of the Faro Mine. Prior operators created the basic mine plan for the development and operation of the site which is subject to reclamation. Among those prior operators are Curragh, Cypress Anvil Mining Corporation, and Dome Petroleum. I believe that Cypress Anvil Mining Corporation is a subsidiary of Cyprus Amax Minerals Company which is now owned by Phelps Dodge Corporation a huge international mine conglomerate based in the United States. I believe

> that Cypress Amex held insurance for environmental reclamation costs which may include the Faro Mine. Others of the predecessors or their successors may also have some form of insurance for this type of claim. So far as I am aware, DIAND has taken no steps to pursue prior operators or insurance which may be available to satisfy any reclamation costs relative to the Faro Mine. Nor am I aware of any efforts made by the Interim Receiver to require DIAND to pursue other avenues of recovery apart from ascertaining a reclamation claim in these proceedings. Attached hereto is Exhibit "F" is a copy of a reference to insurance held by Cypress Amex in a report on Mining prepared by KPMG.

It is always, of course, important to test the theoretical against the real world. It is not disputed by anyone that each of the predecessors would have contributed in part to the overall environmental condition of the Anvil property as such condition now exists. Each successor has "inherited" not only the benefit of the assets but the obligations inherent or attached to those assets - for our purposes, the environmental liability existing as of acquisition. Should DIAND go after the predecessors, to the exclusion of looking to the present assets. The answer must reasonably be "no". The most it could do on a reliance solely of "polluter pays" would be to go after each predecessor for what it contributed. It is recognizable that Anvil contributed for 3 years. Curragh and Dome Petroleum have evaporated. Sultan only alludes to insurance which a parent of Cypress Anvil Mining Corporation may hold which might extend to their subsidiary whose continued existence has not been indicated, together with insurance other predecessors may have had. He has no direct knowledge of this insurance being in existence or being able to be called on in accordance with its terms and conditions at this date. It does not appear that the board and management of Anvil, of which Sultan was a member, concerned themselves with establishing what insurance of others it might call upon if Anvil were required during its regime to do reclamation work including these contributions of past polluters. For the purposes of this exercise then it seems to me that the objections as to the environmental concerns is a diversionary tactic. In any event, in or out, the environmental claims merely meant that the objectors are drowned either in 50 feet of water or at a depth of 100 feet after falling overboard from the heavily listing Anvil ship which was taking on water.

16 The other secured creditors always recognized, as did DIAND, that the significant value of DIAND's claim was contingent in the sense it related to future obligations. To suggest that the vote of the secureds would be any different if they had the "advantage" of my observations above before voting is to my view underestimating their intelligence.

17 With respect to the tax pools, they only have value if there are profits from the mine. There does not appear to be any reasonable likelihood of this in the foreseeable future. The Memorandum of Understanding, dated August 10, 1999, among Cominco Ltd., Government of Yukon and DIAND in reciting its purpose should not be taken as establishing as a fact something which is not so established when it indicates:

> This MOU is to facilitate the protection of the environment and the preservation and protection of assets referred to in this MOU so that the mining operation may recommence in a cost effective and economic manner.

That is not any foundation for concluding that the mining operation will ever be economic so that it may recommence. Further this MOU statement and the MOU itself does not contradict that there is

no present value to the mine. It does not appear that anyone will restart the mine under foreseeable circumstances. But it is conceivable that unforeseen circumstances may occur especially the longer one goes out on the horizon.

18 In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship.

19 The objectors assert that no value was attributed to Anvil's interest in the Kassandra Mines in Greece. Aside from the fact that on December 30, 1999 I decided that Anvil had no such interest, which decision was affirmed by the Court of Appeal on November 1, 2000, in a short six paragraph decision which indicated that I had correctly decided the matters in issue, all that the Cumberland Group has to point to is that its leave to appeal to the Supreme Court of Canada has not been heard yet.

20 Mr. Aalto referred to Royal Bank of Canada v. Fracmaster [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR.

21 In the end result, I am of the view that the Plan is fair and reasonable for the foregoing reasons and therefore the three part test has been met. The Plan is sanctioned and approved.

22 I may be spoken to as to costs if necessary by booking an appointment through the Commercial List Office.

FARLEY J.

cp/s/qlrme

Case Name:
Anvil Range Mining Corp. (Re)

Between
IN THE MATTER OF Anvil Range Mining Corporation
AND IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Courts of Justice Act, R.S.O. 1990, c. C-43, as amended
AND IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
AND IN THE MATTER OF the Plan of Compromise or Arrangement of Anvil Range Mining Corporation

[2002] O.J. No. 2606

34 C.B.R. (4th) 157

115 A.C.W.S. (3d) 923

Docket No. C36919

Ontario Court of Appeal
Toronto, Ontario

Morden, Borins and Feldman JJ.A.

Heard: March 6, 2002.
Judgment: July 5, 2002.

(41 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Purpose of -- Arrangement, judicial approval -- Arrangement, classes of creditors -- Arrangement, participation -- Appeals.

Appeal by the unsecured creditors from a decision approving a plan of arrangement. Anvil Range, which was the owner of a mine, applied for and received protection from its creditors. Anvil's secured creditors submitted a plan providing for certain of the secured creditors to acquire the mine and certain other assets, and assume responsibility for the ongoing maintenance and upkeep of the

mine. The remaining secured creditors were to share in the proceeds of sale of the remaining assets. The judge considered a report commissioned by the interim receiver to the effect that there was no value remaining for the unsecured creditors, as the amount owed to secured creditors of over $90 million exceeded the value of Anvil's assets by about $75 to $80 million. The unsecured creditors argued that the judge erred in approving the plan, as it was not fair and reasonable, and it was contrary to the purposes underlying the relevant legislation. They also argued that the judge erred in not requiring a more detailed valuation of Anvil's assets. They further argued that it was wrong for one of the secured creditors to have a secured claim for environmental remediation at the expense of unsecured creditors.

HELD: Appeal dismissed. While the report could have been more detailed, it was capable of forming a reasonable basis for the judge's findings. Even after eliminating the secured creditor's claim for environmental remediation, the total secured claim still greatly exceeded the value of the assets. Even if the plan was contrary to the relevant legislation, the same result could have been achieved by the judge granting the secured creditors' alternative relief. Given that the assets were insufficient to pay even half of the secured claims, the order occasioned no prejudice to the unsecured creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 5, 6.

Appeal from:

On appeal from orders of Justice James Farley dated March 29, 2001 and May 7, 2001.

Counsel:

Kevin R. Aalto and David Estrin, for the appellants, Cumberland Asset Management, Berner & Company, Global Securities Corporation, Peel Brooke Inc., Inukshuk Resources Inc., Robert N. Granger and Adrian M.S. White.
George Karayannides and Kenneth Kraft, for the respondent, Deloitte & Touche Inc., Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.
David Hager, for the respondent, Cominco Ltd.
John Porter, for the respondent, Department of Indian Affairs and Northern Development.
Jeremy Dacks, for the respondent, the Yukon Territorial Government.
Derek T. Ground, for the respondent, Ross River Dena Council and Ross River Development Corporation.
Geoffrey B. Morawetz, for the respondent, Yukon Energy Corporation.

The following judgment was delivered by

1 THE COURT:-- Cumberland Asset Management, and others, appeal from orders made by Farley J. dated March 29, 2001 and May 7, 2001. In the March 29, 2001 order Farley J. sanctioned a plan of arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (C.C.A.A.) proposed by Deloitte & Touche Inc., the Interim Receiver of Anvil Range Mining Range Mining Corporation and Anvil Range Properties Inc. In his May 7, 2001 order, Far-

ley J. ordered that the appellants pay costs relating to the sanction motion in the total amount of $28,500.

2 The facts respecting the sanctioning of the plan are set forth in Farley J.'s reasons which are reported at 25 C.B.R. (4th) 1 and need not be repeated in detail. The following is an outline, which contains some history of this proceeding which is not included in Farley J.'s reasons.

3 Anvil Range Mining Corporation is the owner of a lead and zinc mine, known as the Faro Mine, in the Yukon Territory. It bought this mine for about $27,000,000 in 1994 from KPMG Inc., in its capacity as Interim Receiver of the then owner, Curragh Inc.

4 Anvil Range began production in August 1995 after conducting a nine-month $75,000,000 pre-stripping and mill refurbishment program. It suspended mining operations in December 1996 and milling operations in the spring of 1997 because of falling metal prices. It recommenced operations in the fall of 1997 but ceased mining and milling early in 1998.

5 In January 1998, Anvil Range applied for and received protection from its creditors under the C.C.A.A. This was the beginning of the proceeding in which the orders under appeal were, eventually, made. In March 1998, Cominco Ltd., a secured creditor of Anvil Range, moved for the appointment of an interim receiver and termination of the stay provided for in the C.C.A.A. proceeding. Deloitte & Touche Inc. was appointed Interim Receiver and the court directed it to report to the court on certain matters, including seeking advice and directions respecting a marketing plan for the mine.

6 In response to this, the Interim Receiver filed its second report dated June 17, 1998 in which it recommended that "no funds be spent on marketing the mine for the present". This was based on several different facts, one of them being "the fact that no prospective purchasers had emerged to that date .... to express even minimal interest in the mine site despite the well publicized facts in the industry press".

7 As part of the ongoing dispute among the parties, the Interim Receiver brought a motion before Blair J., which was heard on August 20, 1998, seeking approval to sell certain assets at the mine. Blair J. noted that the Interim Receiver had expressed the opinion on the basis of its market analysis that it was "unlikely that the Faro Mine can be reopened within the next 2-3 years and possibly as long as 5 years." He then said:

> I agree that it is difficult to be very optimistic about the future prospects of the Faro Mine, including the chance of its re-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a "standby-mode" ready to be made operative quickly when a period of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

8 Blair J. did not dismiss the request for approval to sell the equipment but adjourned it to October 29, 1998 to enable the Yukon Territorial Government to do further analysis. This was because of the importance of the mine to the fabric of the Yukon Territory.

9 After extensive negotiations and a filing of the Yukon Territorial Government report, a funding formula was established in December 1998 whereby the Department of Indian Affairs and Northern Development ("DIAND") assumed most of the funding obligations of going forward. This funding was secured by a charge against the real property.

10 In December 1999, the court granted leave to the Interim Receiver or the secured creditors to file a plan of arrangement. About a year of negotiations among the secured creditors followed, eventually leading to an extensive settlement conference held in Vancouver under the direction of Justice Kierans, sitting as a justice of the Supreme Court of the Yukon Territory. The conference resulted in a settlement among three groups of secured creditors: (1) the Mining Lien Act Claimants; (2) Cominco Ltd.; and (3) DIAND, the Yukon Territorial Government and the Yukon Workers' Compensation, Health and Safety Board. The settlement was to be implemented by a plan under the C.C.A.A.

11 As will be set forth in more detail later in these reasons, the three groups of secured creditors were the only parties with a legal and economic interest in the assets of Anvil Range. The plan settled a series of complex priority disputes both within creditor classes and among creditor classes and also dealt with allocating funds in the Interim Receiver's possession.

12 The plan divides the creditors who are affected by it (the "Affected Creditors") into three classes (the three groups mentioned above):

1. The Mining Lien Act Claimants.
2. Cominco Ltd.
3. The government creditors, DIAND, the Yukon Territorial Government, and the Yukon Workers' Compensation, Health and Safety Board.

13 The plan provides for the class 3 creditors to acquire the mine and the mill located on it and certain other assets (the "Excluded Assets") and to assume responsibility for funding the ongoing necessary environmental, maintenance and security programs. The other two classes of Affected Creditors are to share in the proceeds of the sale of the remaining assets (the "Realization Assets").

14 The Interim Receiver recommended approval of the plan as the best alternative for settling the outstanding priority issues in dispute and because there was no recovery possible other than to the Affected Creditors.

15 The class 1 creditors' secured claims against Anvil Range property, as judicially declared by judgments of the Supreme Court of the Yukon Territory, total $18,312,169. The claim of the class 2 creditor, Cominco Ltd., was judicially determined by the Superior Court of Justice (Ontario) on January 27, 1999 to be $24,353,657 with post-judgment interest accruing on this amount at 8.5% per annum.

16 With respect to the class 3 creditors, the Yukon Territorial Government and the Yukon Workers' Compensation and Health and Safety Board claim is about $1,000,000. The claim advanced on behalf of DIAND is said to total over $60,000,000 for funding the Interim Receiver's expenses and, also, the environmental remediation costs. We shall deal with the salient details of it shortly.

17 The Affected Creditors unanimously approved the plan which was then sanctioned by the order of Farley J. dated March 29, 2001.

18 The appellants' appeal is substantially based on the following submissions:

1. The plan is not "fair and reasonable" in all of its circumstances as it effectively eliminates the opportunity for unsecured creditors to realize anything.
2. The plan is contrary to the purposes underlying the C.C.A.A.
3. DIAND's reclamation claim is inconsistent with the "fair and reasonable principles" of the C.C.A.A. and environmental remediation legislation.

19 Underlying these submissions is the submission that Farley J. erred in not requiring a more complete and in-depth valuation of Anvil Range's assets be obtained by the Interim Receiver.

20 This last submission should be dealt with first because it is fundamental to the success of the appeal. Farley J.'s findings were based on two reports, one by Strathcona Mineral Services Ltd. dated March 12, 2001 and the other by Deloitte & Touche Corporate Finance Canada, Inc. dated March 13, 2001. In preparing its report, Deloitte & Touche reviewed the Strathcona report, among other materials.

21 In its report Strathcona noted that in the Interim Receiver's 22nd report there was an estimate of the capital expenditures that would be required to resume mining activity at the Grum deposit (which was the only accessible resource base on the Anvil property) including the purchase of mining equipment, rehabilitation of the pit walls, and modifications and repairs to the process facilities. Strathcona said:

> The total is estimated at $80 to $100 million before working capital requirements and we consider this estimate to be reasonable and in the general range of what could be expected. It is clear that the capital expenditures to restart mining operations are going to exceed, perhaps by a factor of two, the cumulative gross operating margins for three years of operation that are indicated.

22 Strathcona concluded its report as follows:

> The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of $10-$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range.
>
> However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

23 Deloitte & Touche Corporate Finance Canada, Inc. concluded that the established market value of all the assets to be "in the range of $11.1 to $19.9 million (Schedule 1), as at January 31, 2001" and that, if it were asked to be more specific, "[it] would suggest the mid-point of the foregoing range, being $15.5 million." It concluded: "Based on the above, there is no value remaining

for the unsecured creditors, as the amount owed to secured creditors of over $90.0 million exceeds the value of the assets of Anvil Range."

24 The appellants submitted a letter from Watts, Griffis & McOuat, Consulting Geologists and Engineers, dated March 21, 2001 which reviewed several documents, "in particular" the Strathcona report dated March 12, 2001. In this letter, Watts, Griffis & McOuat stated "a number of questions about the methodology and logic that Strathcona is using". It did not state an opinion on the value of the Anvil Range property.

25 On these materials, Farley J. concluded that "the secured claims are far in excess of the value of the assets" and that the value had to be determined "on a current basis" and not "on a speculative or (remote) possibility basis." He dealt with the evidence submitted by the appellant as follows:

> The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions - but not to discredit them. In fact in numerous instances [the] letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

26 In our view, Farley J. did not err in accepting the respondent's evidence as affording a reasonable basis for his findings and, further, he did not make any error in his assessment of this evidence that would justify our interfering with his conclusions: Equity Waste Management of Canada v. Halton Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.) at 333-336.

27 It may be that the Strathcona report, as a free standing document, could have been more detailed but this is far from saying that it was not capable, particularly in the context of this proceeding, which began in 1998, of forming a reasonable basis for Farley J.'s findings. This context includes the evidence that Anvil Range bought the property in 1994 for $27,000,000, that its resources underwent depletion since then, that the cost of putting the property in a state where it could recommence operations was some $80,000,000 to $100,000,000 and, although it had been known for sometime in the industry that the property was "available", no one had expressed any interest in it.

28 We turn now to the three basic submissions of the appellant set forth in paragraph 18 of these reasons.

29 It will be helpful to deal with the third submission first, that relating to the DIAND claim. The total DIAND claim is for something over $60,000,000. The appellants submit that by reason of

the "polluter pays" principle, it is wrong that DIAND should have a secured claim against the assets of Anvil Range for environmental remediation at the expense of the unsecured creditors. There are several facets to this submission but, because of the particular facts of this case, we need not explore them. Of the total DIAND claim, some $16,000,000 relates to funds expended under court orders for the Interim Receiver and this is, undeniably, a valid secured claim. As will be apparent, it is sufficient to resolve this appeal if only this part of DIAND's claim is taken into account - and it may well not be necessary to take any part of the claim into account.

30 We turn now to the first two of the appellant's specific submissions. The first is that the plan is not fair and reasonable because it effectively eliminates the opportunity for unsecured creditors to realize anything.

31 From the accepted valuation the maximum possible total value of Anvil Range's assets is $19,900,000. After eliminating the portion of DIAND's claim for remediation costs, the secured claims total at least $60,000.000. Accordingly, even after allowing for a fair margin of error on each side of the equation (the assets side and the claims side) it can be seen that the unsecured creditors have no legal or economic interest in the assets in question.

32 The second submission is that the plan is contrary to the purposes of the C.C.A.A. Courts have recognized that the purpose of the C.C.A.A. is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators. See, for example, Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can. (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) at 201. Farley J. recognized this but also expressed the view in paragraph 11 of his reasons that:

> The CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; Re Olympia & York Developments Ltd. (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List] at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

33 Further to this it may be noted that the plan in this case reflected a compromise of difficult priority issues among the secured creditors and, as stated later in Farley J.'s reasons, "the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship."

34 It may also be noted that s. 5 of the C.C.A.A. contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.

35 Relevant to this issue is the fact that the appellants put forward an alternative plan, which involved their receiving the corporate shell of Anvil Range together with $500,000, and other terms. This plan, however, had no viability. As Farley J. noted in his reasons for the costs disposition it was "doomed to failure given the stated opposition to same [the alternate plan] of the secureds-Cominco Lien and Claimants and DIAND".

36 It is not necessary to resolve this issue to decide the appeal. If the order under appeal was not properly made under the C.C.A.A., there is no doubt that it could have been made by Farley J. in response to the alternative relief sought, which was that of approving a sale of Anvil Range's assets by the Interim Receiver on terms substantially similar to those provided for in the plan. Taking into account that the assets are insufficient to pay even half of the secured creditors claims, it is clear that the order under appeal occasioned no prejudice whatsoever to the appellants. Accordingly we do not give effect to this submission.

37 In the complex circumstances of the operation of the mine and given that there is no hope of the sale generating sufficient funds to satisfy the secured creditors, it cannot be said that Farley J. erred in approving the plan as being fair and reasonable.

COSTS

38 The other appeal is from Farley J.'s order requiring the appellants to pay costs relating to the motion which he fixed in the total amount of $28,500 and allocated as follows:

$15,000 to the Interim Receiver;

$ 7,000 to Cominco;

$ 5,000 to DIAND;

$ 1,500 to Yukon Energy Corporation

39 The appellants submit that Farley J. erred in this costs disposition because parties with an interest in a company governed by the C.C.A.A. should be free to appear in court and oppose the sanctioning of a plan on legitimate grounds without the threat of the penalty of the costs being imposed against them.

40 The award of costs, of course, was a matter within the discretion of the judge and we are not entitled to interfere with the exercise of the discretion just because we may have exercised it differently. To succeed the appellants must show that the exercise of discretion was affected by some error in principle or by misapprehension of the facts. In this case, while we might have been inclined simply to deprive the appellant of costs relating to the motion, we cannot say that there was no principled basis for the disposition which Farley J. made. He was entitled to conclude, as he did, that there was no realistic basis supporting the appellants' opposition to the plan.

DISPOSITION

41 In the result, the appeal is dismissed with costs payable by the appellants to the respondents who delivered factums and appeared on the hearing of the appeal. These respondents should deliver their submissions respecting the costs of the appeal, in writing, within seven days of the release of these reasons and the appellants should deliver their submissions within fourteen days of the release of the reasons.

MORDEN J.A.
BORINS J.A.
FELDMAN J.A.

cp/e/nc/qlgkw

TAB 8

Case Name:

Air Canada (Re)

APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, as amended
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"*

[2004] O.J. No. 303

47 C.B.R. (4th) 169

128 A.C.W.S. (3d) 1067

2004 CarswellOnt 469

Court File No. 03-CL-4932

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: January 16, 2004.
Judgment: January 16, 2004.

(16 paras.)

Insolvency law -- Practice -- Administration of the estate -- Application to court for directions.

Application for directions on the entering into certain agreements by Air Canada.

HELD: Application granted. The agreements were beneficial to Air Canada and its stakeholders.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, RSC 1985.

Counsel:

Sean F. Dunphy and Ashley John Taylor, for Air Canada.
Peter J. Osborne and Peter H. Griffin, for the Monitor.
Howard Gorman, for the Ad Hoc Unsecured Creditors Committee.
Aubrey Kauffman, for the Ad Hoc Committee of Various Creditors.
Jay Swartz, for Deutsche Bank.
Mark Gelowitz, for Trinity Time Investments.
Robert Thornton and 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 the Aircraft Lessor/Lender Group.
Terri Hilborn, for Unionized Retiree Committee.
William Sasso and Sharon Strosberg, for Mizuho International, PLC.
Jim Dube, for Deutsche Lufthansa A.G.

[* Editor's note: Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

1 **FARLEY J.**:-- 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 in-

volved 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 Ltd. v. Harold E. Ballard Ltd., [1991] O.J. No. 266, (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), aff'd, [1991] O.J. No. 1082, (1991), 3 B.L.R. (2d) 113 (Div. Ct.).

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 selec-

> tion 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. v. Excelsior Life Ins. Co. of Canada (1989), 73 C.B.R. (N.S.) 195 at 201 (B.C.C.A.). In Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Blair J. at p. 316 adopted the principles in Royal Bank of Canada 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 Re Sammi Atlas Inc. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), 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, 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.

FARLEY J.

cp/e/nc/qw/qlrme/qlhcs/qlmjb

drs/e/qlmxk/qlcdv/qlliq

TAB 9

Indexed as:
Cadillac Fairview Inc. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF a plan of compromise or arrangement of Cadillac Fairview Inc. and all other companies set out in Schedule "A" attached hereto with head offices or assets in the City of Toronto, Province of Ontario

[1995] O.J. No. 274

Court File No. B348/94

Ontario Court of Justice (General Division)
Commercial List - Toronto, Ontario

Farley J.

February 6, 1995.

(5 pp.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement -- Practice.

The court made some observations on process in the matter of a plan of compromise or arrangement of Cadillac Fairview Inc. and other companies under the Companies' Creditors Arrangement Act.

HELD: The court was of the view that any condition involved in a particular bid should be disclosed in writing. While the court noted that there were complaints that Peat Marwick had not set up a continuous flow of information or done an appropriate job, it also observed that no-one had as yet felt sufficiently aggrieved to bring a motion. The court did note that everyone needed sufficient information on a timely basis so that reasoned decisions could be made.

Statutes, Regulations and Rules Cited:

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

Counsel:

Charles F. Scott, for Syndicate Lenders' Steering Committee, moving party.

David Byers, for Mortgage Lenders Steering Committee, moving party.
Jay A. Swartz, for Goldman Sachs and Whitehall, moving party.
Lyndon Barnes and Fred Myers, for Cadillac Fairview Inc., respondent.
Peter Roy, for Subordinated Debtholders Steering Committee, respondent.

ENDORSEMENT

1 **FARLEY J.**:-- There has been an "informal" formal meeting called on short notice wherein the various stakeholders (except it would appear the subdebt holders) complain about (a) disclosure and (b) lack of timeliness in disclosure.

2 The allegation is that there is a condition involved in the BOT bid which has not been disclosed. It is submitted that this condition was agreed to between BOT and subdebtholders some week or so ago and that it has in some way been acquiesced in by Cadillac Fairview (and without the Cadillac Fairview board knowing the precise details). It would also seem to be alleged that this deal is in writing but that it has been disclosed on an oral basis. If there is such a side deal I would be surprised if it were not in writing, since this would be a way (if not in writing) that there could be confusion as to what the deal is. I would therefore think that if there is an oral deal it should be reduced to writing immediately. Of course if it has been disclosed orally, then it should be disclosed in writing.

3 If there is a binding agreement between BOT and subdebt as to allocation, then it would appear to be a material aspect of the BOT proposal going forward. One can imagine that the rest of the stakeholders would have a different view of the BOT deal if BOT has agreed to 1% to the subdebt or if it had agreed to 99.9% to the subdebt.

4 As to the complaint of there not being a good and continuous flow of information or that Peat Marwick has not done an appropriate job, I would observe that "complaints" are one thing but if anyone truly felt that they were being disadvantaged in a material way in which the process were being carried out, then they have had plenty of time to use the comeback clause to enforce "proper disclosure" i.e. either by proceeding with a motion or merely service intended to rein in a runaway. Nothing has been done so far.

5 As to the disclosure of the side deal by the company, certainly this should be disclosed if the company agreed directly or by acquiescence. I do not see that the company can pull a Nelson's blind eye to the situation if it is aware or ought to be aware of a binding deal which will of necessity affect the filing of its Plan based on BOT deal.

6 I would further be of the observation that it would appear difficult to suggest that a Plan (as defined) is capable of being presented with bullets for allocation. I would think that the company must bite the bullet forthwith -- the minimum would appear to be a narrow range.

7 Further I would observe as I did above that the Court would depend on the stakeholders to monitor the situation. If they feel aggrieved they may bring a motion. I am of the view that they are sophisticated enough to regard their self interests as vital. Therefore I would not assume that they would chase a technical breach if that chase were likely to result in a viable plan being cratered without there being truly practical reasons for the cratering.

8 However, this does not give the company carte blanche. It may well have to answer for breaches at a subsequent time and its officers and directors held accountable for breaches (if there have truly been same).

9 I would further observe that it appears everyone has claimed a veto. It reminds me of the "peace" of the Cold War where the two super powers were held in check from blowing the planet to pieces -- a fragile peace, one with plenty of problems but one which held on a global basis despite the countless number of losses in local areas of conflict.

10 Lastly, I would observe that everyone needs sufficient information on a timely basis so that reasoned decisions can be made. The company should not play with fire in the timing or content of the information release.

11 I would note specifically that no one suggested that counsel were involved in game playing -- in fact there was specific reference to Oslers not being fingered in this respect.

FARLEY J.

qp/d/gta/DRS/DRS/DRS

TAB 10

Case Name:

Calpine Canada Energy Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended AND IN THE MATTER OF Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company, Applicants

[2007] A.J. No. 923

2007 ABQB 504

415 A.R. 196

33 B.L.R. (4th) 68

35 C.B.R. (5th) 1

161 A.C.W.S. (3d) 369

2007 CarswellAlta 1050

Docket: 0501 17864

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E. Romaine J.

Heard: July 24, 2007.
Judgment: July 31, 2007.

(82 paras.)

Civil procedure -- Settlements -- Approval -- In this insolvency proceeding, the court approved a settlement between Canadian and U.S. debtors -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved.

Insolvency law -- Property of bankrupt -- In this insolvency proceeding, the court approved a settlement between Canadian and U.S. debtors -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved.

Insolvency law -- Proposals -- Court approval -- In this insolvency proceeding, the court approved a settlement between Canadian and U.S. debtors -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved.

In this complex insolvency proceeding, the "Calpine Applicants" and the U.S. debtors applied to the present court and the U.S. Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which were hoped to break the deadlock -- The Monitor unequivocally endorsed the settlement agreement -- The Ad Hoc Committee, however, argued that the Canadian creditors would receive less than full recovery and that, therefore, their claims had been compromised -- HELD: The court approved the settlement -- The agreement was a reasonable and necessary path out of the deadlock -- It was a remarkable step forward in resolving the CCAA filing -- It eliminated roughly $7.5 billion in claims against the CCAA debtors, and resolved the major issues between the CCAA debtors and the U.S. debtors that had stalled progress in asset realization and claims resolution -- Most significantly, it unlocked the Canadian proceeding and provided the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities -- The Monitor had concluded that its likely outcome was the payment in full of all Canadian creditors -- The sale of the CCRC ULC1 Notes was a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale could not occur otherwise than in the context of a settlement with those parties whose claims directly affected the Notes themselves -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved -- Without that resolution, the Canadian creditors faced protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that had plagued these proceedings on both sides of the border.

Statutes, Regulations and Rules Cited:

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

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Robert I. Thornton, John L. Finnigan and Rachelle F. Moncur for the Ad Hoc Committee.

Sean F. Dunphy and Elizabeth Pillon for the ULC2 Trustee.

Howard A. Gorman for the ULC1 Noteholders Committee.

Peter H. Griffin and Peter J. Osborne for the U.S. Debtors.

Peter T. Linder, Q.C. and Emi R. Bossio for the Fund.

Ken Lenz for the HSBC Bank USA, N.A., as ULC1 Indenture Trustee.

Jay A. Swartz for Lehman Brothers.

Rinus De Waal for the Unsecured Creditors' Committee.

Neil Rabinovitch for the Unofficial Committee of 2nd Lien Debtholders.

B.A.R. Smith, Q.C. for Alliance Pipelines.

Douglas I. McLean for TransCanada Pipelines Limited.

Reasons for Judgment

B.E. ROMAINE J.:--

Introduction

1 This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

2 Both Courts approved the settlement. These are my reasons for that approval.

Background

3 Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U.S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation ("CORPX"), the primary party in the U.S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

4 During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ulti-

mately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

5 In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

> a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 1/2% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
> b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;
> c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
> d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
> e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;
> f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");
> g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
> h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
> i. Marker claims filed by the ULC1 Indenture Trustee.

6 In the Report, the Monitor describes the settlement process that led to this application as follows:

> 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.
> 11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.

12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...
17. The [GSA] is subject to the following conditions:

    a. The approval of both this Court and the U.S. Bankruptcy Court;
    b. The execution of the [GSA]; and
    c. The CCRC ULC1 Notes being sold.

7 As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U.S. Debtors. The Report describes the "key elements" of the GSA as follows:

a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim ... against CORPX which results in a total claim against CORPX in the amount of US$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;

b The withdrawal of the BDCs advanced by the U.S. Debtors ...;

c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;
d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;
e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims.

Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;
ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;
iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;
iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");
v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and
vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;
g. The settlement of the Greenfield Action;
h. The withdrawal of the UL1 Indenture Trustee Marker Claim;
i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;
j. The resolution of the quantum of the cross-border intercompany claims ... ;
k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;
l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;
m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan ... ;
n. Resolution of all jurisdictional issues between Canada and the U.S.; and

o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

8 The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

9 The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

10 The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

11 The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.". Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

12 The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analyzed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of $7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:

> ... While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U.S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.

b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors' creditors. According to the Monitor's conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

13 The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S. $650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

14 This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing

which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

15 The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

16 As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

17 The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of $25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately $2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately $23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

18 The shortfall, if any, to which the creditors of CESCA will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from $142 million to $378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth $200 million or less, all of the CESCA creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCA will receive full payment even if the CLP Toll Claim is worth as much as $300 million.

19 Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

20 The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Com-

mittee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

21 The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only $25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX guarantees under the "low" scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

22 The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U.S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

23 The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

24 Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

25 Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed

out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

26 I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

27 As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly 3 2 months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U.S. Court.

The Fund's Objections

28 As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

29 The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

30 Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that $15 million of the possible $90 million priority claim to be paid to the U.S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

31 The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

32 The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established

as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

33 The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of $10.5 million on the "high" scenario basis or $19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

34 The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

35 The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

36 In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

37 I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

38 While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

39 With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

40 The ULC2 Trustee also objects to the timing of the payment of $75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the $75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

41 It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster* 1999 ABCA 178 (CanLII), (1999), 244 A.R. 93 (C.A.) at para. 13.

42 The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* reflex, (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J.) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

43 The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity

caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

44 The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

45 The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

46 In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky ... contingent claimants, and ... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan ... without the right to vote on the proposal."

47 The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

48 These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U.S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanc-

tioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

49 Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

50 It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

51 The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

52 The Opposing Creditors rely on *Cable Satisfaction International, Inc. v. Richter Associés Inc.* 2004 CanLII 28107 (QC C.S.), (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

53 There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

54 It is surely not the case that an arrangement or compromise need be labelled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

55 I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of $25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

56 The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Re Playdium Entertainment Corp.* reflex, (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List]) at paras. 11 and 23 and *Re Air Canada* reflex, (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

57 In *Playdium*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Re Lehendorff General Partner Ltd.* reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Re Canadian Red Cross Society* reflex, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]) and *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Comm. List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Red Cross*.

58 Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

59 In *Air Canada*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Red Cross* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

> ... 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.* ... In *Sammi Atlas Inc., Re* reflex, (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.

60 The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

61 Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

62 This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

63 I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

64 The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

65 In *Red Cross*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

66 Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

67 The objecting claimants in *Red Cross* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

68 Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

69 He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

70 Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

71 Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be

"grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'."

72 At para. 45, Blair J. made the following comments, which resonate in this application:

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

73 Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

74 While there are clear differences between the *Red Cross* sale transaction and the GSA in this case, what the *Red Cross* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and alloca-

tions of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Red Cross, Air Canada* and *Playdium*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

75 That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

76 In this case, as in *Red Cross*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

77 The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Re Stelco Inc.* reflex, (2005), 78 O.R. (3d) 254 at para. 18. This was an appeal of an order made by Farley J., [2005] O.J. No. 4309, approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

78 At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process.
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> ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary juris-

> diction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

79 The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

80 Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

81 I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analyzed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

82 The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unrav-

elling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

B.E. ROMAINE J.

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