Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

REPLY BOOK OF AUTHORITIES OF THE DIP LENDERS

MOTION FOR AUTHORIZATION ORDER, MEETINGS ORDER, AND OTHER RELIEF RETURNABLE JUNE 7, 2022

June 5, 2022

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Lawyers for the DIP Lenders

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3. *Blackburn Developments Ltd., Re,* 2011 BCSC 1671

4. *Canadian Airlines Corp. (Re),* 2000 ABQB 442

5. Decision of Justice O'Connor, dated May 24, 2022

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8. *Just Energy Group Inc et. al. v Morgan Stanley Capital Group Inc et. al.,* 2022 ONSC 2697

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10. Tenth Report of the Monitor, dated May 18, 2022 (excerpted)

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12. *Re Sherritt International Corporation,* 2020 ONSC 5822

13. Sears Canada Inc. and Related Applicants Plan of Arrangement dated February 15, 2019

14. Supplement to the Tenth Report of the Monitor, dated June 1, 2022

15. Twenty-Ninth Report of FTI Consulting Canada Inc., as Monitor, dated February 6, 2019, Sears Canada Inc. and Related Applicants (excerpted)

Tab 1

1992 CarswellOnt 162
Ontario Court of Justice (General Division)

Algoma Steel Corp. v. Royal Bank

1992 CarswellOnt 162, 11 C.B.R. (3d) 1, 32 A.C.W.S. (3d) 814

ALGOMA STEEL CORPORATION, LIMITED v. ROYAL BANK OF CANADA, MONTREAL TRUST COMPANY, et al.

Farley J.

Judgment: February 25, 1992
Docket: Doc. Toronto

Counsel: *Michael E. Royce*, for applicant.
J.L. McDougall, Q.C., for respondents.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Role of court for sanctioning of plan considered — Position of holder of guarantee from company under protection determined — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The role of the court on an application for the sanctioning of a plan is to determine whether the plan is fair and reasonable. The court must take into consideration the impact of the plan upon all interested parties. The whole scheme of *Companies' Creditors Arrangement Act* ("CCAA") proceedings is to see whether compromise or arrangement can be effected among the creditors and shareholders of a company with a view to see if the company can be made viable, assuming certain changes are made.

The holder of a guarantee from the company under CCAA protection is a creditor within the meaning of s. 12 of the CCAA.

Table of Authorities

Cases considered:

Film House Ltd., Re (1974), 19 C.B.R. (N.S.) 231 (Ont. S.C.), varied (1974), 19 C.B.R. (N.S.) 231 at 234 (Ont. S.C.) — *referred to*

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Froment, Re, 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377 (Alta. T.D.) — *referred to*

Hammond Organ Studios of Kelowna Ltd., Re (1981), 40 C.B.R. (N.S.) 293 (B.C. S.C.) — *referred to*

J. LeBar Seafoods Inc., Re (1981), 38 C.B.R. (N.S.) 64 (Ont. S.C.) — *referred to*

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

Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd., [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) — *referred to*

Quintette Coal Ltd., Re (1991), 7 C.B.R. (3d) 165, (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp.)* 56 B.C.L.R. (2d) 80 (S.C.) — *referred to*

Standard Trust Co. v. Bodrug (1988), 71 C.B.R. (N.S.) 49, 63 Alta. L.R. (2d) 205, 90 A.R. 249, [1989] 2 W.W.R. 69 (Q.B.) — *referred to*

Standard Trust Co. v. Paragon Homes Ltd. (1987), 66 C.B.R. (N.S.) 224, 54 Alta. L.R. (2d) 48, 81 A.R. 187 (Q.B.) — *referred to*

Statutes considered:

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

Companies' Creditors Arrangement Act, R.S.C. 1952, c. 54 —

s. 11(1)(a)

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

s. 2 "company"

s. 12(1)

s. 12(2)

Courts of Justice Act, 1984, S.O. 1984, c. 11 [now R.S.O. 1990, c. C.43].

Words and phrases considered:

CREDITOR

Parker J. [in *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349 (H.C.)] . . . reached the conclusion, based on the former language of the C.C.A.A. [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] that since creditor [in s. 12] was not per se defined, that one had to resort to the common law rules which dictated that one with an unliquidated claim could not be considered a creditor.

Motion for various declarations concerning the effect of the *Companies' Creditors Arrangement Act* on a guarantee.

Farley J. **(orally):**

1 This is the Bank of Montreal motion with respect to Algoma, related to the American subsidiary, Cannelton Iron Ore Co. Counsel were J.L. McDougall at that time for the Bank of Montreal, and Michael Royce for Algoma and Cannelton. It

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was heard February 14, 1992, with further written submissions up to and including February 24, 1992.

2 Algoma Steel Corp., Ltd. ("Algoma") is a corporation operating since February 18, 1991 under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A."); its American subsidiary, Cannelton Iron Ore Co. ("C.I.O.C."), is not (see definition of "company", s. 2 C.C.A.A.). The Bank of Montreal ("B. of M.") loaned C.I.O.C. 15 million U.S. dollars pursuant to a credit arrangement dated as of February 18, 1989 to which C.I.O.C., Algoma and B. of M. are parties ("credit agreement"). The loan was made to allow C.I.O.C. to fund its share of mining equipment for a joint venture partnership operating the Tilden iron mines in Michigan.

3 Pursuant to the credit agreement, Algoma guaranteed the loan. C.I.O.C. has defaulted on the loan, including a principal repayment of $2,250,000 U.S. due August 19, 1991. B. of M. has neither exercised its right to demand and enforce payment of the C.I.O.C. debt by C.I.O.C., nor has it made any demand for payment under Algoma's guarantee. Aside from the guarantee, it does not appear that the loan was secured.

4 The plan that Algoma has filed under the C.C.A.A. appears to propose that Algoma's liability to the B. of M. under the guarantee constitute for the purpose of the plan a *claim* by a *specified unsecured creditor* (as defined in the plan) to be valued and compromised through the issuance to the B. of M. of an undetermined number of *NA common shares* (emphasis indicating terms defined in the plan). *Trade creditors* are proposed to be treated more favourably. However, under the plan, Algoma proposes that its indebtedness to C.I.O.C. as to iron ore that it has purchased from C.I.O.C. not be treated as a trade debt for the purposes of the plan. Rather, Algoma proposes to reduce the $26,112,000 Algoma owes C.I.O.C. on an inter-company account basis to the nominal amount of one dollar as an amount owed to a fully owned subsidiary. An affidavit submitted by the B. of M. stated:

> The November 30, 1991 Balance Sheet confirms that the outstanding account receivable owed by Algoma to CIOC in the amount of $26,112,000, CIOC's interest in the Joint Venture and CIOC's iron ore inventory are the only assets of CIOC which appear to be available to satisfy the CIOC Debt. I have been advised by representatives of Algoma and I do believe that the realizable value of the assets of CIOC may not be sufficient to satisfy the CIOC Debt.

5 Before and after the February 18, 1991 C.C.A.A. order, Algoma has purchased iron ore from C.I.O.C. It is understood that the purchases were valued on a transfer pricing arrangement — i.e., one that is to be calculated on a "friendly arm's length basis" for the purposes of tax filings in Canada and the U.S.A. Apparently Algoma could (and did in fact from time to time) repatriate part of its equity investment in C.I.O.C. by redemptions and used the funds in a paper transaction to reduce the amount of debt it owed C.I.O.C. Such indebtedness would also be affected by the amount of cash calls that Algoma contributed to the joint venture on behalf of C.I.O.C. from time to time. Given the present view of C.I.O.C.'s assets versus its liabilities, it may be very questionable as to Algoma's present ability to accomplish such an "exchange".

6 One assumes that the B. of M. wishes to keep its options open before proceeding to enforce payment against physical assets — i.e., it would wish to see if it could benefit from C.I.O.C. being treated as a trade creditor, which would have minimal impact on the $26,112,000 receivable asset as opposed to the practical write-off of the receivable.

7 Algoma's position as to the B. of M. loan to C.I.O.C. was es sentially that the loan arrangement should be treated as one with Algoma directly and that the B. of M. should not (and was not) concerned with the dealings between C.I.O.C. and Algoma.

8 The motion was for an order

9 (a) declaring that the B. of M. is not, in its capacity as a holder of the Algoma guarantee, a creditor of Algoma within the meaning of the C.C.A.A. and that the guarantee is not an obligation or liability of Algoma subject to compromise or arrangement under that C.C.A.A.;

10 (b) in the alternative, if the B. of M. is held to be a creditor of Algoma, declaring that

> (i) the rights of the B. of M. to claim against C.I.O.C. for the C.I.O.C. debt to it shall not be varied, affected or impaired as a consequence if the plan proposed by Algoma under the C.C.A.A.;

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(ii) no valuation of Algoma's guarantee liability to the B. of M. for the purposes of the plan and no issuance of any *NA common shares* to the B. of M. in accordance with the plan shall have the effect of either reducing the C.I.O.C. debt or entitling Algoma to any rights of subrogation to the B. of M.'s position; and

(iii) any consideration provided the B. of M. pursuant to the plan in respect of the guarantee shall not constitute a payment by a guarantor on a guarantee but shall be deemed to constitute consideration paid to amend or vary a contract;

11 (c) declaring that any plan of compromise and arrangement by Algoma under the C.C.A.A. would not be fair and equitable if C.I.O.C.'s receivables from Algoma were not treated in a manner equivalent to the treatment afforded other trade creditors of Algoma.

Is the B. of M. a "creditor" within the meaning of the C.C.A.A.?

12 The B. of M. relied heavily on the decision of Parker J. in *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) for the proposition that it was not a creditor. This case was decided before the C.C.A.A. was amended. Under the previous legislation (R.S.C. 1952, c. 54), the relevant section reads as follows:

11. (1) For all purposes of this Act the amount represented by a claim of any secured creditor or unsecured creditor shall be determined as follows:

(*a*) 'claim' means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy Act*;

13 Under the current legislation, the relevant section reads as follows:

12. (1) For the purposes of this Act, 'claim' means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy Act*.

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be defined as follows: ...

14 Parker J. in *Quebec Steel* reached the conclusion, based on the former language of C.C.A.A. that since creditor was not per se defined, that one had to resort to the common law rules which dictated that one with an unliquidated claim could not be considered a creditor. After quoting s. 11, he said at p. 356 [O.R.]:

This section clearly refers only to amount. If a creditor has a claim under the *Companies' Creditors Arrangement Act* then the amount may be extended under this section. In the present case we are not concerned with the amount unless the plaintiff first qualifies as an unsecured creditor as of January 17, 1965.

He had previously stated at p. 353:

At common law, a claim for unliquidated damages does not constitute one a creditor. Jowitt's Dictionary of English Law (1959), defines 'creditor' at p. 535 as follows:

Creditor, a person to whom a debt is owing by another person, called the debtor ...

and 'debt' is defined at p. 581 in these words:

A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor).

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15 Thackray J. in *Re Quintette Coal Ltd.* (1991), 7 C.B.R. (3d) 165, (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp.)* 56 B.C.L.R. (2d) 80 (S.C.) said, in referring to *Quebec Steel* [at p. 88 B.C.L.R.]:

> CdFI conceded that I am not bound by that decision, but said that it is persuasive authority. I am not convinced that if Mr. Justice Parker had the present placement (that is, in s. 12 instead of s. 11) in front of him, he would come to the same decision. He preferred to resort to a common law definition of 'claim' because he found that the definition in the C.C.A.A. was restricted to that section concerned with amount. The legislation has been amended and we must assume with purpose. The concepts of claim and amount are no longer tethered together. 'Claim' is visualized with a future prospect, i.e., 'would be a debt' and in my opinion clearly envisages giving potential creditors a role in the C.C.A.A. proceedings.

It should also be noted that *Quebec Steel* was dealing with a situation when "the plaintiff did not know of the plan of compromise or of the holding of a meeting to approve it" (at p. 351 [O.R.]), conditions which are not present in the subject case.

16 When one appreciates that debtor companies (such as Algoma) are entitled to a broad and liberal interpretation of the jurisdiction of the court under the C.C.A.A., see *Nova Metal Products Inc. v. Comiskey (Trustee of)*, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289, where Doherty J.A. in dissent, but not apparently as to the following, quite explicitly described the importance of the policy and objectives underlining the C.C.A.A. stated at pp. 119-120 [C.B.R.]:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> . . . . .
>
> The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21; *Hongkong Bank of Canada v. Chef Ready Foods Ltd. ...*

17 It strikes me that the double recitation in s. 12(1) and (2) of "[f]or the purposes of this Act" and the segregation of these subsections was intended to allow "claim" to be determined as any "indebtedness, liability or obligation of any kind" by reference to whether it "could be a debt provable in bankruptcy within the meaning of the *Bankruptcy Act*". The determination of the amount of that claim is to be determined under another provision, also "[f]or the purposes of this Act". Under the structure and context of the C.C.A.A. could there be a claim (unsecured debt provable as such under the *Bankruptcy Act*) without there being a creditor as the holder of that claim. I think not. I therefore conclude that the B. of M. is creditor of Algoma vis-à-vis the guarantee (see *Re Film House Ltd.* (1974), 19 C.B.R. (N.S.) 231 (Ont. S.C.), varied (1974), 19 C.B.R. (N.S.) 231 at 234 (Ont. S.C.); *Re Froment*, 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377 (Alta. T.D.), which indicate that the contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid should be considered a debt provable in bankruptcy pursuant to the *Bankruptcy Act*).

18 In *Re J. LeBar Seafoods Inc.* (1981), 38 C.B.R. (N.S.) 64 (Ont. S.C.), Henry J. stated at p. 68:

> As I apprehend the law, the right of the principal creditor, Ocean Garden, to claim against the estate of the guarantor LeBar, is governed by *Re Blakely; Ex parte Aachener Disconto Gesellschaft* (1892), 9 Morr. 173 (D.C.). The principle established in that decision is that upon the bankruptcy of its debtor, the creditor is entitled to claim against the estate of the bankrupt guarantor for the full amount of the debt. The claim is to be reduced only by any amount paid to the creditor by the debtor or by the debtor's estate and by the amount of any dividend declared in favour of the creditor prior to proof of the creditor's claim in the estate of the guarantor.

Does the plan affect the right of the bank against C.I.O.C.?

19 It is quite clear the C.I.O.C. is not a company within the definition of that term in the C.C.A.A. It is a U.S. corporation. Apparently, no proceedings have been taken which directly affect it.

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20 There appears to be consensus between the B. of M. and Algoma that if the B. of M. exercised its rights against C.I.O.C., there would be a shortfall even if the C.I.O.C. receivable from Algoma were left at $26,112,000. I do not see the operations of the C.C.A.A. proceedings as affecting the B. of M.'s rights to proceed against C.I.O.C. C.C.A.A. is a shield, not a sword, as it affects proceedings. It is as well not a sword as to the compromise of obligations with the requisite votes are taken and the plan sanctioned by the court. In other words, I do not see that Algoma at the present time can force the B. of M. to take *any common shares* — not for all or any part of its guarantee obligation. The B. of M. has sat on the fence as to which way it wishes to proceed. It seems to me that the time is ripe (possibly even overripe) for a decision to be made in fairness to Algoma (and all other interested parties) getting on with its proposed C.C.A.A. restructuring. Given that, the practical approach would be to determine what the B. of M. could obtain from C.I.O.C. It may be that this would have to be determined by a valuation. Most certainly, it will necessitate a determination of what is to be the appropriate valuation of the C.I.O.C. receivable from Algoma — i.e., should it be (i) valued at one dollar, as proposed by the plan, or (ii) treated as per a trade receivable, or (iii) determined in some other fashion.

21 A guarantee and the principal debt it guarantees are separate and distinct obligations. A guarantor ceased to be liable only when the principal debt has been repaid in full (unless otherwise released from liability). Where, by operation of law, the principal debt is completely discharged by partial payment, the amount owing under the guarantee is reduced, but the guarantee is not discharged; see *Standard Trust Co. v. Paragon Homes Ltd.* (1987), 66 C.B.R. (N.S.) 224, 54 Alta. L.R. (2d) 48, 81 A.R. 187 (Q.B.) and *Standard Trust Co. v. Bodrug* (1988), 71 C.B.R. (N.S.) 49, 63 Alta L.R. (2d) 205, 90 A.R. 249, [1989] 2 W.W.R. 69 (Q.B.).

22 It was agreed in this case that if a guarantor (Algoma) made payment on a guarantee, the guarantor is then subrogated to the rights of the guaranteed party (B. of M.) against the primary debtor (C.I.O.C.). Given my view that the B. of M. should be allowed to proceed in the manner which in its view might produce the maximum recovery for the B. of M., I do not see this as a case where the B. of M. should be faced with Algoma potentially saying that the guarantee to the full extent of the C.I.O.C. debt to the B. of M. should be valued and satisfied by the proposed issuance of *NA common shares* pursuant to the plan. If, contrary to my view, this were to prevail, then it appears that Algoma could claim that the B. of M. should not press C.I.O.C. for payment since this would involve a duplication of the payment arrangement (see *Re Hammond Organ Studios of Kelowna Ltd.* (1981), 40 C.B.R. (N.S.) 293 (B.C. S.C.)).

How should the C.I.O.C. receivable from Algoma be treated?

23 The credit agreement provides, among other things, that:

24 (a) B. of M. loan C.I.O.C. 15 million U.S. dollars;

25 (b) C.I.O.C. represented and warranted to the B. of M. that its December 31, 1988 financials were prepared in accordance with generally accepted accounting principles and that they fairly represented the financial position of C.I.O.C.;

26 (c) C.I.O.C. agreed to provide the B. of M. with future financials which met the requirements of (b) above; and

27 (d) as to each advance requested, C.I.O.C. was taken to have certified that the representations and warranties were true in all material respects.

28 Given these terms of the credit agreement and including the reference to Algoma as an entity distinct from C.I.O.C., it does not seem to me that Algoma should be able to say that the loan to the C.I.O.C. was made entirely without regard to transactions between Algoma and C.I.O.C. Furthermore, it appears that Algoma's position that the loan was made on the strength of Algoma's covenant under its guarantee was unsupported speculation.

29 I am of the view that the B. of M. is entitled to treat the C.I.O.C. receivable from Algoma as a receivable. It was represented (and continued to be represented) to the B. of M. that the receivable was "good". It is true that there was no contractual restriction against Algoma, reducing its equity and using the redemption proceeds to pay down the inter-company account. However, it did not do so in the last several years.

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30 The B. of M. then submits that it would not be fair and reasonable to permit Algoma to prefer Algoma's creditors and shareholders over the creditors of C.I.O.C. by causing C.I.O.C. to vote in favour of the plan or to otherwise agree to or acquiesce in the reduction of its $26,112,000 receivable from Algoma to one dollar. I think that it is premature to rule on this instant situation. Clearly, the role of the court in a C.C.A.A. situation in this regard is to determine, on the application for sanctioning a plan, whether that plan is fair and reasonable. It is not, in my mind, something that can be answered in the vacuum of the instant case as only Algoma, C.I.O.C. and the B. of M. are being looked at in isolation. Whether a plan is fair and reasonable must take into consideration the impact of same upon all interested parties (in this situation all creditors and shareholders). What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate, particularly in light of the wholly owned subsidiary scenario. The whole scheme of C.C.A.A. proceedings is to see whether a compromise or arrangement can be effected among the creditors and shareholders of a company with a view to see if the company can be made viable, assuming certain changes are made. See Doherty J.A.'s comments, supra, in *Nova Metal Products Inc.*

31 In the result I have determined:

32 (a) the B. of M. as holder of a guarantee from Algoma is a creditor of Algoma within the meaning of C.C.A.A.;

33 (b) the B. of M. is entitled to enforce its rights against C.I.O.C. without being then affected by the proposed plan, but that if there is determined to be a deficiency thereby, Algoma may satisfy such deficiency pursuant to its obligations under the guarantee and that such satisfaction may involve the issuance of *NA common shares*;

34 (c) it would be premature and inappropriate to rule on whether the write-down of the C.I.O.C. receivable to one dollar was fair and reasonable; such should be determined in the context of considering the sanction of the plan as it affects all interested parties.

35 I have endorsed the motion record accordingly.

36 On consent, no order as to costs.

Order accordingly.

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Tab 2

Commercial List File No. 98-CL-002970

AMENDED PLAN OF COMPROMISE AND ARRANGEMENT

Pursuant to the
***Companies' Creditors Arrangement Act* (Canada)**
concerning, affecting and involving

THE CANADIAN RED CROSS SOCIETY/
LA SOCIÉTÉ CANADIENNE DE LA CROIX-ROUGE

DATED JULY 31, 2000
as Amended and Approved at
Meetings of Creditors held on August 30, 2000

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6.02 Class Voting

Ordinary Creditors holding Proven Claims as of the Record Date shall be entitled to vote at the Meeting for Class 1, in person or by proxy, in the amount of such Creditors' Proven Claims determined pursuant to the Claims Order. Transfusion Claimants holding Proven Claims as of the Record Date shall be entitled to vote at the Meeting for Class 2, in person or by proxy, in the amount of $1.00. HIV Claimants holding Proven Claims as of the Record Date shall be entitled to vote at the Meeting for Class 3, in person or by proxy, in the amount of $1.00. For the purposes of voting within Class 4, the Government of Canada shall be deemed to hold a Proven Claim valued at $800.00, and each of the Governments of the Provinces and Territories shall be deemed to hold a Proven Claim valued at the product of $300.00 multiplied by that Government's proportion, expressed as a fraction, of the Provincial and Territorial Government funding of the FPT 1986 – 1990 Settlement. For greater certainty, the total value of the Proven Claims in Class 4 shall be deemed to be $1,100.00, for voting purposes.

6.03 Creditor Approval

This Plan will be approved by the Creditors if all Classes approve a resolution in favour of the Plan. The resolution shall be approved by a Class if a majority (i.e. 50% plus 1) in number of the members of that Class entitled to vote representing in the aggregate two-thirds in value of the Proven Claims of the members of that Class present and voting (either in person or by proxy) at the Meeting vote in favour of the resolution.

6.04 Application for Sanction Order

If Creditor Approval is obtained, the Society shall apply for the Sanction Order within ten (10) Business Days following the day on which Creditor Approval for this Plan is obtained. If such approval is not given at the Meeting or at any adjourned Meeting, the Society shall so report to the Court as soon as reasonably possible.

6.05 Sanction Order

In addition to sanctioning the Plan and the processes herein provided for, the Society shall apply for a Sanction Order having effect on the Plan Implementation Date or as may be otherwise provided in the Sanction Order and having substantially the effect that:

(a) The compromises and arrangements effected hereby are approved, binding and effective as herein set out on all Creditors affected by this Plan.

Tab 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blackburn Developments Ltd. (Re),*
2011 BCSC 1671

Date: 20111207
Docket: S111150
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Blackburn Developments Ltd.

Petitioner

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for PricewaterhouseCoopers Inc.:	K. Jackson D. Toigo
Counsel for Home Equity Development Inc. and Landus Development Group Inc.:	J. Sandrelli
Counsel for Pinnacle International Lands Inc.:	W. Milman
Counsel for Streetwise Capital Partners Inc.:	D. Gruber T. Louman-Gardiner
Counsel for Christina Friesen and Martin Biggerstaff:	B. Friesen
Counsel for R. Wellsby and R. Wilson:	D. Fitzpatrick
Place and Date of Trial/Hearing:	Vancouver, B.C. November 24 and 25, 2011
Place and Date of Judgment:	Vancouver, B.C. December 7, 2011

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[1] The petitioner, Blackburn Developments Ltd. ("Blackburn"), is a real estate development company that undertook a very large residential real estate development project near Chilliwack, British Columbia. The development went on for many years. Blackburn sold some lots. In order to meet its financial obligations over the years it granted a large number of mortgages over its development lands and a golf course that was an important part of the development.

[2] By 2010 and probably before, Blackburn was insolvent. It had incurred many millions of dollars of losses and owed its creditors, both secured and unsecured, in excess of $80,000,000. While many creditors had mortgage security over the Blackburn real estate portfolio, the value of the properties charged was not sufficient to satisfy the amounts secured by the mortgages and most mortgage creditors were in fact unsecured or faced large deficiencies. Despite Blackburn's difficulties, its management was still hopeful of restructuring its affairs. It was recognized that it had potentially valuable losses that could be monetized through a corporate reorganization. However, it was far behind in preparing its financial statements and filing its required income tax returns, and it was therefore impossible to value its tax attributes.

[3] In February 2011 Blackburn sought protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. On February 23, 2011 it obtained an order (the "Initial Order") granting a stay of proceedings against it to permit it to prepare a plan of arrangement (the "Plan") to present to its creditors.

[4] From the outset of these proceedings it was apparent that Blackburn had two potential sources of funds to finance the Plan. The first was the development potential of its real estate holdings. The second was its tax attributes. It was also apparent that Blackburn faced formidable obstacles to completing a Plan. These included the chaotic state of its financial records, its lack of liquidity, the complicated state of the title to its real estate holdings, and the scepticism of some of its secured creditors about its ability to bring forward an acceptable plan.

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[5] These obstacles were addressed in part by the adoption of what has come to be known as a two track process in the *CCAA* proceedings by which Blackburn pursued a restructuring plan and the Monitor, PricewaterhouseCoopers, marketed its assets. This provided Blackburn with a chance to restructure and gave some comfort to its secured creditors that realization on their security would not be unduly delayed.

[6] Initially the focus of the Monitor's marketing efforts was on the company's real estate and related assets. The potential of marketing the real estate and tax attributes through a reorganization was recognized but was not the primary focus of the early applications before me.

[7] The applications addressed in these reasons arise partially out of the collision of the two processes. There are three applications, all by the Monitor. They are:

a. to disallow the votes of Streetwise Capital Partners Inc. ("Streetwise") cast at the creditors' meeting held to consider the Plan;

b. to sanction the Plan;

c. to extend the stay of proceedings to January 15, 2012.

[8] The history of this proceeding is well known to the parties and need not be repeated in detail. By July 2011, the financial, tax and accounting records of Blackburn had been brought up to date, giving a clearer picture of the value of its tax attributes. The Monitor was in a position to begin the process of negotiating and finalizing an asset sale agreement. On July 22, 2011 I made an order (the "Claims Procedure Order") approving a claims procedure that authorized the Monitor to undertake a claims process. Paragraphs 22 and 23 of the Claims Procedure Order provided for assignment of claims and expressly stated that the assignee of a claim was entitled to vote that claim, provided it complied with the provisions of paragraph 23.

[9] After July 22, management of Blackburn continued to pursue a restructuring as contemplated in the Initial Order.

[10] With the benefit of hindsight it can now be seen that the two track process had a fundamental flaw. It was based on the erroneous assumption that an asset sale and a restructuring could be separately negotiated. In fact the Monitor was unable to negotiate any asset sale that was not effected through a restructuring.

[11] It was able to enter into a Restructuring Term Sheet (the “Pinnacle RTS”) with Pinnacle International Lands Inc. (“Pinnacle”) in September 2011. As the name discloses, a restructuring was an essential part of the Pinnacle RTS. In the Pinnacle RTS, Pinnacle agreed to provide sufficient funds to Blackburn to pay senior secured debt and, through a corporate arrangement, ultimately become the sole shareholder of Blackburn. It would thereby acquire Blackburn’s attributes. An essential step in the process therefore was approval by Blackburn’s creditors of a plan of arrangement implementing the Pinnacle RTS.

[12] In the period up to August 30, 2011 management of Blackburn pursued a restructuring, as contemplated in the Initial Order. The only entity that showed a serious interest in pursuing a restructuring with Blackburn was Streetwise, a company that specialized in realizing value from financially distressed enterprises. Streetwise is a self-described “vulture fund”. By August 30, 2011, discussions between management of Blackburn and Streetwise had advanced to the point that the directors of Blackburn had concluded that Streetwise’s restructuring proposal offered the best recovery for creditors.

[13] On August 30, Mr. Rick Wellsby, one of the two directors of Blackburn, sent an email to most of the unsecured creditors of Blackburn soliciting their support for the Streetwise proposal. The email was criticized in the Monitor’s submissions to me. I will return to those criticisms later in these reasons. The email attached a letter of intent that bound any creditor signing it to assign its claim against Blackburn to Streetwise for 2 cents on the dollar plus certain additional consideration.

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[14] Many creditors executed letters of intent. The letters of intent contained conditions precedent in favour of Streetwise that gave Streetwise until October 15, 2011 to satisfy itself that it had sufficient support for its proposed restructuring to proceed with it. For all practical purposes, the executed letters of intent were options in favour of Streetwise. By September 30, Streetwise had received sufficient signed letters of intent to ensure that, if it acted upon them, it could defeat any plan proposed pursuant to the *CCAA*.

[15] On September 16, 2011, Streetwise proposed a transaction to the Monitor pursuant to which Streetwise would become the sole shareholder of Blackburn and acquire its tax attributes through a restructuring that required a plan of arrangement. Streetwise proposed a capital contribution, payment of a portion of the restructuring costs and payment of $1,250,000 as a fund to make a distribution to unsecured creditors. The principal difference between the Pinnacle and Streetwise proposals was that the Pinnacle proposal called for Blackburn to retain its real estate holdings and provided sufficient capital to satisfy senior secured claims while the Streetwise proposal called for a disposition of those real estate assets, except for the golf course.

[16] The Monitor did not pursue Streetwise's proposal for the reasons set out in paragraph 3.10 of the Monitor's 11th Report. Among those reasons was the fact that the Landus Group ("Landus") did not support the proposed transaction and in the Monitor's view no restructuring proposal could succeed without the support of Landus because Landus held sufficient unsecured claims to defeat any plan. On September 23, the Monitor informed Streetwise that it was moving forward with a preferred bidder.

[17] On September 30, I approved The Pinnacle RTS on the recommendation of the Monitor. As part of that order I directed Blackburn to execute the Pinnacle RTS. I did so despite the fact that Streetwise sought to have the Monitor or the Court consider a revised offer from it. While I have already given my reasons for approving the Pinnacle RTS I repeat that I was concerned that the *CCAA*

proceedings had already become prolonged, that restructuring costs were mounting alarmingly and that the Streetwise proposal did not have the support of Landus, without whose support no Plan could be approved.

[18] However, Blackburn was unable to execute the Pinnacle RTS because both its directors, Messrs. Wellsby and Wilson, resigned. On October 5, I made a further order authorizing the Monitor to execute the Pinnacle RTS on behalf of Blackburn and to take the steps necessary to bring the a plan of arrangement implementing the Pinnacle RTS (the "Pinnacle Plan") to a meeting of creditors for approval. At the same time I ordered that Blackburn and its principals, including its former directors, cease restructuring activities.

[19] In my brief oral reasons I tried to make it clear that I was in no way restricting any creditor from exercising its rights to oppose the Pinnacle Plan or to persuade other creditors to vote against it.

[20] Streetwise did not appeal the September 30 order. However it did proceed to acquire the claims of those creditors who had signed letters of intent prior to September 30 and to purchase other claims. As a result Streetwise had by the end of October acquired claims in the amount of approximately $38,000,000, including approximately $7,500,000 in related party claims. The related party claims are subject to a challenge. However, even excluding those claims, Streetwise was the assignee of $30,500,000 in claims, more than sufficient to defeat the implementing of the Pinnacle Plan.

[21] At the meeting of creditors held on November 21 Streetwise voted all its claims against approval of the Pinnacle Plan and it was defeated. However, the Monitor, supported by Landus and Pinnacle, seeks an order disallowing Streetwise's votes. If those votes are disallowed the result will be that the Pinnacle Plan will be approved by a sufficient number of creditors to be approved in accordance with s. 6 of the *CCAA*.

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[22] The Monitor submits that I have the discretionary jurisdiction to disallow Streetwise's votes, but not its right to receive a dividend, on its claims. It submits that I should exercise that jurisdiction to disallow the votes if I conclude that Streetwise has not acted in good faith and has voted its claims for a collateral and improper purpose. The Monitor concedes that there is no express provision in the *CCAA* permitting the court to disallow votes of a person who is a creditor. However, it submits that the broad discretion granted by s. 11 of the *CCAA* extents to controlling any conduct done in bad faith, particularly if that conduct has the effect of frustrating the due process of the administration of a *CCAA* plan. The Monitor says that that control extends to a power to disallow votes.

[23] The Monitor relies on three authorities, two from the United States and one from Nova Scotia, to support the proposition that a court exercising supervisory jurisdiction over an insolvency matter has the jurisdiction to disallow votes of creditors if those votes are cast for an improper purpose. Counsel for all parties agreed that this question has not previously been considered in Canada in *CCAA* proceedings.

[24] The Monitor submits that Streetwise did not act in good faith when it voted against the Pinnacle Plan. The Monitor says that Streetwise acquired sufficient claims to block approval of the Plan as part of a scheme to defeat the Pinnacle Plan for the purpose of getting a second chance to acquire Blackburn's tax attributes for itself. The Monitor submits that it was improper for Streetwise to buy up claims and vote those claims in order to allow it to force the other interested parties to reconsider its offer for the tax attributes.

[25] Streetwise submits that I have no jurisdiction to disallow votes by a creditor who has obtained its status in accordance with the Claims Procedure Order because in so doing I would be depriving that creditor of an express statutory right given by the *CCAA.* It also submits that the facts of this case do not call for making such an order even if I have jurisdiction to do so. Streetwise's position is that it has participated in good faith in the very process contemplated by the Initial Order and

that it has acted throughout in the *bona fide* belief that there is more value to unsecured creditors than is provided by the Pinnacle RTS.

[26] The three cases relied on by the Monitor are *In re Allegheny International Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1990) [*Allegheny*], *In re DBSB North America Inc.*, 421 B.R. 133 (Bankr. S.D.N.Y., 2009) [*DBSB*], and *Re Laserworks Computer Services Inc.* (1997), 6 C.B.R. (4th) 69, [1998] N.S.J. No. 60 (CA) [*Laserworks*].

[27] In this case Streetwise undoubtedly became involved in the Blackburn *CCAA* proceedings because it wished to acquire the tax attributes of Blackburn for itself. This is obvious from the terms of its September 16th offer to the Monitor. However the critical question is not why Streetwise first became interested in Blackburn but whether it voted against the Plan for an improper purpose. In deciding this matter I must proceed on the basis that Streetwise is a creditor pursuant to legally valid assignments. It is of course implicit in the position taken by the Monitor that Streetwise is entitled to share in the distribution to creditors that this is so.

[28] I do not find it necessary to decide whether a judge supervising a *CCAA* proceeding has the jurisdiction to disallow the votes of a creditor while at the same time recognizing that the creditor has a valid claim for purposes of distribution. As is often the case in *CCAA* matters, the parties urgently require a decision. I will therefore proceed on the assumption that I have that jurisdiction. In so doing, I will attempt to adopt the analysis and apply the principles set out in *Laserworks*.

[29] *Laserworks* was a case decided in the context of a proposal under the *Bankruptcy and Insolvency Act* [*BIA*]. In that case *Laserworks* made a proposal to its creditors. A competitor purchased sufficient claims to allow it to defeat the proposal. Under the *BIA* this had the effect of putting *Laserworks* into bankruptcy, thereby eliminating it as a competitor, the very purpose for which the competitor had purchased the claims. The remaining creditors favoured approval of the proposal. The Nova Scotia Court of Appeal found that the creditor had voted its claims for an improper purpose and that the Registrar had the discretion to disallow the votes of that creditor.

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[30] In *Laserworks,* the court set out the basis on which it thought it appropriate to intervene to disallow votes at paras. 50-56 as follows:

> 50 Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the BIA. These are established in several sections, including s. 109(1), persons who had not duly proved and lodged a claim; s. 54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s. 110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s. 111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s. 112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.
>
> 51 (It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)
>
> 52 However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in *Dimples Diapers*.
>
> 53 Tortious or tort-like behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See *Shepard*.) In my view that is why Parliament chose the language it did in s. 187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.
>
> (ii) The Authorities
>
> 54 The four cases cited by the Registrar establish that the threshold is crossed when the BIA is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.
>
> 55 Farley J. held in *Dimples Diapers* that:
>
> > . . . the *Bankruptcy Act*, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of Canada, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

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> 56 In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

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[31] The court elaborated on the concept of substantial injustice at paras. 72-74, in a portion of the judgment dealing with class voting, as follows:

> 72 Hardie Boys J. cited the same passage quoted above by Justice Stewart from Vicount Haldane's judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:
>
> > ...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.
>
> 73 Hardie Boys J. considered *Re Farmers' Co-operative*, which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed.
>
> > ...In a later development of the same matter, but not now involving the Court's sanction under s. 205, Gallen J. accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the *British America Nickel* case. Immediately after the passage already quoted, his Lordship said
> >
> > > Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.
> >
> > Thus in *Pender v. Lushington* (1877) 6 Ch. D.
> > Jessel MR said there is:
> >
> > > . . . no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

> While the voting rights conferred by Part XV of the *Insolvency Act* are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: *King v. Henderson* [1898] AC 720, *Re King, ex parte Commercial Bank of Australia Ltd. (No. 2)*, [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right because he may have some other motive as well...

> 74 If the exception made for fraud is broadened to "substantial injustice" I would take Hardie Boys J.'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.

[32] The reference to “substantial injustice” in paragraph 74 of *Laserworks* finds its origin in s. 187(9) of the *BIA*. No such express provision is found in the *CCAA*. However, assuming without deciding that the same jurisdiction can be found in s. 11 of the *CCAA*, the test promulgated in *Laserworks* is difficult to meet. As I understand that test I must be satisfied that there has been conduct amounting to an abuse of process or other tortious or near tortious character and that that conduct has resulted in a substantial injustice before I can exercise my discretion to disallow a vote of a creditor.

[33] In its submissions to me the Monitor placed particular emphasis on the fact that Streetwise was actively seeking to acquire the tax attributes of Blackburn. It points out that after I had approved the Pinnacle RTS, Streetwise continued to acquire claims. It submits that the inescapable inference to be drawn from these facts is that Streetwise acquired the claims and voted to block approval of the Pinnacle Plan not for the purpose of achieving the purposes of the *CCAA,* but for the improper purpose of forcing a situation in which it would acquire the tax attributes for itself.

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[34] All parties supporting the application to disallow Streetwise's votes emphasized that Streetwise was not a creditor of Blackburn at the outset of these proceedings, that it continued to purchase claims after it was aware that the Pinnacle RTS had been approved to be presented to creditors and that it was obvious that Streetwise wished to obtain the tax attributes of Blackburn. They submit that these circumstances are strong indicators that Streetwise was not acting in good faith.

[35] The Monitor has asked that I infer that Streetwise exercised its votes for an improper purpose analogous to the improper purpose found in the authorities referred to above. Against that inference I have the evidence of Mr. Sethi, contained in two affidavits. The gist of that evidence is that Streetwise entered into restructuring discussions with management of Blackburn prior to August 30, 2011 and that by that date Streetwise believed that it had a viable restructuring plan. Mr. Sethi deposes that in accordance with its expectation it began to acquire the right to have debt assigned to it in order to facilitate approval of its proposed restructuring. Mr. Sethi says, and the documentary evidence supports, that he attempted to initiate discussions with the Monitor in mid-September 2011, but that the Monitor declined to negotiate with him.

[36] Mr. Sethi deposes that when he became aware of the Pinnacle RTS, he attempted to put forward an alternative plan but was unsuccessful in persuading me to give more time to consider Streetwise's offer. Critically, he has deposed that he does not consider that the Pinnacle Plan fairly allocates the value of the tax attributes between the secured and unsecured creditors. In his affidavit #2 he states that he was of the view that there was more value in the unsecured claims than was being offered under the Pinnacle Plan and that accordingly Streetwise decided to acquire the unsecured claims that it effectively had under option. It also acquired additional claims in the same belief.

[37] I think the substance of Mr. Sethi's evidence was that he was confident that Streetwise could recover more than the cost of acquiring the claims, either through

an enhanced offer from Pinnacle or through some other plan that would be presented, if the Pinnacle Plan was defeated.

[38] I accept Mr. Sethi's evidence as reliable. He was not cross-examined on his affidavit. The uncontradicted evidence before me is that Streetwise was acting as a *bona fide* party seeking to participate in a restructuring of Blackburn up to September 30, 2011. There is no dispute that management of Blackburn had the right to pursue a restructuring up to that date. Streetwise became involved in the proceeding at a time when it was known that Blackburn's assets were being offered for sale. I think I can infer that by the summer of 2011 it was obvious to everyone that any restructuring would result in a third party gaining control of Blackburn. I find that by September 30, 2011 Streetwise had committed considerable time and resources in pursuing what I will describe as the Blackburn opportunity.

[39] I also accept as genuine Mr. Sethi's evidence that Streetwise proceeded to acquire creditor claims because it believed that it would ultimately recover more than it paid for those claims. I do not think that Streetwise can be said to be acting in bad faith by acquiring those claims even if it was motivated in part to do so to acquire a blocking position. It is obvious that a party with a blocking position is in a strong position in the negotiations over the terms of a plan of arrangement. That reality was demonstrated in this case by the Monitor's recognition that no plan of arrangement was possible without the support of Landus.

[40] It seems to me that this case raises squarely the appropriateness of permitting "vulture funds" to participate in insolvency restructurings. In my view there is no compelling argument that the activities of vulture funds are undesirable. Even if there were, I think it is the role of Parliament and not the courts to address what limits, if any, should be placed on the activities of such funds. I also note that in this case the terms of the Pinnacle RTS were significantly improved after it became apparent that Streetwise had a substantial position in the claims. There is no doubt that the Pinnacle Plan put to the creditors on November 21 was significantly superior to that recommended by the Monitor on September 30. The

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inference that I draw from that is that the enhancements to the offer were motivated by a desire to enlist creditor support in the face of the Streetwise opposition to the Plan.

[41] I think that the cases cited to me by the Monitor in which bad faith was found are distinguishable from this case. Firstly, the courts in those cases found that the creditor who acquired claims had no *bona fide* intention of profiting from realizing on those claims. In the American cases the courts relied on the fact that the claims were acquired at par or close to par as evidence that the acquiring party did not regard the investment in the claims as a legitimate profit making venture. In all three cases the acquiring creditor did not put forward any plausibly credible evidence that it acquired the claims to make a profit on them or that there was any reasonable prospect of a greater recovery for creditors if the plan or proposal was defeated. In addition, as far as I am able to discern, none of the cases involved an assignee that had become involved in the process with the support of management of the insolvent company. Finally I can see no indication that the plans or proposals under consideration in those cases were in effect liquidation proposals, as is the case in this proceeding.

[42] In *DBSD* the Court found that the acquiring creditor had no *bona fide* interest in profiting from an investment in the debt as the debt was purchased at par. In *Allegheny* the Court also found as a fact that the acquiring creditor, Japonica, had no *bona fide* intention to profit from its investment in the debt. In addition it acquired *de facto* blocking positions in two separate classes whose interests were in direct conflict. These actions were in the Court's view inconsistent with Japonica's actions being carried out for economic reasons.

[43] I also question whether the US decisions are consistent with the law in Canada. Firstly, the US decisions concern the exercise of an express statutory power to disallow votes. It appears from the cases cited that US courts have been prepared to exercise that power in situations in which they conclude that the votes have been exercised in aid of a plan to acquire control of the debtor company. I

must frankly say that I find the distinction made in those cases between pursuing economic interests as a creditor and as a potential owner difficult to grasp. In both cases the creditor is pursuing its economic interests. Both American decisions acknowledge that acquiring debt with a view to making a profit is not bad faith behaviour. Thus the activities of a vulture fund are permissible under US law.

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[44] As I have already stated, I think that the policy approach taken in *Laserworks* is preferable to that of the US authorities. As the above quoted passages make clear, the Court in *Laserworks* recognized that creditors are entitled to vote their claims in what they as creditors perceived to be their own economic interests as long as their actions are not unlawful or do not result in a substantial injustice.

[45] I think this approach is preferable because it recognizes that the effect of such an order is to deprive the assignee of a statutory right and to subject it to having its contractual rights compromised against its will. In my view such a result would only be appropriate in the clearest of cases.

[46] The Monitor and other parties were critical of the conduct of the directors of Blackburn and in particular with the contents of the August 30 email from Mr. Wellsby to Blackburn's creditors. The Monitor submits that this email contained misleading and inaccurate information that may well have misled creditors into signing the Letters of Intent that empowered Streetwise to obtain assignments of their claims. In the Monitor's submission I should take the allegedly misleading statements into account in deciding whether I should disallow Streetwise's votes.

[47] It is quite clear that the email does contain inaccurate information, particularly with respect to the potential recovery creditors could expect if the proposed Streetwise restructuring plan was approved. I am also concerned that the email did not adequately explain that the Letters of Intent purported to give Streetwise the unilateral right to take an assignment of claims whether or not its proposed restructuring plan proceeded.

[48] I have decided that I should not take the contents of the email into account in deciding these applications. The point made by the Monitor is that the assignments of claims acted upon by Streetwise may have been obtained as a result of misrepresentations contained in the email. However, even if that were so, in law the assignments would only be voidable at the instance of any affected creditor. While some assigning creditors have expressed regret to the Monitor about executing the Letters of Intent and assignments, none has applied to me to have the assignments set aside or for any other remedy against Streetwise. In addition the Monitor has registered Streetwise as a creditor in accordance with the Claims Procedure Order. While that registration is not conclusive with respect to Streetwise's right to vote on the Pinnacle Plan, it does relieve me of the task of examining the circumstances of the assignments to determine their validity in the absence of an express challenge thereto.

[49] I am also of the view that Mr. Wellsby did not intend to deceive the creditors when he sent the email. I accept his evidence that he genuinely believed that the Streetwise proposal offered the best recovery to creditors and that he continued to hold that belief after I approved the Pinnacle RTS.

[50] After hearing the submissions of all parties and considering the extensive evidence before me I have concluded that in this case there was a genuine difference of opinion about the best course to follow to maximize recovery for the unsecured creditors of Blackburn. The Monitor was clearly of the view that it was futile to proceed with a restructuring without the support of Landus, which effectively had a blocking position given the extent of unsecured debt that it held. I accept that Streetwise and the directors of Blackburn held the genuine belief that the Pinnacle Plan unfairly favoured Landus and did not provide a fair dividend to unsecured creditors.

[51] In this case I cannot find that the predominate purpose of Streetwise's negative vote was to acquire control of Blackburn and hence its tax attributes. Mr. Sethi has denied that that was the predominate purpose and the surrounding

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circumstances do not lead to that conclusion. In addition, the liquidation analysis prepared by the Monitor does not lead to the conclusion that creditors will be worse off under liquidation.

[52] Accordingly, the application to disallow Streetwise's votes is dismissed. With that dismissal there is no approved Plan to be sanctioned and it follows that that application is also dismissed.

[53] At the hearing I extended the stay in this matter until December 15, 2011. As is probably apparent from these reasons it is my view that it is possible for the parties to reach an agreement that would permit a Plan to be approved. The difference of opinion over the appropriate allocation of the value of the tax attributes has unfortunately led to the defeat of the restructuring plan favoured by the Monitor. Despite this setback it is my view that the synergies between the values of the real estate assets and the tax attributes remain and I urge the parties to renew their efforts to reach an agreement on how to share those values.

[54] To assist in that regard I am therefore prepared to hear an application to extend the stay beyond December 15 if the parties see any utility in so doing.

"Sewell J."

The Honourable Mr. Justice Sewell

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Tab 4

Re Canadian Airlines Corporation, 2000 ABQB 442

Date: 20000627

Action No. 0001-05071

2000 ABQB 442 (CanLII)

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT* (ALBERTA) S.A. 1981, c. B-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE M. S. PAPERNY

2000 ABQB 442 (CanLII)

I. INTRODUCTION

[1] After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the ***Companies' Creditors Arrangement Act*** ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

[2] The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

[3] Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

[4] CAC and CAIL are corporations incorporated or continued under the ***Business Corporations Act*** of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

[5] In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

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[6] By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

[7] CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. (“CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

[8] CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

[9] Canadian’s financial difficulties significantly predate these proceedings.

[10] In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

[11] In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by

pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

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[12] Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

[13] The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

[14] The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

[15] The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

[16] In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 (“Senior Secured Notes”) and U.S. $100,000,000 of unsecured notes in August, 1998 (“Unsecured Notes”).

[17] The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial

performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

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[18] As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the **oneworldTM** Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

[19] Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

[20] Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

[21] Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

[22] Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

[23] Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity

investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

[24] In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

[25] On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

[26] On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

[27] There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

[28] Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

[29] On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on

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October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

[30] As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

[31] Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

[32] After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

[33] On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

[34] As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
b) sales for future air travel were down by approximately 10% compared to 1998;
c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

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[35] In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

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[36] If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

[37] On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

[38] Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

[39] Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

[40] Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described

above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

[41] On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

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[42] Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

[43] Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[44] Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

[45] On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

[46] Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

[47] On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

[48] On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

[49] The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

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[50] The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

[51] The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

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3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.
Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

[52] There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

[53] The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable

alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

[54] In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

[55] There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

[56] Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

[57] Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

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[58] The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the ***Alberta Business Corporations Act*** ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

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III. ANALYSIS

[59] Section 6 of the CCAA provides that:

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

[60] Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.

[61] A leading articulation of this three-part test appears in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example ***Re Sammi Atlas Inc***. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and ***Re T. Eaton Co.***, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

[62] Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

[63] I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

[64] This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in ***Olympia & York Developments Ltd.* v. *Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in ***Cadillac Fairview (Re)*** (1995), 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

[65] In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario

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Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

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[66] Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

[67] Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

> a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
> b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

[68] The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

> (a) consolidating all of the issued and outstanding common shares into one common share;
> (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
> (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

[69] Reorganizations under section 185 of the ABCA are subject to two preconditions:

> a. The corporation must be "subject to an order for re-organization"; and
> b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

[70] The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

[71] The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

[72] Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) – consolidation of Common Shares	167(1)(f)
(b) – change of designation and rights	167(1)(e)
(c) – cancellation	167(1)(g.1)
(d) – change in shares	167(1)(f)
(e) – change of designation and rights	167(1)(e)
(f) – cancellation	167(1)(g.1)

[73] The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

[74] In R. Dickerson et al, ***Proposals for a New Business Corporation Law for Canada***, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

[75] The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

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> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

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[76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

[77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of ***Royal Oak Mines Inc.***, [1999] O.J. No. 4848 and ***Re T Eaton Co.,*** *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

[78] Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

[79] In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

[80] The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

[81] I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in ***Savage v.***

Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

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Ontario Securities Commission Policy 9.1

[82] The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

[83] These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

[84] To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

[85] Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

[86] The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

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

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that:

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

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

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on ***Barrette v. Crabtree Estate,*** [1993], 1 S.C.R. 1027 at 1044 and ***Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of)*** (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

[89] With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words **"excluding the claims excepted by s. 5.1(2) of the CCAA"** immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

[90] In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

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[91] Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

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[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

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

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

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

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

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

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

[98] However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example ***Quintette Coal Ltd.,*** (1992) 13 C.B.R. (3rd) 14 (B.C.S.C) and ***Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*** (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

[99] The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

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[100] The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

[101] The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, ***Hochberger* v. *Rittenberg*** (1916), 36 D.L.R. 450 (S.C.C.)

[102] ***In Northland Properties Ltd. (Re)*** (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[103] Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There

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is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in ***Northland Properties Ltd. (Re)***.

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[104] If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

[105] The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

[106] The authorities which address minority creditors' complaints speak of "substantial injustice" (***Keddy Motor Inns Ltd. (Re)*** (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (***Campeau Corp. (Re)*** (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); ***Skydome Corp. (Re)*** (1999), 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (***Quintette Coal Ltd. (Re)***, (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and ***Northland Properties (Re)***, *supra* at 9.

[107] Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

[108] Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The

affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

[109] The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

[110] The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

[111] As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

[112] The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

[113] Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

[114] While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

[115] The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

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1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

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[116] The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

[117] The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

[118] It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

[119] Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

[120] There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

[121] The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

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[122] For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

[123] Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

[124] There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

[125] If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

[126] The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are <u>not</u> treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

[127] Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

[128] CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

[129] Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the ***Aeronautics Act*** and the ***Canada Transportation Act***, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

[130] Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million , which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

[131] There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

[132] The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses

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can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

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Undepreciated capital cost ("UCC")

[133] There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million . There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

[134] The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

[135] The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

[136] Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

[137] When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the

future. As Farley J. stated in ***Re T. Eaton Co.*** (1999) O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

[138] The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in ***T. Eaton Co,*** *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

[139] Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

[140] Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: ***Re Diligenti v. RWMD Operations Kelowna*** (1976), 1 B.C.L.R. 36 (S.C).

[141] The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in ***First Edmonton Place,*** *supra* at 57:

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

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[142] While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: ***Pente Investment Management Ltd. v. Schneider Corp.*** (1998), 42 O.R. (3d) 177 (C.A.).

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company,*** *supra*.

[144] To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

[145] It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

[146] Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

[147] The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this

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moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

[148] The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

[149] It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

[150] At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to <u>all</u> creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

[151] Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[152] The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

[153] Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

[154] The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The

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evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

[155] Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

[156] I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

[157] Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

[158] The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

[159] The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any

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vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

[160] They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

[161] Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

[162] That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

[163] The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased after the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

[164] In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

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[165] The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

[166] These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

[167] The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

[168] The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

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[169] The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

[170] Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion , it is not unfair that shareholders receive nothing.

e. The Public Interest

[171] In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

[172] In his often cited article, ***Reorganizations Under the Companies' Creditors Arrangement Act*** (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

[173] In ***Re Repap British Columbia Inc.*** (1998), 1 C.B.R. 449 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In ***Re Quintette Coal Ltd.,*** *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include ***Canadian Red Cross Society (Re)***, (1998),5

C.B.R.(4th) (Ont. Gen. Div.) and ***Algoma Steel Corp. v. Royal Bank of Canada (Trustee of***), [1992] O.J. No. 795 (Ont. Gen. Div.)

[174] The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

[175] More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

[176] The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

[177] The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the ***Transportation Act*** , which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

[178] In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d)

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316 (N.BQ.B), ***Quintette Coal***, *supra* and ***Repap***, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to ***Algoma Steel v. Royal Bank of Canada***., *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

[179] Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in ***Re Sammi Atlas Inc***., (1998), 3C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

[180] I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

[181] The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

[182] Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

[183] This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

[184] I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

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[185] The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

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HEARD on the 5th day of June to the 19th day of June, 2000.
DATED at Calgary, Alberta this 27th day of June, 2000.

J.C.Q.B.A.

APPEARANCES:

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P. Pastewka
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J. Medhurst-Tivadar
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R. Wilkins, Q.C.
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Tab 5

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED, AND WITH RESPECT TO JUST ENERGY GROUP INC. ET AL. AND IN THE MATTER OF THE CLAIMS OF FIRA DONIN AND TREVOR JORDET

RULING

1. This is my ruling on the Plaintiffs' motion to produce documents in the Donin and Jordet class actions. At the request of the parties I have abbreviated the ruling in order to have it released as quickly as possible. The parties are familiar with the background of the proceedings that underlie the motion and the issues and arguments of the other side.

2. The Plaintiffs in each action request eight categories of documents that are described in the letter of March 22, 2022.

3. There are six issues in dispute (two in Donin and four in Jordet) that need to be resolved in order to determine the scope of the requests.

Donin

4. The first issue is whether the Plaintiffs are entitled to additional documents by way of fact discovery. Just Energy has already produced many of the documents requested.

5. United States District Judge William F. Kuntz, II has been the supervising judge in the Donin class action. At a hearing in January 2020, Judge Kuntz directed that the discovery in the case was over. When asked if he meant "stayed" he said "I am saying discovery is over. Done. Kaput. It's over. No more discovery".

6. When asked whether he was overturning Magistrate Judge Bulsara (who was dealing with discovery issues in the case) he said "I am overruling Judge Bulsara in that regard".

7. I am satisfied that Judge Kuntz's direction was clear and that he meant what he said. The Plaintiffs did not seek to have the decision reviewed. Judge Kuntz had the authority to overrule Magistrate Judge Bulsara and that is what he did.

8. It is not appropriate for me, as a claims officer in this CCAA proceeding, to go behind Judge Kuntz's ruling and to question whether he reached it for a proper purpose and through an appropriate process. Judge Kuntz ruled and I proceed keeping that ruling in mind.

9. In response to a request from me, counsel provided me with authorities on whether rulings, such as the one referred to above, are binding on this claims process. I thank them for their timely responses.

10. I do not find it necessary to decide this legal issue. For the reasons that follow, I conclude I should attach weight to Judge Kuntz's ruling and I attach significant weight to it.

11. I have a broad discretion with respect to the procedure in this claims process. The objective should be to conduct a timely summary process that is fair and expeditious. This objective can be furthered by avoiding re-litigating issues that could cause delay, expense and potentially inconsistent results.

12. In this case there had been at least ten discovery motions by the time when Judge Kuntz ruled discoveries were closed. I see no reason to second guess Judge Kuntz. Whether issue estoppel or similar principles strictly apply to his ruling, attaching weight to it is consistent with those principles as well as the objectives of the CCAA claims process.

13. It is worth noting that after the motion to dismiss was decided in September 2021, the Court issued an order setting a deadline of November 22, 2021 for the first steps with respect to dispositive motions. This order was premised on the notion that discoveries were complete.

14. I conclude that I should give effect to Judge Kuntz's order that discoveries are complete. The motion requesting that the Defendants produce further documents in the Donin Action is dismissed.

15. The second issue in the Donin case is whether the action is limited to claims by customers in the State of New York. While it is not necessary to decide this issue, I think it useful to briefly set out my conclusion that even if discoveries were re-opened, the Plaintiffs would not be entitled to discovery outside of New York.

16. The only claims that remain after the dismissal ruling are for breach of contract and an implied duty of good faith and fair dealing. The Complaint had alleged that Just Energy entered into contracts outside of New York through 100 John Does.

17. Judge Kuntz dismissed the claim against the John Does because of a lack of personal jurisdiction. The remaining claims in the action can only succeed for customers that contracted with the remaining Defendants in the action. The Complaint does not allege that either of the remaining Defendants contracted with customers outside of New York

Jordet

18. The first issue is whether the class period begins in 2014. For purposes of this analysis, I proceed on the assumption that in addition to Pennsylvania, the Jordet claim includes contracts with customers in California, Georgia, Maryland, New Jersey and Ohio.

19. On December 7, 2020 United States District Judge William M. Skretny granted the Defendant's motion to dismiss several parts of the claim. He ruled that the Plaintiffs' claims prior to April 6, 2014 were time barred. He went on to say "Similarly, the purported class claims prior to that date are also barred" The purported class included customers in states other than Pennsylvania where the Defendant entered into contracts.

20. The limitation period in Pennsylvania was four years. The limitation periods in some of the other states were longer. The Plaintiffs argue that Judge Skretny did not intend to rule that the Pennsylvania limitation period applied to customers in states with longer limitation periods.

21. While the Plaintiffs' Complaint referred to a class period beginning on April 12, 2012, Judge Skretny pointed out that the Plaintiffs did not argue the timeliness of the April 12, 2012 to April 6, 2014 breach of contract claims. Obviously, he was alive to the issue of pre-April 2014 limitation periods.

22. Judge Skretny's order is clear. Class claims prior to April 16, 2014 are barred. The Plaintiffs do not argue that the judge did not have jurisdiction to make that order. For similar reasons to those discussed in paragraphs 8 to 11 above, I do not consider it

appropriate for me to delve into the process or the reasons that led to Judge Skretny's order. I decline to order production of documents for the period prior to April 6, 2014.

23. The second issue in Jordet is whether the class action includes non-residential customers. I conclude that it does not. In the Complaint, the Plaintiffs define the class as "Just Energy's customers charged a variable rate for residential natural gas services by Just Energy from April 2012 to the present." [Emphasis added.] It defines the Pennsylvania sub-class as "residential natural gas customers" [Emphasis added.] The Complaint does not assert claims for non-residential or commercial customers.

24. The Plaintiffs point out that Just Energy uses certain contracts for both residential and commercial customers and argue commercial customers should be included in the class. Be that as it may, the Complaint limits the class to residential customers and that is the class to which certification, if granted, would apply.

25. Moreover, I note that the Plaintiffs' requests for documents in the March 22, 2022 letter specifically limit the requests to documents relating to residential customers.

26. I conclude that I should not, in the context of this CCAA claims process, expand the class of claimants beyond that plead by the Plaintiffs in the Complaint or to documents not sought in the letter requesting production.

27. The third issue in Jordet is whether production should be limited to only those states where the Defendant, Just Energy Solutions, Inc. contracted with customers. I am satisfied that it should. Just Energy's counsel asserted that the Defendant did not contract with customers in Michigan, New York and Illinois. Plaintiffs' counsel questions whether that is the case.

28. I direct the Defendant to produce an affidavit of an officer with knowledge of the facts indicating whether or not the Defendant contracted with customers in the three states in issue during the relevant time period. If the affidavit indicates that the Defendant did not do so, I dismiss the request for documents relating to those three states.

29. The fourth issue in Jordet arises from the language in the Complaint claiming on behalf of Just Energy customers for the period from April 2012 "to the present".

30. The issue is whether the reference "to the present" refers to the date of the Complaint (April 6, 2018) or to the present time, that is the month of May 2022.

31. The parties referred me to a number of American authorities where a representative plaintiff in a class action has sought to include claims occurring after the commencement of the class action and up to the present time. The results in the cases vary and often turned on the circumstances in the particular case.

32. I direct the parties to meet and confer on or before May 30, 2022 to attempt to resolve this issue. If they are unable to do so, they may contact me.

33. I am inclined to allow this request if it is not unduly burdensome for the Defendant. It strikes me that the documents necessary to provide the Plaintiffs with information sufficient to determine the amount of the claims for the four year period from April 2018 to the present should be readily available. This type of information will be provided to the Plaintiffs for the previous four years and it does not seem unreasonable to extend the order for production to the present time.

34. During the motion, counsel for the Defendants in Jordet and Donin raised concerns about the amount of work required to satisfy all of the requests being made at the same time as they were dealing with the CCAA process. In addressing the request for documents for the period from 2018 to the present, counsel should bear in mind my rulings above that should alleviate many of their workload concerns.

The Specific Requests in the March 22, 2022 Letter

35. In Donin, the Defendants have produced documents relating only to customers in New York State and as mentioned above, the District Court has ruled discovery is complete. I am not ordering any further production for the Donin action.

36. In Jordet, the Defendant has agreed to produce documents with respect to the five additional states mentioned above on a without prejudice basis. The Defendant has also agreed to produce documents for categories one to six in the March 22, 2022 request, subject to the limits I have ruled upon above. The Defendant takes issue with the need for

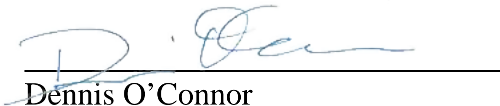
production of some of the documents in requests one to six and the availability of some of the others. It takes the position that the production of the documents it has agreed to produce will satisfy the reasons underlying requests one to six.

37. In my view the most efficient way to proceed with requests one to six is to have the Defendant complete the production of documents that it has agreed to and for the parties to meet and confer about what further production, if any, needs to be made. I will be available on short notice to settle any disputes.

38. Request seven relates to communications with regulators. This is a burdensome request. I am not persuaded that the relevance of these communications is sufficient to warrant production. The only remaining claim in the Jordet action relates to breach of contract. The fraud-related claims have all been dismissed. I decline to order production with respect to request seven.

39. Request eight relates to the names of personnel involved in fixing variable rates. Having heard counsel it seems to me that this issue can be nicely sorted out by a meet and confer.

DATED at Toronto this 24th day of May, 2022.



Dennis O'Connor

Tab 6

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

S U P E R I O R   C O U R T
Commercial Division

File: No: 500-11-048114-157

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

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED AND WABUSH RESOURCES INC.

Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

- and -

FTI CONSULTING CANADA INC.

Monitor

FORTY-FIFTH REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS MONITOR

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10. Future oriented financial information reported or relied on in preparing this Report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.

11. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the Bloom Lake Initial Order, the Wabush Initial Order or previous reports of the Monitor.

EXECUTIVE SUMMARY

12. There is no dispute that Representative Counsel and the USW are authorized to represent their members pursuant to their respective existing mandates. However, their existing mandates do not authorize them to vote on the Plan on behalf of their respective members. Representative Counsel and USW Counsel seek to expand those current mandates by requesting an Order that would enable them to vote the claims of their members without being appointed proxyholder by the creditors themselves.

13. With respect to the request by Representative Counsel and USW Counsel to be appointed as deemed proxyholder for the Salaried Members and the USW Members, respectively, in the circumstances of this case it is the Monitor's view that:

    (a) There is no apparent need for Representative Counsel and USW Counsel to be appointed as deemed proxyholder for the Salaried Members and the USW Members, respectively;

    (b) There is no apparent benefit to the process from Representative Counsel and USW Counsel being deemed to be appointed proxyholder for the Salaried Members and the USW Members, respectively;

(c) The requested deemed appointment of Representative Counsel and USW Counsel as proxyholder for the Salaried Members and the USW Members, respectively, would enable Representative Counsel and USW Counsel to exercise an unwarranted degree of power that could jeopardize the otherwise potentially viable Plan, to the detriment of all Affected Unsecured Creditors; and

(d) The requested deemed appointment of Representative Counsel and USW Counsel as proxyholder for the Salaried Members and the USW Members, respectively, both of whom are have been unable or unwilling to confirm whether or not they would support the Plan, would remove the fundamental right of each individual Salaried Member and USW Member to cast their vote on the Plan as they see fit based on their individual circumstances or to abstain from voting if they wished to do so.

14. Accordingly, in the circumstances of this case, it is the Monitor's view that the request by Representative Counsel and USW Counsel for an Order deeming them as proxyholder for the Salaried Members and the USW Members, respectively, should not be granted.

15. With respect to the April Rep Counsel Fee Motion:

(a) The Monitor has no specific recommendation in respect of the proposed Rep Fee Cap; and

(b) The Monitor remains concerned about potential duplication of effort between KM and FFMP, in part because the division of duties between KM and FFMP is unclear to the Monitor.

THE MEETINGS ORDER OBJECTIONS

16. As described in the Monitor's Forty-Fourth Report, on March 19, 2018, the Participating CCAA Parties filed the Meetings Order Motion requesting the granting of the Meetings Order *inter alia* accepting the filing of the Participating CCAA Parties' proposed joint plan of compromise and arrangement dated March 19, 2018 (as may be amended, the "**Plan**") and authorizing the convening of meetings of creditors to consider and vote on the Plan. In the Forty-Fourth Report, the Monitor also provided its recommendation that the Meetings Order be granted. For ease of reference, a copy of the Monitor's Forty-Fourth Report, without appendices, is attached hereto as **Appendix A**.

17. Pursuant to the provisions of the Bloom Lake Initial Order and the Wabush Initial Order, the deadline for the filing of notice of objections in respect of the Meetings Order Motion was March 22, 2018 (the "**Meetings Order Objection Deadline**").

18. Four notices of objection were filed by the Meetings Order Objection Deadline. The primary bases of the objections are summarized as follows:

    (a) Representative Counsel:

        (i) Additional time is required to review the Plan, determine the financial and legal consequences, if any, of the proposed distributions, the classification of creditors and the limited substantive consolidation provided for in the Plan;

        (ii) The settlement of the Non-Filed Affiliate Transaction Matters benefits only the CQIM/Quinto Parties and prejudices all other creditors;

(iii) The Salaried Members and other affected creditors should have the opportunity to review and, if necessary, contest the allowance of the Non-Filed Affiliate Unsecured Interco Claims and the Non-Filed Affiliate Secured Interco Claims;

(iv) The Salaried Members and Union retires will receive no meaningful recovery should the Pension Claims be determined to be unsecured claims once the Pension Priority Matters are finally determined;

(v) It would be manifestly unfair for the creditors of the Wabush CCAA Parties to be required to vote on the Plan before the final determination of the Pension Priority Matters;

(vi) It would be manifestly unfair for the sanction hearing to proceed before the final determination of the Pension Priority Matters;

(vii) The Parent retains discretion with respect to the contents of the Plan;

(viii) The Plan does not explain how the Pension Claims will be paid if ultimately found to have the benefit of a deemed trust or statutory lien and charge; and

(ix) The Plan on its face is unreasonable and incapable of being sanctioned;

(b) USW:

(i) The Plan is difficult to assess without the assistance of professionals and the proposed timetable for the Meetings and the Sanction Motion are very short and do not provide enough time to make the necessary assessments;

(ii) It is unclear whether the USW will, under the Plan, be able to represent its members and exercise their rights at the Meetings; and

(iii) The objections of Representative Counsel are supported;

(c) Pension Administrator:

(i) Additional time is required to review the motion, consider its implications and seek clarification on a number of issues from the CCAA Parties and the Monitor;

(ii) It is unclear what the effect of the proposed limited substantive consolidation of Wabush Mines, WRI and WICL provided for under the Plan would be on potential recoveries for unsecured creditors;

(iii) It is unclear how the Pension Claims will be treated for voting purposes under the Plan;

(iv) There is no carve out from the releases provided for in the Plan for the Non-Filed Affiliate Employee Claims; and

(v) It would be unfair for the creditors of the Wabush CCAA Parties to be required to vote on the Plan before the final determination of the Pension Priority Matters and while the funds available to unsecured creditors remain uncertain;

(d) City of Fermont:

(i) Insufficient information has been provided to enable the City of Fermont to take a position on the Plan;

(ii) Unsecured creditors would not know the percentage distribution they would receive under the Plan; and

(iii) Additional time is required to review the motions.

19. The Monitor convened a meeting (the "**March 26 Meeting**") with Representative Counsel, USW Counsel (together, the "**Objecting Parties**") and counsel to the Pension Administrator, also attended by counsel to the CCAA Parties, on March 26, 2018, in order to provide further explanation of the Plan and the opportunity for the Objecting Parties to ask any questions or seek further clarifications with respect to the Plan or the proposed Meetings Order.

20. As the nature of the objections and the interests of the City or Fermont were somewhat different from those of the Objecting Parties, the Monitor suggested a separate discussion with counsel to the City of Fermont, rather than them attending the March 26 Meeting. That discussion took place by telephone on April 6, 2018, wherein the Monitor discussed the objections raised by the City of Fermont and addressed additional questions that the City of Fermont had with respect to the Plan. Counsel to the City of Fermont informed the Monitor on April 9, 2018, that the City of Fermont withdrew its objection.

21. Further discussions regarding the potential resolution of some or all of the objections took place with the Objecting Parties and the Pension Administrator and its counsel following the March 26 Meeting.

22. On April 11, 2018, counsel to the Pension Administrator confirmed that the Pension Administrator withdrew its objection.

23. As a result of discussions with the Objecting Parties, the CCAA Parties, with the concurrence of the Monitor, agreed to amend the proposed form of Meetings Order. A "black-line" comparing the revised proposed form of Meetings Order to the originally proposed form of Meetings Order is attached hereto as **Appendix B**. The key changes to the proposed form of Meetings Order are to remove:

(a) Paragraph 13 which would require Representative Counsel and the USW to provide updated contact information for their respective constituents. This paragraph was considered unnecessary as the Monitor has contact information and the previous Order of the Court dated September 7, 2016, provides for the sharing of updated contact information collected by Representative Counsel or the USW; and

(b) Paragraph 17 setting the Non-Filed Affiliate Unsecured Interco Claims, the Non-Filed Affiliate Secured Interco Claims and the CCAA Party Pre-Filing Interco Claims for the purposes of the Plan. This paragraph was considered unnecessary as such claims would be set pursuant to the Plan, if approved and sanctioned.

24. As a result of the adjournment of the hearing of the motion for the Meetings Order, it became necessary to amend the timetable for the Creditors' Meetings, Sanction Order and implementation of the Plan, if approved, and to obtain an extension of the deadline for Plan implementation under the Restructuring Term Sheet and the Plan (the "**Plan Implementation Deadline**"). The Non-Filed Affiliates would only agree to extend the Plan Implementation Deadline to July 31, 2018, provided that the Sanction Order is issued by no later than June 29, 2018. The extension was agreed on that basis.

25. Accordingly, the CCAA Parties, with the concurrence of the Monitor and the Non-Filed Affiliates, now propose the following amended timetable in respect of the Creditors' Meetings and the Sanction Hearing:

(a) Mailing of notices and materials – no later than April 27, 2018;

(b) Creditors' Meetings – June 18, 2018;

(c) Filing of motion for Sanction of the Plan, if Plan is approved at the Creditors' Meetings - no later than June 19, 2018

(d) Monitor's Report on Creditors' Meetings – no later than June 21, 2018;

(e) Deadline for objections to the Sanction Motion – June 26, 2018; and

(f) Sanction Hearing – June 29, 2018.

26. As noted above, the objections of City of Fermont and the Pension Administrator have been withdrawn. Representative Counsel and USW Counsel have both confirmed to the Monitor that they are satisfied with the proposed amended timetable and that they have no objection to the revised proposed form of Meetings Order other than that they will seek to include in the Meetings Order provisions deeming Representative Counsel and USW Counsel as proxy holder for each of the Salaried Members and USW Members respectively, with the right, in each case, to vote the Affected Unsecured Claims of each of the Salaried Members and the USW Members[3] in their discretion either for or against the Plan.

DEEMED PROXIES FOR REPRESENTATIVE COUNSEL AND USW COUNSEL

27. Representative Counsel and USW Counsel seek to amend the proposed Meetings Order *inter alia* to include the following provisions:

> "25. DECLARES that in respect of the Eligible Voting Claims of the Salaried Members and the Union Members:

[3] Such Affected Unsecured Claims do not include the Pension Claims, which are claims of the Pension Administrator who will be entitled to appoint a proxy of its own choosing.

> 25.1 the Salaried Members Representative Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the Salaried Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any Salaried Member to submit a Proxy to the Monitor, save in respect of any Salaried Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy; and
>
> 25.2 the Union Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the Union Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any Union Member to submit a Proxy to the Monitor, save in respect of any Union Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy.
>
> For greater certainty, however, only the Pension Plan Administrator or its designated Proxy may vote the Pension Claims."

28. The effect of these provisions would be to deem Representative Counsel and USW Counsel as proxyholder for each of the Salaried Members and the USW Members respectively, subject to the ability for any individual Salaried Member or USW Member to revoke that proxy. Representative Counsel and USW Counsel confirmed to the Monitor that the deemed proxy was not intended to cover the Pension Claims. Under the proposed language, Representative Counsel and USW Counsel would have discretion to vote either for or against the Plan.

29. The Monitor has been informed by counsel to the CCAA Parties that it has identified ten CCAA cases since 2000 where both representative counsel for employees.was appointed and a CCAA plan of compromise and arrangement was filed in which employee claims were affected. Of those ten cases:

   (a) In seven of those cases[4], there was no deemed proxy for employee claims;

   (b) In three cases[5], there was a deemed proxy for employee claims that representative counsel was required to vote in favour of the plan; and

   (c) In no case was there a deemed proxy for employee claims allowing representative counsel to vote in their discretion.

30. As noted, in each of the three cases where there was a deemed proxy for employee claims, the deemed proxy was required to vote in favour of the plan of arrangement. It appears, therefore, that the rationale for the granting of the "deemed proxy" in each of these cases was to facilitate the approval of the plan of arrangement. Furthermore, the Monitor understands that there was no reported opposition to the deeming of proxies in any of those cases.

31. In the case of Bloom/Wabush CCAA Proceedings, the deemed proxy mechanism requested by Representative Counsel and USW Counsel, if granted, would give discretion to Representative Counsel and USW Counsel to vote as they see fit and regardless of the wishes of the Salaried Members and the USW Members, subject to only to an opt-out right that could be exercised by appointing another proxy, which, as discussed later in this Report, may be difficult to exercise.

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[4] Air Canada, Canwest Global, Canwest Publishing, Fraser Papers, Cotton Ginny, Irwin Toy and Target.
[5] Hollinger, Nortel and US Steel.

Tab 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HSBC Bank Canada v. Bear Mountain Master Partnership,* 2010 BCSC 1563

Date: 20101004
Docket: S102120
Registry: Vancouver

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

And In The Matter Of A Plan Of Compromise Or Arrangement Of Bear Mountain Master Partnership, Bear Mountain Development Holdings Ltd., 18 on 18 Developments Ltd., And Bear Mountain Resort Management Corp.

Between:

HSBC Bank Canada

Petitioner

And:

Bear Mountain Master Partnership, Bear Mountain Development Holdings Ltd., 18 on 18 Developments Ltd., Bear Mountain Resort Management Corp., 391043 Alberta Ltd. as trustee of the Vernon Family Trust, Kory Les Rasmus Gronnestad as trustee of the Gronnestad Family Trust, Leonard Greig Barrie as trustee of the Barrie Family Trust, 624583 B.C. Ltd., Bear Mountain Developments Corporation as trustee of Bear Mountain Realty Fund, Vulpine Enterprises Ltd., Jackson Penney, Afrt Bear Mountain Investment Corp., Wildhorse Management Ltd., 670513 B.C. Ltd., Grappler Development Ltd.

Respondent

Before: The Honourable Mr. Justice Masuhara

Oral Reasons for Judgment
In Chambers

2010 BCSC 1563 (CanLII)

Counsel for the Petitioner:	J. Grieve
Counsel for the Respondent, Turner Lane Development Corp.:	David Gruber and Eli Walker
Counsel for the Chief Restructuring Officer:	S. Golick
Counsel for the Respondent Canada Revenue Agency:	N. Beckie
Counsel for The Monitor Price Waterhouse Coopers:	C. Emslie
Counsel for the Respondent Bear Mountain Master Partnership:	J. Milton
Place and Date of Hearing:	Vancouver, B.C. September 29, 2010
Place and Date of Judgment:	Vancouver, B.C. October 4, 2010

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[1] On September 29, 2010, HSBC Canada (“HSBC”) applied for an order sanctioning the amended plan of arrangement (the “Plan") filed in this proceeding and an order vesting the assets as defined in the Plan, or such of the assets as HSBC may seek to be vested from time to time, in subsidiaries of the bank. The Monitor and the Chief Restructuring Officer (“CRO”) have endorsed the Plan. In an earlier ruling, I approved the filing of a consolidated plan and the creation of the current general creditor class. At that time, I also invited Turner Lane Development Corp. ("Turner Lane") to make submissions with respect to fairness at this hearing.

[2] The meeting of the general creditor class was held on September 21, 2010, to approve the Plan.

[3] Turner Lane opposes the sanctioning of the Plan. This appears to be a late decision, as I am advised that following the meeting of the general creditor class, Turner Lane, through counsel, had advised that it did not intend to oppose sanctioning of the Plan. This is also evidenced by the fact that Mr. Gruber, Turner Lane's counsel, did not have written materials to present to this court or parties until midway through the sanction hearing. I also note that only more recently did Turner Lane file an Appearance, despite having been duly notified of these proceedings.

[4] The report of the Monitor says that the general creditors have voted to approve the Plan by the requisite majorities under section 6 of the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 (“*CCAA”)*, including the votes of HSBC in respect of the HSBC deficiency claim and the assigned claims. The result of the vote was 97 percent in number and 97.2 percent in value in favour of the Plan. Excluding HSBC's vote, the result of the vote is 81.3 percent in number and 69.9 percent in value in favour of the Plan.

[5] As mentioned in earlier rulings in these proceedings, the Plan has been endorsed by the Monitor and the CRO. In its fifth report dated September 26, 2010, the Monitor, in recommending the approval of the Plan, had this to say:

> It has taken approximately six months to restructure Bear Mountain under these CCAA proceedings. As previously noted by the Monitor, the initiation

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> of CCAA proceedings, via creditor, is rare. HSBC undertook these proceedings in order to maximize the potential realizable value of the assets in the future and preserve the Bear Mountain brand. Post CCAA filing, HSBC has contributed approximately $5.9 million towards the operations and restructuring activities. This included the full payment to certain resort creditors to preserve supply and good will who would have not received any payment under an alternative realization scenario. If the plan is approved by the court, HSBC will be required to fund a distribution of up to $500 to each proven creditor within 30 days of the plan implementation. While the Monitor acknowledges that the initial distribution to general creditors is small, the Monitor points out, for several of the smaller creditors, a payment of 500 dollars will represent a meaningful percentage of their outstanding claim. Furthermore, the plan provides a potential opportunity for additional recoveries to the general creditors in the future. While it may take three years to determine whether or not the plan achieves additional recoveries for the general creditors, in the Monitor's view the plan provides the most stability going forward for the 150 suppliers to Bear Mountain and the approximate 273 full and part-time employees. In addition, it is a positive outcome for the existing homeowners on Bear Mountain and in general for the communities of Langford in Highlands. The Monitor also notes that the plan provides a much better result for the unsecured creditors than the alternative. HSBC and Bear Mountain have and continue to act in good faith and with due diligence.

[6] Turner Lane is an unsecured creditor who filed a claim in the amount of $3,275,052.65. Turner Lane provided land development and consulting services to Bear Mountain Master Partnership (“BMMP”) for all aspects of the Bear Mountain development project starting in 2002 until its contract was recently terminated by the CRO. The Monitor admitted $1,452,800.45, disallowed $22,252.20, and objected to $1.8 million of Turner Lane’s claim. This last figure was objected to by the Monitor in writing on June 14, 2010, on the basis that it was a contingent claim relating to estimated gross revenues on residual values, undeveloped land, and unfinished built forms.

[7] It is Turner Lane's view that because of its history with the Bear Mountain project, it expected to be part of the restructuring contemplated in these proceedings and expected to be able to help the project attain its best economic potential through and beyond the restructuring. Turner Lane was obviously disappointed when its contract was terminated.

[8] It is now Turner Lane's position that the court should not sanction the Plan. Their position appears to be based on the following reasons:

(a) That HSBC should not have been permitted to vote in the general creditor class because it is a related party to the BMMP and its affiliates.

(b) That "HSBC ought properly to be understood to have taken an equity risk rather than a credit risk", and it is grossly unfair that the party that ultimately took an equity risk should be so vastly preferred over parties like Turner Lane who extended credit in the ordinary course. Mr. Bjola, the CEO of Turner Lane, takes the view that "it was, in reality, not a paper investment....HSBC was a partner in the project". He says further that HSBC did not exercise adequate risk or credit controls to ensure its secured position was backed by adequate collateral.

(c) That HSBC was "merely going through a pretence of consultation [with Turner Lane] and was focussed only on its interest as a secured creditor." I take from this that Turner Lane asserts that the Monitor and HSBC did not meet and consult with Turner Lane in good faith.

(d) That upon a proper accounting of the votes, only 42.2 percent in value voted in favour of the Plan. Turner Lane notes that the amount of the general creditor class that voted at the meeting, excluding HSBC, was $7.2 million; about $2 million more than all of the proven claims reported in the Monitor's fourth report to the court on June 28, 2010. It appears that the difference is the inclusion of a claim by the Canada Revenue Agency ("CRA") and its vote of $3,455,926.20. The CRA apparently filed its amended proof of claim on September 20, 2010, one day before the vote. While Turner Lane does not assert that this is impermissible, it argues that it raises a negative inference with respect to the lateness of the filing. Turner Lane also notes that on August 11, 2010, BMMP and its related entities filed an affidavit in this proceeding deposing that it had filed notices of objection with CRA for the entirety of the amounts claimed by CRA in its proof for claim. Turner Lane questions how CRA should then be entitled to vote in light of this

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objection. Turner Lane calculates that if the votes of CRA and HSBC were to be excluded, the results of the vote would be 80.6 percent in number but only 42.2 percent in value in favour of the Plan.

(e) That the second largest voting unsecured creditor, Scansa Construction ("Scansa"), having a claim of $666,040.32, voted in favour of the Plan at least in part because it is a guarantor of some of the BMMP's and its related entities' obligations to HSBC. Turner Lane notes that the sole director of Scansa, Mr. Gronnestad, is Len Barrie's brother-in-law. Len Barrie is the former head of Bear Mountain Resort. It also notes that the fifth largest unsecured creditor, 665821 BC Ltd., having a claim of $179,717.06, voted in favour of the Plan but is a company solely directed by a former executive of BMMP, Phil Leseur.

(f) That Turner Lane is the largest of the unsecured creditors and that the third and fourth largest voting unsecured creditors, respectively Westbay Mechanical with a claim of $400,049.57 and Emery Electric with a claim of $190,970.07, all voted against the Plan. Turner Lane notes that these three creditors represent 54 percent of the value of the general creditor class, once HSBC and CRA are excluded.

(g) That the $250,000 fund and the $500 initial distribution as set out in the Plan are inadequate. The fund represents only 0.13 percent of the overall restructured project. The inadequacy is furthered in Turner Lane's view because "there will almost certainly be no subsequent distribution."

[9] As a final argument, Turner Lane submits that given the usual circumstances for a creditor to initiate *CCAA* proceedings, the insolvency community ought to be given some direction as to whether a secured creditor can avail itself of the many advantages of the *CCAA* without sharing any meaningful value with unsecured creditors who normally constitute a significant constituency given that they, too, extend a credit and have a perfect right in law to be paid out of any arrangement.

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[10] Turning to this last point first, in my view, I do not think that any comment is necessary. Each case is unique. Secured creditors are clearly able to bring a petition. The *CCAA* specifies legal tests which have been elaborated upon in the jurisprudence. In my view, to single out a particular type of applicant in the context of this case would not be helpful.

[11] Section 6(1) of the *CCAA* provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. In terms of Turner Lane's argument regarding HSBC and CRA voting at the meeting of general creditors, I note that Turner Lane did not object to HSBC voting its assigned votes, even though Turner Lane had suggested it might do so at an earlier point in these proceedings. Furthermore, it is settled that a creditor is entitled to vote its assigned claims so long as they have been obtained in good faith. The evidence indicates that HSBC obtained its assignments for consideration and in good faith from arm's length trade creditors who are deemed by the CRO to be critical suppliers. The payment to critical suppliers was to ensure the viability of the Bear Mountain development for the benefit of all creditors. The amounts of the critical supplier claims were also verified by the Monitor. Turner Lane has not adduced evidence that is sufficient to suggest a lack of *bona fides*.

[12] I further do not take issue with the CRO's determination of who were the critical suppliers. It must be disappointing to Mr. Bjola that Turner Lane was not considered a critical supplier. It is Mr. Bjola's belief that his services were and are critical to the successful restructuring of the BMMP. He is quite critical of the decision not to continue on with his services. He questioned the current management and its ability to deal with the challenges of the project compared to his depth of knowledge and abilities. However, it cannot be overlooked that Turner Lane was involved as a development manager from the outset of the Bear Mountain project. If the current management team deems it necessary to disassociate itself with a party such as Turner Lane, a firm which was closely involved with the previous management team that bears the responsibility for the financial collapse of the project, I respect their decision. Given the circumstances of the project, an

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objective observer would support change generally as a reasonable management decision.

[13] Turner Lane argued that HSBC should be excluded from the vote due to its relationship with BMMP. I have not been provided with any evidence to establish that HSBC controls the shares of BMMP. As already mentioned, HSBC is an arm's length creditor over Bear Mountain. While HSBC is the party that brought on these proceedings, the CRO and the Monitor, both court officers, have been appointed to oversee Bear Mountain and provide the appropriate level of independence.

[14] Turner Lane also raised the argument that HSBC was equivalent to an equity partner and not an arm's length creditor. As such, it says that HSBC's vote should not be permitted. Turner Lane has adduced no evidence to suggest that the financing provided by HSBC to Bear Mountain was anything but an arm's length debt financing. Turner Lane relies upon the following rhetorical question to support its proposition: "How did it come to be that HSBC apparently extended hundreds of millions of dollars to BMMP without syndicating its exposure and apparently without adequate risk or credit controls to ensure its first secured position was backed by adequate collateral?" This is a most interesting question, no doubt asked in several different ways by the executives at HSBC; however, the question is not a sufficient basis to characterize HSBC as an equity holder and to disallow the HSBC vote. Mr. Bjola also attached a PowerPoint presentation to an affidavit filed with Mr. Gruber's reply submissions. Mr. Bjola deposes that he received the PowerPoint presentation from Mr. Gruber. The presentation, he says, is from a Canadian Bar Association insolvency conference entitled "The Psychology of Raising Debt and Equity". He submits the presentation to support the assertion that funds advanced by HSBC were equivalent to equity. The PowerPoint slides are summary and are very brief in commentary, including short phrases such as "equity is sold on the basis of greed" and "debt is sold on the basis of risk", a cartoon or two for humour, some images, and some charts that reference "EBITDA", "RISK", and "RETURN REQUIRED", with little to no explanation. Mr. Bjola can say nothing about this presentation, as he did not attend it. Mr. Bjola provides no details of how any of the

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generalizations within the slides would apply to the specifics of this case. These slides can hardly be relied upon and no weight can be attached to them.

[15] Turner Lane also refers to the recent amendments to the *CCAA*, in particular section 2(2), which states that "for the purpose of [the *CCAA*], section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company". Turner Lane argues that this provision, as amended in 2009, was explicitly enacted to overrule the decision in *Re: Canadian Airlines*, 2000 ABQB 42. In my view, the submissions of Turner Lane are limited and do not persuade me that this language overrules the findings in *Canadian Airlines*. Further, Turner Lane has had some time to seek and review documents related to the financing arrangement, but has not adduced anything that suggests a non-arm's length relationship between HSBC and Bear Mountain.

[16] Turner Lane also argues that HSBC should be excluded because no meaningful consultation occurred between HSBC, the Monitor and Turner Lane. It complains that Turner Lane was given a "take it or leave it" proposition by HSBC, that proposition being what was set out in the Plan. I note that the Monitor's sixth report discusses the meeting that occurred. It appears that Turner Lane sought to persuade HSBC and the Monitor to enhance the overall pay out to unsecured creditors, including monetizing tax losses to enhance the benefit to unsecured creditors. It also sought to discuss enhancing its own individual situation and sought to have HSBC purchase its claim or to be rehired to assist in the restructuring of Bear Mountain.

[17] It appears that the Monitor did review the idea of distributing tax losses but considered it to be uneconomical and communicated that to Turner Lane. Counsel for HSBC, having knowledge of another *CCAA* situation where realization of tax losses was under discussion, stated that the situation in the instant case was different in that:

> There were not a large number of dysfunctional partners who were hostile to the debtor and petitioner in that other case. To realize any tax losses, each

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> limited partner would have to be brought aside. That is virtually impossible in this case.

[18] While the discussions at the meeting did not lead to a change, it cannot be stated that consultation did not occur. Mr. Bjola asserts that HSBC was only going through the pretence of consultation. It is easy to reach such a conclusion when a positive result is not achieved. However, it must be remembered that consultation does not mean that the other party is required to change its position or yield to the position of the other such as rehiring Turner Lane. An objective view of the entirety of the circumstances is required to determine whether there has been an honest attempt at consultation. In a financial distress situation, those factors that relate to financial distress inform the nature of the consultation. In this case in particular, given the comments of the Monitor regarding the financial situation of Bear Mountain, the nature of the discussions between the parties, and the benefits of the Plan relative to other options, I am not persuaded that the discussions can be said to have been simply “for appearances”.

[19] I also reject Turner Lane's assertion that the votes of CRA should be disallowed simply because Bear Mountain has filed notices of objections against the amounts assessed by CRA for the purpose of preserving its ability to challenge these assessments at some point in the future. In my view, the votes should remain. The Monitor allowed the claim for voting at the meeting of the general creditors.

[20] In my view, the unsecured claim of CRA, as opposed to the deemed trust claim which is not in the vote, is not different from any other unsecured creditor claim.

[21] I also note that CRA has conducted an audit of Bear Mountain and that aspects of the CRA claim were recently before me in the last hearing in these proceedings. This indicates a level of some diligence behind CRA’s position.

[22] Mr. Bjola questions the change of CRA’s position from abstaining at the meeting to voting in favour of the Plan. However, there is nothing to preclude a person from changing their mind as to whether they will or will not vote. Again, there

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is no evidence to suggest that the change resulted from wrongdoing or bad faith on the part of anyone. While I can see an argument for inconsistency, I am also aware that such things are done to preserve positions. I am not persuaded that the inclusion of the vote of CRA was inappropriate.

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[23] Given all of the circumstances, I am not persuaded that the HSBC and CRA vote should be disallowed. Further, I find no irregularity or defect to disallow the votes of Scansa or 665821 (B.C.) Ltd. Mr. Barrie and Mr. Leseur no longer have any management role or decision-making authority in the Bear Mountain Development.

[24] In sanctioning a plan, the court is to consider whether the plan fairly balances the interests of all stakeholders. The court is to look forward and determine whether the plan represents a fair and reasonable compromise that will permit a viable commercial entity to emerge. The court is also to consider whether the proposed plan brings more value to creditors in the bankruptcy or liquidation.

[25] A broad set of factors are to be considered. A key measure of the Plan being fair is the level of approval for the Plan. In my view, there is a significant level of approval whether you include the HSBC vote or not. I recognize that there is considerable dissatisfaction on the part of Turner Lane as to features of the Plan and I am sure that this is shared by others who oppose the Plan. I note that the initial payment is small. However, I am also persuaded by the following factors: the results of the vote, which indicate a high level of support for the Plan; the endorsement of the Monitor who has indicated that HSBC's proposal is the only "game in town"; the support of larger unsecured creditors who are arguably in the same general range as those identified by Mr. Bjola as having opposed the Plan; the benefits of the initial distribution to a large number of smaller creditors; the benefits to the broader constituents such as employees, suppliers and homeowners in Bear Mountain and the general community surrounding the resort as set out in the Monitor's report; the potential to participate in a future distribution in the next three years, at which time it is hoped the market will have improved; the real possibility of HSBC pursuing a receivership; the $5.9 million that HSBC has funded into the project post filing; and HSBC’s foregoing of its $58 million unsecured claims in participating in any of the

1/3 surplus over net recovery from a sale of the project. In light of these facts, I conclude that the order sanctioning the Plan should be granted.

[26] In conclusion, the order sanctioning the Plan is granted and the vesting orders as sought are approved.

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"The Honourable Mr. Justice Masuhara"

Tab 8

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 2697
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220505

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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 ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSONENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG

Jeremy Dacks Shawn Irving, Marc Wasserman and *Michael De Lellis,* for the Applicants

Ryan Jacobs and *Jane Dietrich*, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders

David Botter, Sarah Schultz and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders

Heather Meredith and *James Gage*, Canadian Counsel to the Agent and the Credit Facility Lenders

Ken Rosenberg and *Danielle Glatt*, Counsel to US Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*

Steven Wittels and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for Trevor Jordet, in his capacity as proposed

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MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

– and –

MORGAN STANLEY CAPITAL GROUP INC.

Respondents

class representative in *Jordet v. Just Energy Solutions Inc.*

Howard Gorman and *Ryan Manns*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)

Alexandra McCawley, for FortisBC Energy Inc.

Mike Weinczok, for Computershare Trust Company of Canada

Robert Thornton, Rebecca Kennedy, Rachel Nicholson and *Puya Fesharaki*, for FTI Consulting Canada Inc., as Monitor

John F. Higgins and *Megan Young-John*, U.S. Counsel to FTI Consulting Canada Inc., as Monitor

HEARD: April 21, 2022

2022 ONSC 2697 (CanLII)

ENDORSEMENT

MCEWEN, J.

[1] The Applicant Just Energy Group, Inc. (“Just Energy”), in its capacity as the foreign representative (the “Foreign Representative”)[1] of the Applicants and the partnerships listed in Schedule “A” of the Initial Order (collectively, the “Just Energy Entities”), pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the “CCAA”) brings this motion seeking an order that the Foreign Representative and other Just Energy Entities, as the case may be, are authorized and empowered to pursue claims pursuant to s. 36.1 of the CCAA (the “Section 36.1 Claims”) in the proceedings commenced in the United States Bankruptcy Court for

[1] For ease of reference I will hereinafter refer to the moving party as the “Foreign Representative”.

the South District of Texas (the “U.S. Bankruptcy Court”) bearing case no. 21-04399 (the “Adversary Proceeding”) *nunc pro tunc*.

[2] The Foreign Representative further seeks an order that FTI Consulting Canada Inc. (the “Monitor”) be authorized to take whatever actions or steps it deems advisable to assist and supervise the Foreign Representative (and the other Just Energy Entities, as the case may be) with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

[3] Last, in the alternative, the Foreign Representative submits that the Monitor ought to be authorized to jointly serve as the foreign representative in the matters before the U.S. Bankruptcy Court (the “Chapter 15 Cases”) to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*.

[4] For the reasons that follow I grant the relief sought. I therefore do not need to deal with the alternative relief sought by the Foreign Representative.

BACKGROUND

[5] In March 2021 the Applicants obtained protection under the CCAA pursuant to the issuance of the Initial Order of this Court. The Initial Order granted protections and authorizations to the partnerships listed in Schedule “A” to the Initial Order and also, amongst other things, appointed the Monitor.

[6] Just Energy was further appointed in the Initial Order as the Foreign Representative in connection with the proposed recognition of the CCAA proceeding under Chapter 15 of the U.S. Bankruptcy Code. The CCAA proceeding was thereafter formally recognized by the U.S. Bankruptcy Court by way of an order dated April 2, 2021.

[7] In November 2021, the Foreign Representative, along with Just Energy Texas LP, Fulcrum Retail Energy LLC and Hudson Energy Services LLC (the “Plaintiffs”) commenced the Adversary Proceeding against the Electricity Reliability Council of Texas (“ERCOT”) and the Texas Public Utilities Commission (“PUCT”) in the U.S. Bankruptcy Court. The Plaintiffs challenge the approximately USD $274 million paid under protest by or on behalf of the Just Energy Entities in respect of invoice obligations incurred with respect to ERCOT and payments made (collectively, the "Transfers”) for electricity purchased by the Just Energy Entities in connection with the winter storm event that occurred in Texas in February 2021.

[8] Subsequently, in January 2022 ERCOT and PUCT moved to dismiss the Initial Complaint filed in the Adversary Proceeding. PUCT was successful. The Court also dismissed some of the claims against ERCOT and directed the Plaintiffs to file an amended complaint with respect to certain claims in the Initial Complaint. The Plaintiffs filed an amended complaint (the “First Amended Complaint”).

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[9] In March 2022 ERCOT filed a motion to dismiss the First Amended Complaint on the basis that, amongst other things, the Foreign Representative did not have standing to advance the Section 36.1 Claims.

[10] The motion proceeded before Judge David R. Jones on April 4, 2022. At the hearing Judge Jones requested that the Foreign Representative seek direction from this Court with respect to the question of the proper party to advance the Section 36.1 Claims. Thereafter Judge Jones stayed the Adversary Proceeding pending further order so that the parties could seek direction from this Court.

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[11] This led to the motion before me.

SECTION 36.1 CLAIMS

[12] Section 36.1 was added to the CCAA in 2009. It is intended to allow fraudulent preferences and transfers undervalue ("TUVs") to be investigated and clawed back for the benefit of the debtor's estate in the CCAA proceeding. The relevant provisions of s. 36.1 read as follows:

> 36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, **with any modifications that the circumstances require**, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.
>
> Interpretation
>
> (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> (a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> (b) **to "trustee" is to be read as a reference to "monitor"**; and
>
> (c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company". (emphasis added)

[13] As can be seen, s. 36.1 incorporates ss. 38 and 95-101 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") to ensure consistency with the BIA. Section 36.1(2) was inserted for clarity to assist with the interpretation of the terminology contained in the BIA in the context of a CCAA proceeding: see Industry Canada, *Bill C-12: Clause by Clause Analysis*, which describes the government's rationale for the addition of section 36. 1.

[14] In its motion to dismiss the Adversary Proceeding, ERCOT relied upon s. 36.1(2)(b) to argue that only the Monitor has standing to pursue Section 36.1 Claims. As noted, Judge Jones referred the issue to this Court.

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THE MOTION

Standing

[15] ERCOT refused to attorn to the jurisdiction of this Court. It therefore did not make submissions. ERCOT did provide a letter outlining its position to the Monitor.

[16] The Monitor advised at the motion that the letter from ERCOT did not raise any cases or points of law that were not included in the Applicant's factum. The Monitor took the position that the letter should not be placed in the court file since it would place the Monitor in a position where it was advocating for a party that did not wish to attorn to this Court's jurisdiction. I agreed with the argument and the letter was not placed before me.

Position of ERCOT in Adversary Proceeding

[17] As I understand it, from reviewing the Applicants' materials which include ERCOT's Motion to Dismiss First Amended Complaint and For Abstention, ERCOT relied upon s. 36.1(2)(b) of the CCAA to argue that only the Monitor has standing to pursue Section 36.1 Claims in the Adversary Proceeding.

[18] Sections 95-101 of the BIA are available to a trustee in bankruptcy to pursue certain transactions that are considered to be a preference. Section 96(1) also provides, in certain circumstances, for the trustee to pursue TUVs. The trustee steps into the shoes of the bankrupt by the operation of law so that the bankrupt cannot maintain control over its own property. As noted above, s. 36.1(2)(2) notes that in the CCAA a reference to the provisions of the BIA is to be read as a reference to the monitor.

[19] Based on the foregoing, ERCOT took the position that only the Monitor, pursuant to s. 36.1(2)(b) could bring Section 36.1 Claims in the CCAA proceeding and s. 36.1 does not provide that a foreign representative can bring such a claim.

[20] In this regard, ERCOT relied up on four CCAA cases.

[21] Two of the cases simply involved cases where the Monitor pursued the claims under s. 36.1: see *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, aff'd 2022 ONCA 202 and *Urbancorp Cumberland 2 GP Inc.*, 2017 ONSC 7156.

[22] In two other cases the Court refused to grant standing to third parties to pursue Section 36.1 Claims: see *Cash Store Financial Services, Re*, 2014 ONSC 4326, aff'd 2014 ONCA 834 and *Verdellen v. Monaghan Mushrooms Ltd.*, 2011 ONSC 5820.

Position of the Foreign Representative

[23] I begin by noting that the Court-appointed Monitor supports the Foreign Representative's position.

[24] The Just Energy Entities have kept the Monitor apprised of the steps taken in the Adversary Proceeding and representatives of the Monitor have attended all relevant hearings before the U.S. Bankruptcy Court. The Monitor is of the view that the Plaintiffs' claim has merit and that there may be recoveries from the Adversary Proceeding.

[25] Insofar as the Foreign Representative's position is concerned, it submits that ERCOT's submission is purely technical in nature. It further submits that in cross-border CCAA proceedings in which Canada is the main centre of interest there is no requirement under the CCAA that the Monitor act as foreign representative in foreign proceedings. It points to a number of cases where an applicant company has acted as the foreign representative: *Xerium Technologies (Re)*, 2010 ONSC 3974; *Cinram International (Re)*, 2012 ONSC 3767.

[26] Insofar as s. 36.1 and its interplay with BIA is concerned, the Foreign Representative submits that it generally makes sense under the BIA to have the trustee step into the shoes of the bankrupt so as to deprive the bankrupt of control over its property during the duration of the bankruptcy. The Foreign Representative, however, submits that the same rationale does not apply to CCAA proceedings where the debtor remains in possession.

[27] The Foreign Representative also stresses that it is well established in Canadian case law that the CCAA is to be read broadly and liberally with a view to facilitating its objectives – namely, to allow the debtor to restructure its affairs to the benefit of its stakeholders: see *Century Services Canada Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70. In this regard it points to s. 11 of the CCAA which provides this Court with the jurisdiction to "make any order that it considers appropriate in the circumstances" and that the broad language of s. 11 "should not be read as bring restricted by the availability of more specific orders": see *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 at para. 118 citing *US Steel Canada (Re),* 2016 ONCA 662 at para. 79; *Century Services Canada Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[28] The Foreign Representative further submits that it is important to note that s. 36.1(2) was inserted to assist in transplanting the BIA provisions into the CCAA and that s. 36.1(1) of the CCAA contemplates that the application of the BIA provisions in a CCAA proceeding will be subject to "any modification that the circumstances require" (as emphasized above in para. 12).

[29] The Foreign Representative therefore submits that a reasonable modification should be made to allow it to pursue the Section 36.1 Complaints. Otherwise, it would be inconsistent with CCAA principles to read s. 36.1(2)(b) as a prohibition against the prosecution of Section 36.1 Claims by the Foreign Representative simply because it is not the Monitor. It stresses that this would be particularly perverse since the Monitor has expressly supported its position and the Foreign Representative's position is to the benefit of the Applicants and all stakeholders.

[30] I pause to note that the Monitor, in support of the Foreign Representative's position, also points to s. 101.1(1) of the BIA which states:

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> Sections 95 to 101 apply, with any **modifications that the circumstances require**, to a proposal made under Division I of Part III unless the proposal provides otherwise. (emphasis added)

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[31] The Monitor submits that s. 101.1(1) deals with the incorporation of these sections into a proposal and allows for "any modifications that the circumstances require." The Monitor therefore argues that it is contemplated that modifications can be made where there is a debtor in possession such as is the case in this matter. This allows the debtor, such as Just Energy as Foreign Representative, to pursue claims where it remains in possession. This is particularly sensible, submits the Monitor, where a claim is being pursued for the benefit of the debtor and the stakeholders, which is the case here.

[32] The Monitor points out that there are instances where the Monitor should pursue a claim, for example where the debtor company may be uninterested, but in the circumstances of this case the Foreign Representative, supported by the Monitor, is fully engaged in pursuing the Adversary Proceeding for the benefit of its estate and all stakeholders. It should not be defeated by a narrow and restrictive reading of s. 36.1 and the relevant provisions of the BIA. This would run contrary to a broad and liberal reading that the case law endorses.

[33] The Foreign Representative submits that all of the cases relied on by ERCOT in its motion to dismiss are distinguishable.

[34] First, the Foreign Representative submits that *Ernst & Young Inc. v. Aquino* and *Urbancorp Cumberland 2 GP Inc* are cases in which the Monitor did act as a party in pursuing a s. 36 claim. However, the issue of standing was not addressed in either case as it did not arise on the facts and therefore did not have to be considered by the court.

[35] In the latter two cases, *Cash Store* and *Verdellen*, the Foreign Representative does not dispute that the courts refused standing to a third party to pursue claims under s. 36.1 but both are distinguishable from this case in that they did not address the issue of standing of a foreign representative.

[36] For example, in *Cash Store,* the DIP lender sought to pursue Section 36.1 Claims before the monitor had completed its review of the purported preferences. The court held that the DIP lender could not proceed because the monitor had not yet refused to pursue Section 36.1 claims, and thus the provisions of s. 36.1 could not be utilized. The Foreign Representative therefore submits that *Cash Store* is entirely distinguishable. It also submits that the *Verdellen* case is distinguishable as the Court simply determined that a person who is not a creditor could not apply under s. 36 of the CCAA. The Foreign Representative therefore submits that neither of these cases address the issue of its standing but simply make general statements of law concerning a monitor's right to advance Section 36.1 Claims.

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[37] Last, the Foreign Representative submits that allowing it to pursue the Section 36.1 Claims is the most cost efficient and economical way to proceed. If the Monitor were to proceed with this claim instead, it would require an extensive and duplicative documentary review which would not assist in obtaining a maximum recovery. The Monitor agrees.

ANALYSIS

[38] I accept the submissions of the Foreign Representative.

[39] The law is settled that the provisions of the CCAA are to be read broadly and liberally with a view to allow the debtor to restructure its affairs to the benefit of its stakeholders. When one considers the intersection of Section 36.1 Claims and the relevant provisions of the BIA it is entirely consistent with the provisions of the BIA and CCAA to allow a foreign representative to pursue Section 36.1 Claims. Both s. 101.1(1) of the BIA and s. 36.1(1) of the CCAA allow for modifications as circumstances require. I pause here to note that, although I am not being asked to determine the issue of whether only a trustee is able to bring a s. 95 action, I can see no provisions in the BIA that state that a trustee is the only party that can bring such an action . This seems to run contrary to the provisions of s. 101.1(1) of the BIA. Further, under s. 38 a creditor can take an assignment from a trustee. In my view this demonstrates the harmony between the BIA and the CCAA in which both are trying to achieve fairness in recovering assets for the benefit of the debtor and all stakeholders.

[40] In this case, where the Foreign Representative seeks to pursue the claim on behalf of the Just Energy Entities, with the support of the Monitor and for the benefit of all stakeholders, it is fair and reasonable to allow the necessary modification to allow the Foreign Representative to pursue the Adversary Proceeding. It further makes sense, as requested by the Foreign Representative, to have the Monitor take whatever actions or steps it deems advisable to assist and, importantly, supervise the Foreign Representative with respect to the prosecution of Section 36.1 Claims in the Adversary Proceeding. This allows the court-appointed Monitor to be kept abreast of all developments in the Adversary Proceeding, supervise the Foreign Representative as necessary and report to this Court. In my view, this undoubtedly benefits the Applicants and all stakeholders.

[41] The position advanced by ERCOT runs contrary to the spirit of the CCAA as well as the wording of the relevant provisions of the BIA and CCAA which allow for, as noted, modifications which ought to be allowed in this case for the reasons noted above.

[42] I further accept the submissions of the Foreign Representative that the case law relied upon by ERCOT in the Adversary Proceeding is entirely distinguishable and not of assistance in this case.

[43] Given the fact that I am allowing the Foreign Representative to pursue the Section 36.1 Claims in the Adversary Proceeding, it is likely unnecessary to determine whether the order should be made *nunc pro tunc*. I am prepared to grant the order, however, since the Foreign

Representative has acted in this capacity throughout the Adversary Proceeding and the Section 36.1 Claims. It would be sensible, therefore, for this to be recognized by way of a *nunc pro tunc* order to avoid any uncertainty.

[44] In conclusion, I see no mischief in allowing the Foreign Representative to pursue the Section 36.1 Claims in the Adversary Proceeding. It is consistent with the broad and liberal reading that should be afforded to the CCAA. This is provided for in the relevant wording of the BIA and CCAA and is to the benefit of the Applicants and stakeholders. For the reasons above, the Monitor will maintain its supervisory capacity. The Monitor's assistance would also be useful to the Foreign Representative as it maintains its duties as a court-appointed officer.

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DISPOSITION

[45] The order shall therefore go allowing the Foreign Representative and other Just Energy Entities, as the case may be, to pursue the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc,* with the Monitor being authorized and directed to take whatever actions and steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

[46] I have reviewed the draft order provided to me by the Foreign Representative. The terms of the order are fair and reasonable. I have signed the order and will provide it to counsel. I attach a copy of the order to this Endorsement as Schedule "A".

McEwen, J.

Released: May 5, 2022

Schedule "A"

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY THE 5th
	)	
JUSTICE MCEWEN	)	DAY OF MAY, 2022

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT. (each, an "**Applicant**", and collectively, the "**Applicants**")

ORDER
(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

THIS MOTION, made by Just Energy Group, Inc. ("**Just Energy**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Applicants and the partnerships listed on Schedule "A" of the Initial Order (collectively, the "**Just Energy Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for various relief was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

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ON READING the Notice of Motion of the Foreign Representative, the Affidavit of James Tecce affirmed April 14, 2022, including the exhibits thereto (the "**Tecce Affidavit**") and the Ninth Report of FTI Consulting Canada Inc., in its capacity as monitor (the "**Monitor**"), dated April 18, 2022 (the "**Ninth Report**"), and on hearing the submissions of respective counsel for the Foreign Representative, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Emily Paplawski, affirmed April 14, 2022, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

STANDING TO PURSUE ADVERSARY PROCEEDING

2. **THIS COURT ORDERS** that:

   (a) the Foreign Representative and other Just Energy Entities, as the case may be, are hereby authorized and empowered to pursue the Section 36.1 Claims (as defined in the Tecce Affidavit) in the adversary proceeding commenced in the United States Bankruptcy Court for the Southern District of Texas (the "**U.S. Bankruptcy Court**") bearing adversary proceeding no. 21-4399 (MI) (the "**Adversary Proceeding**"), *nunc pro tunc*; and

   (b) the Monitor is hereby authorized and directed to take whatever actions or steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

GENERAL

3. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces

and territories in Canada.

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

McE J.

2022 ONSC 2697 (CanLII)

Court File No: CV-21-00658423-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., *et al*.

Applicants

5 May 22

Order to go as per the draft filed and signed.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Motion re Authorization to Pursue Section 36.1 Claims in Adversary Proceeding)

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2022 ONSC 2697 (CanLII)

CITATION: Just Energy Group Inc. et. al., 2022 ONSC 2697
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220505

2022 ONSC 2697 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSONENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING

CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

ENDORSEMENT

McEwen, J.

2022 ONSC 2697 (CanLII)

Released: May 5, 2022

Tab 9

Court of Queen's Bench of Alberta

Citation: Lutheran Church Canada (Re), 2016 ABQB 419

2016 ABQB 419 (CanLII)

Date: 20160802
Docket: 1501 00955
Registry: Calgary

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

and

In the Matter of Lutheran Church - Canada, the Alberta - British Columbia District, Encharis Community Housing and Services, Encharis Management and Support Services, and Lutheran Church – Canada, The Alberta – British Columbia District Investments Ltd.

Corrected judgment: A corrigendum was issued on August 30, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decisions
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately $95.7 million, plus 12 trade creditors with claims of approximately $957,000. There are 896 investors in the Church investment corporation with outstanding claims of $22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought

were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

[2] A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so. I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

2016 ABQB 419 (CanLII)

II. Factual Overview

A. Background

[3] On January 23, 2015, the Lutheran Church – Canada, the Alberta – British Columbia District (the "District"), Encharis Community Housing and Services ("ECHS"), Encharis Management and Support Services ("EMSS") and Lutheran Church – Canada, the Alberta – British Columbia District Investment Ltd. ("DIL", collectively the "District Group") obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. Deloitte Restructuring Inc. was appointed as Monitor and a CRO was appointed for the District and DIL.

[4] The District is a registered charity that includes the Church Extension Fund ("CEF"), which was created to allow District members to lend money to what are characterized as faith-based developments. Through the CEF, the District borrowed approximately $96 million from corporation, churches and individuals. These funds were invested by the District in a variety of ways, including loans and mortgages available to congregations to build or renovate churches and schools, real estate investments, and a mortgage on a real estate development known as the Prince of Peace Development.

[5] CEF was managed by the District's Department of Stewardship and Financial Ministries and was not created as a separate legal entity. As such, District members who loaned funds to CEF are creditors of the District (the "District Depositors").

[6] ECHS owned land and buildings within the Prince of Peace Development, including the Manor and the Harbour, senior care facilities managed by EMSS. EMSS operated the Manor and Harbour for the purpose of providing integrated supportive living services at the Manor and the Harbour to seniors.

[7] The Prince of Peace Development also included a church, a school, condominiums, lands known as the Chestermere lands and other development lands.

[8] DIL is a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for annuitants. Concentra Trust acted as the trustee with respect to these investments. Depositors to DIL are referred to as the "DIL Investors". The District Depositors and the DIL Investors will collectively be referred to as the "Depositors".

[9] Soon after the initial order, the District and the Monitor received feedback that the District Depositors and the DIL Investors wanted to have a voice in the *CCAA* process. Thus, on February 13, 2015, Jones, J granted an order creating creditors' committees for the District (the "District Creditors' Committee") and DIL (the "DIL Creditors' Committee"), tasked with representing the interests of the District Depositors and DIL Investors. The members of the committees were elected from among the Depositors. By the order that created them, they must act in a fiduciary capacity with respect to their respective groups of creditors. The committees were authorized to engage legal counsel, who have represented them throughout the *CCAA* process, and the committees and their counsel have been active participants in the process.

[10] ECHS and EMSS prepared plans of compromise and arrangement that were approved by creditors and sanctioned by the Court in January 2016. Pursuant to those plans, ECHS' interest in the condominiums was transferred to a new corporation that is to be incorporated under the District Plan ("NewCo"). The Chestermere lands were sold. The remainder of the lands and buildings (the "Prince of Peace properties") are dealt with in the District Plan.

[11] On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church – Canada, Lutheran Church – Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

[12] On March 3, 2016, DIL submitted a plan of arrangement that had been approved by creditors for sanction by the Court. I deferred the decision on whether to sanction the DIL plan until the District plan had been finalized, presented to District creditors, and, if approved, submitted for sanctioning. At the same time, I stayed the class action proceedings. The DIL and District plans contain similar provisions that are subject to controversy among some Depositors. There is considerable overlap among the DIL Investors and the District Depositors.

[13] On July 15, 2016, the District applied for an order sanctioning the District plan. On the same day, the Depositors who commenced the class action proceedings applied for an order replacing the Monitor.

B. The District Plan

[14] The District plan has one class of creditors. Pursuant to the claims process, there were 2,638 District Depositors. An emergency fund was implemented prior to the filing date and approved by the Court as part of the initial order, to ensure that District Depositors, many of whom are seniors, would have sufficient funds to cover their basic necessities. Taking into account those payments, District Depositors had proven claims of approximately $96.2 million as at December 31, 2015.

[15] Under the plan, each eligible affected creditor will be paid the lesser of $5,000 or the total amount of their claim (the "Convenience Payment(s)") upon the date that the District plan takes effect. This will result in 1,640 District Depositors (approximately 62%) and 10 trades creditors (approximately 77%) being paid in full. The Convenience Payments are estimated to total $6.3 million.

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[16] The District plan contemplates the liquidation of certain non-core assets. Each time the quantum of funds held in trust from the liquidation of these assets, net of the "Restructuring Holdback" and the "Representative Action Holdback" referred to later in this decision, reaches $3 million, funds will be distributed on a pro-rata basis to creditors.

[17] If the District plan is approved, a private Alberta corporation ("NewCo") will be formed following the effective date of the plan. NewCo will purchase the Prince of Peace properties from ECHS in exchange for the NewCo shares. The value of the NewCo shares would be based on the following:

a) the forced sale value of the Harbour and Manor seniors' care facilities based on an independent appraisal dated November 30, 2015;
b) the forced sale value of the remaining Peace of Peace properties, based on an independent appraisal dated October 15, 2015;
c) the estimated value of the assets held by ECHS that would be transferred to NewCo pursuant to the ECHS plan; and
d) the estimated value of the assets held by EMSS that would be transferred to NewCo pursuant to the EMSS plan.

[18] ECHS will then transfer the NewCo shares to the District in partial satisfaction of the District – ECHS mortgage. The NewCo shares will be distributed to eligible affected creditors of the District on a pro-rata basis. The Monitor currently estimates that creditors remaining unpaid after the Convenience Payment will receive NewCo shares valued at between 53% and 60% of their remaining proven claims. The cash payments arising from liquidation of non-core assets and the distribution of shares are anticipated by the Monitor to provide creditors who are not paid in full by the Convenience Payments with distributions valued at between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. Non-resident creditors (8 in total) will receive only cash.

[19] Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and
b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

[20] The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

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[21] NewCo's bylaws will include a clause requiring that 50% of the board of directors must be comprised of District Depositors or their nominees. Although NewCo is being created with the object of placing the NewCo assets in the hands of a professional management team with appropriate business and real estate expertise, the District Creditors' Committee wanted to ensure that affected Creditors will have representation equal to that of the professional management team on the NewCo board. The members of the NewCo board may change prior to NewCo being formed, subject to District Creditors' Committee approval. Subsequent changes to the NewCo board would be voted on at future shareholder meetings.

[22] The articles of incorporation for NewCo will be created to include the following provisions, which are intended to provide additional protection for affected creditors:

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;
b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;
c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;
d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and
e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

[23] The District plan establishes a Representative Action process whereby a future legal action or actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those District Depositors who elect or are deemed to elect to participate. The Representative Action would include only claims by District Depositors who are not fully paid under the District plan and specifically includes the following:

a) claims related to a contractual right of one or more of the District Depositors;
b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;
c) claims for breach of any legal, equitable , contractual or other duty;
d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and
e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

[24] District Depositors may opt-out of the Representative Action process, in which case they would be barred from further participation. Evidently, some Depositors are precluded by their religious beliefs from participating in this type of litigation.

[25] The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the

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Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, the estimated amount of the Representative Action Holdback, the commencement date of the representative action, the deadline for opting out of the Representative Action and instructions on how to opt out of the Representative Action should they choose to do so.

[26] A Subcommittee will be established to choose legal counsel to represent the participating District Depositors. The Subcommittee will include between three and five individuals and all members of the Subcommittee will be appointed by the District Creditors' Committee. The Subcommittee is not anticipated to include a member of the District Committee.

[27] The duties and responsibilities of the Subcommittee will include the following:

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;
b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;
c) remaining in place throughout the Representative Action with its mandate to include:
   (i) assisting in maximizing the amount available for distribution;
   (ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;
   (iii) replacing counsel;
   (iv) serving in a fiduciary capacity on behalf of the participating District Depositors;
   (v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and
   (vi) bringing any matter before the Court by way of an application for advice and direction.

[28] The Representative Action process will be the sole recourse available to District Depositors with respect to the Representative Action claims.

[29] The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and
b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

[30] The following claims are specifically excluded from being released by the District plan:

a) claims against directors that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors as set out in Section 5.1(2) of the *CCAA*;

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b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;
c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and
d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

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C. The District Meeting

[31] On March 21, 2016, I granted an order authorizing the District to file the District plan of compromise and arrangement and present it to the creditors. A draft version of the Monitor's Report to District Creditors was provided to both the Court and counsel for the class action plaintiffs ahead of the District meeting order being granted. Neither class action counsel voiced specific concerns with the disclosure provided therein.

[32] The first meeting of District creditors was held on May 14, 2016. Counsel for the BC and Alberta class action plaintiffs were in attendance and able to make submissions to the meeting and to question the Monitor. A number of attendees made submissions and asked questions. Certain documents that had been referenced in a Monitor's FAQ report on the issue of future potential development of the Prince of Peace properties (described later in this decision) were discussed in detail and questions with respect to these documents were answered by the Monitor. The meeting lasted approximately six hours. It was adjourned at the request of the representative of a Depositor who wanted more time to consider the Prince of Peace development disclosure and obtain further instructions from his congregation.

[33] After making inquiries and being satisfied that congregations who wished further consultation had time to do so, the Monitor posted a notice on its website on May 20, 2016 that the reconvened meeting was to be held on June 10, 2016. The notice was sent by email to those creditors who are congregations on May 20, 2016 and sent by regular mail to all creditors on May 24, 2016. The notice advised creditors that they had additional time to change their vote on the District plan, should they choose to do so. Four congregations asked the Monitor for further information before the reconvened meeting.

[34] The Monitor received a total of 1,294 votes on the District plan from eligible affected creditors with claims totalling approximately $85.1 million. Of these votes, 1,239 were received by way of election letters and 55 were received by way of written ballots submitted in person or by proxy at the District meeting. In total, 50% of eligible affected creditors voted and the claims of those creditors who voted represented 88% of the total proven claims of eligible affected creditors.

[35] Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore, the District plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting eligible affected creditors.

D. The DIL Plan

[36] The DIL plan includes only one class of affected creditors consisting of DIL Investors. The DIL Investors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts held by DIL Investors are RRSP and RRIF accounts.

[37] Following the release of the original DIL package of meeting materials, based on discussions with DIL Investors, the Monitor prepared two documents entitled “Answers to frequently asked questions” (the “FAQs”), one of which was dated December 24, 2015 and the other dated January 18, and amended January 20, 2015.

[38] The DIL plan contains provisions for the orderly transition of the registered accounts from Concentra to a replacement trustee and administrator. As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlines in the DIL plan, to the replacement fund manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the fund manager.

[39] Pursuant to previous order, DIL was authorized to distribute up to $15 million to the DIL Investors. For those DIL Investors who held registered retirement savings plan, tax free savings accounts or locked-in retirement accounts with DIL, their pro-rate share of the first DIL Distribution was transferred into accounts that had been established with the replacement fund manager. For those DIL Investors who held RRIFs or LIFs, their pro-rate share of the first DIL distribution was transferred upon their request, to an alternate registered account of their choosing. A second distribution of up to $7.5 million was made in April, 2016.

[40] In addition to this these interim distribution, statutory annual minimum payment to RRIF holders were made for 2015. Selected DIL Investors also received payments pursuant to the emergency fund. Taking into account these payments, pre-filing distributions to DIL Investors totalled approximately $15.6 million, 41% of their original investment without taking into account any estimated write-downs on the value of the assets held by DIL.

[41] The DIL plan contains substantially the same provisions with respect to limited releases and a Representative Action process as the District plan.

[42] The Monitor estimates that, prior to any recovery under the Representation Action, DIL Investors will recover between 77% and 83% of their original investment as of the filing date.

E. The DIL Meeting

[43] The DIL meeting of creditors was held on January 23, 2016.

[44] There were 87 attendees at the DIL meeting. The Monitor received a total of 472 votes from DIL Investors with claims totalling approximately $14.5 million. In total, 53% of DIL Investors voted and the claims of those DIL Investors who voted represented 65% of the total proven claims of DIL Investors.

[45] Of the 472 DIL Investors who voted, 434, or approximately 92%, voted in favour of the DIL plan and 38 DIL Investors, or approximately 8%, voted against the DIL plan. Those DIL Investors who voted in favour of the DIL plan had claims totalling approximately $12.7 million, or approximately 87% of the claims, and those DIL Investors who voted against the DIL plan had claims totalling approximately $1.8 million, or approximately 13% of the claims and a majority in number of voting DIL Investors. Therefore, the DIL plan was approved by the required double majority.

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III. The Applications

A. Application to Remove the Monitor

[46] The Depositors who commenced the British Columbia class action proceedings, Elvira Kroeger and Randall Kellen, apply:

a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively
b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;
c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and
d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

[47] They are supported in their application by the Alberta class action plaintiffs, collectively the "opposing Depositors". The opposing Depositors submit that the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion with respect to the Representative Action provisions of the District plan. They also submit that the Monitor has breached its fiduciary duty to the Court and to the District creditors by failing to disclose certain municipal planning documents relating to the Prince of Peace Development.

1. Overview

[48] It is trite law that the Monitor in *CCAA* proceedings is an officer of the Court and that its duty is to act in the best interests of all stakeholders. Monitors are required to act honestly and fairly and to provide independent observation and oversight of the debtor company.

[49] The Monitor is expected and required to report regularly to the Court, creditors and other stakeholders, and has a statutory obligation to advise the Court on the reasonableness and fairness of any plan of arrangement proposed between the debtor and its creditors: section 23(1) of the *CCAA*. Courts accord a high level of deference to decisions and opinions of the Monitor.

[50] The opposing Depositors submit that the Monitor is acting as an advocate of the debtor, without a sufficient degree of neutrality. They submit, by implication, that I should give the Monitor's recommendations on the plans little or no deference for that reason.

[51] An attack on the Monitor is an attack on the integrity of the *CCAA* process, and must be taken seriously.

2. Conflict of Interest

[52] The opposing Depositors allege that the Monitor has a conflict of interest on the following bases:

a) In its Pre-Filing Report to the Court, the Monitor disclosed that it had provided consulting services to the District between February 6, 2014 and the date of the initial order, including:

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(i) on February 6, 2014; to provide an independent evaluation of the potential options relating to the Prince of Peace Development and to create a plan for executing the option that was ultimately chosen;

(ii) on June 30, 2014; to provide an evaluation of the debt structure of the CEF as it related to the District, the members of the District, ECHS, EMSS and the Prince of Peace Development; and

(iii) on July 25, 2014; to act as a consultant regarding the informal or formal restructuring of the District Group.

b) In its Fourth Report dated June 24, 2015, the Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. While the Monitor had performed a conflicts check prior to agreeing to act as Monitor, this check failed to flag the previous audit engagement. The Monitor further stated that, while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might be precluded from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development for the period during which it had acted as auditor. However, as the District had been unable to produce supporting documentation with respect to funds expended on the Prince of Peace development prior to 2006, and Deloitte did not act as auditor subsequent to 1999, the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available".

c) On March 8, 2016, the Monitor advised the Court and the parties that Deloitte & Touche had completed the DIL audit for the years ended January 31, 1998 and January 31, 1999, the first two years during which DIL operated the registered fund. Again, the reason for the late disclosure appears to be that the engagements were recorded under different names those now used by the District.

[53] These previous services do not, on their face, disqualify the Monitor from acting as Monitor. With respect to the audit services, it is not a conflict of interest for the auditor of a debtor company to act as Monitor in *CCAA* proceedings. In this case, the sister company of the Monitor has not been the auditor of either the District or DIL for over 16 years, The Monitor does not suffer from any of the restrictions placed on who may be a Monitor by Section 11.7(2) of the *Act*. While the late disclosure of the historical audits was unfortunate, audits performed more than 16 years ago by a sister corporation raise no reasonable apprehension of bias, either real or perceived.

[54] It is also not a conflict of interest, nor is it unusual, for a proposed Monitor to be involved with the debtor companies for a period of time prior to a *CCAA* filing. The Monitor made full disclosure of that involvement prior to being appointed, more than a year before this application was brought.

[55] This is not a case where a Monitor was involved in or required to give advice to the Court on the essential issue before it, such as a pre-filing sales process. The issues with respect to the plans before the Court arise from details of the plans that have been the subject of negotiation and consultation among the District Group, the Creditors' Committees and the Monitor post-filing.

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[56] The opposing Depositors, however, point to certain representations that were made by the District in letters to some of Depositors in the months prior to the *CCAA* filing, which they say were untrue and misleading. They submit that the Monitor must have known about these letters, and thus condoned, if not participated in, misrepresentations made to the Depositors.

[57] The Monitor responds that it did not act in a management capacity with respect to the District nor did it prepare or issue communications pre-filing. It did not control the District Group.

[58] There is no realistic indication of conflict arising from these allegations. The attempt to taint the Monitor with knowledge of letters sent by the District to the Depositors is speculation unsupported by any evidence.

[59] The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that the District commence legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

[60] It is not appropriate for this Court to determine or to speculate on whether the Depositors have a realistic cause of action against an auditor sixteen years after the final audit engagement, but assuming that the Representative Action provisions of the plans could result in an action against a sister corporation of the Monitor, the proposed ongoing role of the Monitor in those proceedings should be examined to determine whether such role could give rise to a real or perceived conflict of interest.

[61] As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of the Subcommittees, the name of the representative counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting out of the Representative Action, and instructions on how to opt-out of the Representative Action should Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

[62] The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be,

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and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

[63] In the circumstances, the Monitor is the most appropriate party to be involved in communication with Depositors in the early stages of the Representative Action process, as it has the information and experience necessary to ensure that such communication is done quickly, effectively, and at the lowest possible expense.

[64] The mere possibility of a decision to proceed against the Monitor's sister corporation does not justify the expense and disruption of bringing in a new Monitor to perform these administrative tasks. If the Subcommittees determine that an action can be commenced against the historical auditors that is not barred by limitations considerations, the issue of a real, rather than a speculative conflict, can be raised before the Court for advice and direction in accordance with the plans. The possibility that the Subcommittees may decide not to proceed against the historical auditors does not imply undue influence from the Monitor. The members of the Subcommittees will be fiduciaries, bound to act in the best interests of the remaining creditors.

[65] There is no persuasive argument nor any evidence that they would act other than in those best interests.

[66] The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

[67] The opposing Depositors submit that there are "substantive and procedural benefits" from its continuing position that the Monitor may take advantage of. On closer examination, those alleged advantages are insignificant.

[68] In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

[69] A more serious charge against the Monitor than conflict of interest is the opposing Depositors' allegation that the Monitor breached its fiduciary duty to the Court and to District Depositors by failing to disclose certain municipal planning documents.

[70] The documents at issue are:

a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and

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b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

[71] The MSDP identifies several prerequisites to development of the Prince of Peace properties, including a connection to the municipal water supply, the upgrading of the sanitary sewer lift station and work on a storm water management infrastructure. The Monitor notes the MSDP was prepared specifically for the development contemplated by EHSS in 2012, being medium density residential and additional assisted living capacity, ground floor retail and a parkade structure. As such, it is likely outdated and may not align with future development. A more recent appraisal of the properties in 2015 assumed low density development. The 2015 appraisal of the properties takes into account the work that would need to be undertaken by any third party who wished to further develop the Prince of Peace properties.

[72] The opposing Depositors submit that the infrastructure projects identified by the MSDP would be costly and would likely pose barriers to development. They presented hearsay evidence of a conversation Mr. Kellen had with a Rocky View official that is of limited relevance apart from its hearsay nature, because future development would likely be different from what was contemplated in 2012.

[73] The Conrich ASP stipulates that no development may occur within the Hamlet of Conrich until the kinds of infrastructure requirements identified in the MSDP are met. The ASP is being appealed by the City of Chestermere.

[74] The Monitor became aware of these documents during its pre-filing services to the District Group. When a Depositor raised a question about these reports on April 28, 2016 at an information meeting, the Monitor prepared a QFA document dated April 29, 2016 regarding the future subdivision and development of the Prince of Peace properties and referencing the documents. This QFA was posted on the Monitor's website on April 29, 2016 and mailed to all affected creditors with claims over $5,000 on May 3, 2016, more than a month before the meeting at which the District plan was approved.

[75] The issue is whether the Monitor breached its duty to the Court and creditors by failing to disclose these reports earlier. The answer to this question must take into account the context of the District plan and the nature of the Monitor's recommendations.

[76] The District plan does not contemplate that any further development of the Prince of Peace properties would occur pursuant to the *CCAA* proceedings. The possibility that NewCo shareholders would pursue further development is one of the options available to NewCo or to a third party purchaser of the Prince of Peace properties if NewCo shareholders decide to sell the properties, as recognized in the plan materials. The plan gives NewCo shareholders the opportunity to consider their options.

[77] As the Monitor notes, a vote on the District plan is not a vote in favour of any particular mandate for NewCo. The District plan contemplates that a NewCo shareholders' meeting will be held within six months of the District plan taking effect, at which time the NewCo shareholders will vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation of all or a portion of the assets held by NewCo, a joint venture to further develop the Prince of Peace properties or

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other options. These options will need to be investigated and reported on by NewCo's management team ahead of the NewCo shareholders' meeting.

[78] It was in this context that the Monitor considered the content of its reports to Depositors on the District plan and did not disclose the two plans, which in any event may be dated and of little relevance to a future development. I do not accept the opposing Depositors' allegation that the Monitor "concealed" this information.

[79] In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

[80] A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit from the ability to liquidate the Prince of Peace Properties at a time when market conditions are more favourable or the ability to benefit from potential upside opportunities that may be available such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture to further develop the Prince of Peace Properties or through other options (emphasis added).

[81] Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

[82] The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

[83] The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

[84] As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

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[85] The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

[86] The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

[87] They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

[88] A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

[89] The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

[90] One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

[91] The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their

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opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

[92] The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

[93] The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor. A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

[94] These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

[95] The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote. It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

[96] The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

[97] I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

[98] The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of

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the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

[99] The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

[100] Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

[101] The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

[102] It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffatt v Wetstein*, [1996] O.J. No. 1966 at para 131.

[103] While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

[104] I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

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[105] Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

[106] I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

[107] At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

[108] I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

[109] The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

[110] The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

[111] There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

[112] I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

[113] As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

[114] The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

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(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done that is not authorized by the *CCAA;* and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd v Royal Trust Co (1993), 17 CBR (3d) 1(Ont Ct J(Gen Div)) at para 17; *Re Canadian Airlines Corp* , 2000 ABQB 442 at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60; *Re Canwest Global Communications Corp,* 2010 ONSC 4209 at para 14.

[115] It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

[116] They submit:

(a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;
(b) the plans compromise third party claims;
(c) the plans provide no benefit to Depositors within the purpose of the CCAA;
(d) the plans contravene section 5.1(2) of the *CCAA*;
(e) the plans have not been advanced in good faith, with due diligence and full disclosure; and
(f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the *CCAA*?

[117] The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

[118] The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

[119] The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

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[120] This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

[121] The opposing Depositors cite *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 240 OAC 245, 2008 ONCA 587 (CanLii); leave dismissed [2008] SCC No. 32765 for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

[122] The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

[123] The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA*. That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

[124] Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church – Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

[125] There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

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2. Do the Representative Action provisions of the plans compromise third party claims?

[126] The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

[127] The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

[128] The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

[129] If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

[130] It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

[131] While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

[132] The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

(a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;
(b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

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(c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and
(d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

[133] The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA*. As noted by the Supreme Court in *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

[134] The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

[135] The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the *CCAA*?

[136] Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

[137] As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

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5. Have the plans been advanced in good faith, with diligence and full disclosure?

[138] As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

[139] The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

[140] The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

[141] Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

[142] Farley, J. in *Re: Sammi Atlas Inc,* [1998] O.J. No. 1089 at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> … is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved – subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will

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> involve pain – if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.,* [1993] O.J. No. 1479.

[143] The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

[144] Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Re Muscletech Research & Development Inc.,* [2007] O.J. No. 695 at para 18 commented:

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

[145] The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Re* G*old Texas Resources* [1989] B.C.J. No. 167 at page 4, to the effect that the court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority…. (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

[146] The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

[147] I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly 1 ½ months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

[148] The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

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[149] As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

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[150] I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

[151] The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

[152] Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

[153] Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

[154] Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

[155] The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contact Enterprises Inc, Re* 2015 BCSC 129;

Target Canada Co., Re 2016 CarswellOnt 8815; *Nelson Financial Group Ltd., Re* 2011 ONSC 2750.

[156] As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

[157] The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

[158] This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

[159] The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

[160] The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

[161] The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of

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compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

[162] This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

[163] In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

[164] The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty* at paras 3&4; *Muscletech* at para 18.

[165] The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

[166] However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

[167] It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

[168] The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

[169] Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of

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views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

[170] As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

[171] The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

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

7. Conclusion

[172] As noted at para 18 of *Metcalfe*:

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

[173] In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

[174] The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

[175] Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

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[176] The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

[177] The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* " in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

[178] The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Heard on the 15th day of July, 2016.
Dated at the City of Calgary, Alberta this 2nd day of August, 2016.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Francis N.J. Taman and Ksena J. Court
for the District Group

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Jeffrey L. Oliver and Frank Lamie
for the Monitor

Chris D. Simard and Alexis E. Teasdale
for the District Creditors' Committee

Douglas S. Nishimura
for the DIL Creditors' Committee

Errin A. Poyner
for Elvira Kroeger and Randall Kellen

Allan a. Garber
for Marilyn Huber and Sharon Sherman

Dean Hutchison
for Concentra Trust

Christa Nicholson
for Francis Taman and Bishop and McKenzie LLP

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Corrigendum of the Reasons for Decisions
of
The Honourable Madam Justice B.E. Romaine

On page 30 - Ms. Nicholson is counsel only for Francis Taman and Bishop and McKenzie LLP.

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Tab 10

Court File No. CV-21-00658423-00CL

Just Energy Group Inc. et al.

**TENTH REPORT OF FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS COURT-APPOINTED MONITOR**

May 18, 2022

F T I CONSULTING

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Appendix "A" Plan of Compromise and Arrangement, dated May 26, 2022

Appendix "B" Cash Flow Forecast for the period ending August 20, 2022

Appendix "C" Fee Affidavit of Paul Bishop sworn May 17, 2022

Appendix "D" Fee Affidavit of Rachel Nicholson sworn May 16, 2022

Appendix "E" Fee Affidavit of John Higgins sworn May 11, 2022

112. The Monitor supports extending the Stay Period to August 19, 2022 for the following reasons:

   (a) the Monitor is of the view that the proposed extension to the Stay Period is necessary to provide the Just Energy Entities with time to:

      (i) satisfy the Milestones under the Support Agreement and allow the 62-day Voting Period to occur;

      (ii) call, hold and conduct the Creditors' Meetings;

      (iii) if approved by the Required Majorities of Creditors at the Creditors' Meetings, seek the Sanction Order;

      (iv) if granted, implement the Plan and emerge from the CCAA Proceedings and Chapter 15 Proceedings;

   (b) as indicated by the Summer 2022 Cash Flow Forecast, the Just Energy Entities are forecast to have sufficient liquidity to continue operating in the ordinary course of business during the requested extension of the Stay Period;

   (c) no creditor of the Just Energy Entities would be materially prejudiced by the extension of the Stay Period; and

   (d) in the Monitor's view, the Just Energy Entities have acted in good faith and with due diligence in the CCAA Proceedings since the inception of the CCAA Proceedings.

APPROVAL OF THE FEES AND ACTIVITIES OF THE MONITOR

113. The proposed Authorization Order seeks approval of (i) the activities and conduct of the Monitor since the date of Ninth Report; (ii) this Tenth Report; and (iii) the fees and disbursements of the Monitor and its counsel from October 30, 2021 to May 6, 2022 and May 7, 2022, as applicable.

114. As outlined in the Monitor's previous reports to the Court (all of which are available on the Monitor's Website), the Monitor and its counsel have played, and continue to play, a significant role in the CCAA Proceedings. The Monitor respectfully submits that its actions, conduct, and activities in the CCAA Proceedings since the Ninth Report have

Tab 11

Citation:	In the Matter of the Proposal of Port Chevrolet Oldsmobile Ltd. 2002 BCSC 1874	Date:	20021113
		Docket:	228939 VA02
		Registry:	Vancouver

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Madam Justice Neilson
As Pronounced in Chambers
November 13, 2002

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT

AND

IN THE MATTER OF THE PROPOSAL OF

PORT CHEVROLET OLDSMOBILE LTD.

Counsel for Minister of National Revenue	E. McDonald
Counsel for Port Chevrolet Oldsmobile Ltd.	J. Grieve
Counsel for Trustee, PricewaterhouseCoopers, Inc.	B. Ingram

INTRODUCTION

[1] **THE COURT:** This is an appeal by Canada Customs Revenue Agency ("CCRA") under ss. 108 and 135(4) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, with respect to a trustee's decision to disallow CCRA's proof of claim for voting purposes at a first meeting of the creditors of Port

Chevrolet Oldsmobile Ltd. ("Port") on October 25, 2002, and with respect to the Chair's decision at that meeting to value CCRA's claim at zero for the purpose of the vote taken. CCRA seeks amendment of the results of the vote to reflect its vote against the proposal, and a resulting declaration that the proposal was defeated, or, alternatively, a declaration that the vote was invalid.

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THE FACTS

[2] On July 9, 2002, following a lengthy investigation, CCRA issued an assessment to Port for $16,436,009.96, that it says Port owes under the ***Excise Tax Act***, R.S.C. 1985, c. E-15. The material indicates that the debt is based on allegations that Port has been party to fraud, in claiming input tax credits with respect to GST paid on purchases of non-existent vehicles. A substantial part of the amount in the assessment is penalties and other charges related to that activity.

[3] CCRA immediately took action to seize Port's assets.

[4] Port emphatically denies that it knowingly engaged in fraud or owes any money to CCRA. It says it was an innocent dupe of a third party, who was engaged in a scheme of selling non-existent vehicles. On July 10, 2002, in order to forestall CCRA's execution proceedings, Port filed a Notice of

Intention to Make a Proposal under the ***Bankruptcy and Insolvency Act***, in the hope of fashioning a means of retaining its assets and keeping its business operational while it pursued its remedies under the ***Excise Tax Act***. The proposal was faxed to CCRA on July 11, 2002.

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[5] Port advised CCRA that it would be formally objecting to the assessment soon after receiving it. Port filed a detailed Notice of Objection to the assessment under the ***Excise Tax Act*** in mid-September, objecting to the entire assessment. Port says that if it is successful, not only will the debt be extinguished but CCRA will owe it money.

[6] In the meantime, Port negotiated with its creditors, including CCRA, in an effort to reach agreement on an acceptable proposal that would allow it to continue operations while it prosecuted its Notice of Objection. CCRA declined to have any input into the proposal. On October 8, 2002, Port sent the trustee's report and a copy of the final proposal to CCRA.

[7] In that report, the trustee recommends that Port's creditors accept the proposal. It indicates that Port was operating at a profit before the proposal was necessitated by the CCRA assessment, that Port has appealed the assessment, and that the proposal is based on an assumption that Port will

successfully deal with the impact of the assessment. It proposes payment in full for secured creditors and creditors owed $400 or less. The remaining unsecured creditors are to be paid *pro rata* from a pool of at least $250,000 created through the continuing operations of the business. Unsecured claims, apart from CCRA's, are $434,000, making CCRA by far the largest unsecured creditor. The trustee's report advises that if Port is placed in bankruptcy, there will be no funds available to pay any unsecured creditors, and over 50 employees will lose their jobs, whereas acceptance of the proposal ensures unsecured creditors will receive part or even all of the funds owed, depending on the outcome of Port's assessment appeal.

[8] The first meeting of creditors was scheduled for October 25, 2002. Prior to the meeting, CCRA was non-committal about whether it would accept the proposal.

[9] CCRA filed its proof of claim the day before the meeting. It claims an unsecured debt of $15,864,279.83 as of July 10, 2002. The proof of claim states that "nil" payments and credits have been received in the three-month period prior to that. It does not mention the assessment or the Notice of Objection, or explain the discrepancy of almost $600,000

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between the amount claimed and the amount assessed on July 9, 2002.

[10] CCRA's representative, Mr. O'Connell, says that he had no idea that the claim would be disallowed for the purpose of the vote until he arrived for the meeting. Port's counsel told him that morning that he intended to ask that the claim be disallowed if CCRA intended to vote against the proposal.

[11] Mr. O'Connell then met with Mr. McMorran, the trustee, and asked to adjourn the meeting to seek legal advice. Mr. McMorran told him that he would have to ask the Chair for an adjournment prior to the vote. Mr. O'Connell says that Mr. McMorran was non-committal about the position the trustee would take on CCRA's proof of claim.

[12] Mr. McMorran says, however, he told Mr. O'Connell the proof of claim did not reference the Notice of Objection and confirmed with him that the matter was still proceeding through CCRA's appeal process. He says Mr. O'Connell acknowledged that one possible outcome of the appeal was a finding that the value of CCRA's proof of claim was nil. Mr. McMorran says he then told Mr. O'Connell that until Port's Notice of Objection was dealt with, he viewed CCRA's proof of claim to be a contingent claim and not proven, and that while

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CCRA could remain at the meeting, its claim had no value for voting purposes.

[13] The meeting was conducted by a representative of the Office of the Superintendent of Bankruptcy. Mr. McMorran told the meeting that the trustee took the view that CCRA's claim was unproven as it was based on an unresolved appeal and Notice of Objection. As a result, he had disallowed it and valued it at nil. The Chair later confirmed this, stating that the trustee had determined it was a contingent claim as it was under active appeal. CCRA said it did not accept this decision and sought an adjournment, which was denied.

[14] The vote took place, with CCRA's intention to vote against the proposal noted but not counted. Ninety-eight percent of the other creditors present, in value and number, voted in favour of the proposal. The proposal preserves CCRA's right to share *pro rata* in the funds generated for unsecured creditors from the continuation of the business despite the fact it did not vote.

[15] On October 28, 2002, pursuant to a request from CCRA, the Chair provided written reasons for determining its claim was contingent and valuing it at nil for voting purposes. The second and third paragraphs of those reasons state:

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> As the minutes of the meeting of creditors will reflect, the trustee, Mr. Gordon McMorran, advised me before the meeting that he had made a determination that the claim of CCRA was a contingent claim as there was an ongoing appeal of the assessment in respect of GST. As a result, pursuant to section 135, the trustee had accepted the claim but assigned it a nil value.
>
> Section 109(1) of the ***Bankruptcy and Insolvency Act*** provides that a person is only entitled to vote at a meeting of creditors if he or she has a provable claim. By section 121(2), a contingent claim or a claim for unliquidated damages is only a provable claim for the amount at which it has been valued by the trustee. As Chair of the meeting I accepted the decision of the trustee in respect of the value of the claim and so informed the meeting.

[16] Also on October 28, 2002, the trustee sent CCRA a formal Notice of Disallowance under s. 135(3) of the ***Bankruptcy and Insolvency Act***. This states that the proof of claim was disallowed as it was not supported by any evidence of the debt as required by s. 124(4) of the ***Bankruptcy and Insolvency Act***, and because the trustee was not persuaded that Port is indebted to CCRA based on the trustee's review of the Notice of Objection.

[17] Michael Wolfe, principal of Port, swears that throughout the CCRA investigation and the proceedings since the assessment, Port has consistently and strenuously denied any wrongdoing and any liability to CCRA under the ***Excise Tax Act***. He characterizes CCRA's conduct in attempting to immediately

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shut down the business on the basis of unproven allegations of fraud as "reprehensible" and a "vendetta", and says that if Port is successful in challenging the assessment, CCRA will owe it money. He says that if CCRA is allowed to place Port in bankruptcy before the validity of the assessment is determined, the result will be loss and injustice to other creditors and employees, as well as to Port itself. While Port has cooperated with CCRA and kept it informed of the process of the proposal, he says neither he nor Port's counsel ever led CCRA to believe its claim would be accepted without challenge at the creditors' meeting if CCRA did not support the proposal.

ANALYSIS

[18] CCRA's appeal rests essentially on two grounds:

1. Were the trustee and the Chair in error in disallowing the claim for non-compliance with s. 124 of the ***Bankruptcy and Insolvency Act***?

2. Did the trustee and Chair err in categorizing CCRA's claim as contingent and of no value for the purpose of voting?

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[19] I will deal first with the question of disallowance of the claim for non-compliance with s. 124. The relevant parts of ss. 124 and 135 of the ***Bankruptcy and Insolvency Act*** read:

> S. 124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> (2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
>
> (4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.
>
> S. 135(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim;
>
> (b) any right to a priority under the applicable order of priority set out in this Act; or
>
> (c) any security.
>
> (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall

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> forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[20] Form 31 under the ***Act*** provides the prescribed form of proof of claim mentioned in s. 124(2).

[21] Paragraph 1 of the Notice of Disallowance issued by the trustee after the meeting states:

> Your Proof of Claim is unsupported by any evidence for an alleged debt of $15,864,279.83 owed by Port on account of Goods and Services Tax. Subsection 124(4) of the BIA requires a proof of claim to include not only a statement of account but also the evidence by which the statement of account can be substantiated.

[22] Section 124(4) and paragraph 3 of Form 31 clearly require specification of evidence by which the claim can be substantiated, as well as a statement of account that includes reference to any counterclaim to which the debtor is entitled. As well, paragraph 6 of Form 31 requires a list of payments

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from, and credits to, the debtor within the three months immediately before the date of the initial bankruptcy event, which, here, is the notice of intention to make a proposal on July 10, 2002.

[23] The provisions dictating the form of a proof of claim are mandatory and to be strictly construed, and the proof of claim should be sufficient to enable the trustee to make an informed decision on its merits: ***Re G. Totton Publishers Ltd.*** (1975), 20 C.B.R. (N.S.) 140, (Ont. S.C.); ***Re Riddler*** (1991), 3 C.B.R. (3d) 273 (B.C.S.C.).

[24] CCRA's proof of claim follows the format of Form 31, and attaches a statement of account that shows a debt occurring between 1995 and 1998 of $15,864,279.83. It includes no reference to the assessment, or to any other basis for this account. There is nothing in the proof of claim that could be construed as evidence in support of the claim. It makes no mention of the Notice of Objection. Nor does it set out any explanation for the discrepancy of almost $600,000 between the debt described in the proof of claim and the assessment that was delivered on July 9, 2002. In paragraph 6, where it is required to state payments from, or credits to, the debtor in the three months preceding the date of bankruptcy event, the response is "nil".

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[25] In my view, these defects provided a lawful basis for the trustee to exercise his discretion in favour of disallowing the claim pursuant to s. 135(2). There was nothing in the proof of claim on which he could make an informed decision as to its merits.

[26] CCRA argues that the trustee was well aware of the assessment and Notice of Objection, and it is disingenuous to reject their proof of claim on that basis. I disagree. The fact that this information was available to the trustee elsewhere does not alleviate CCRA's obligation to comply with the mandatory provisions of s. 124 of the ***Bankruptcy and Insolvency Act***.

[27] Nor does that argument explain the significant discrepancy between the amount set out in the proof of claim and the assessment. Counsel for CCRA asks me to infer that it arises from credits to Port since July 10, 2002, but there is nothing in the proof of claim or the evidence on this appeal to permit such an inference, and I am not prepared to do so.

[28] Counsel for CCRA also argues that if the proof of claim did not set out sufficient evidence, it was incumbent on the trustee to require further evidence under s. 135(1). That provision, however, is discretionary, and places no obligation on the trustee to do so. This is particularly so, in my view,

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when the creditor chooses to deliver his proof of claim the day before the meeting. CCRA's decision to submit its claim at the last minute precluded any opportunity for discussion and amendment of its inadequacies prior to the meeting.

[29] CCRA seeks to explain the late delivery of its proof of claim by saying that no one had advised it there may be problems with its claim prior to the meeting. In fact, Mr. O'Connell relates discussions he had with Port's counsel in September 2002, in which he says he was told that a reference in correspondence to having CCRA's claim disallowed for voting purposes was explained away by saying the statement had been made only to satisfy General Motors' requirements for financing. The counsel involved denies this, through Mr. Wolfe.

[30] I recognize this raises an issue of credibility, but having considered these alleged statements by counsel in the overall context of the events surrounding the proposal, I find it difficult to believe they would have led CCRA to expect any leniency with respect to the formalities required to permit it to vote against the proposal. Port had consistently and strenuously denied the basis for CCRA's debt. Its proposal was necessitated by CCRA's action in executing against its assets. Port was fighting for its economic survival. CCRA,

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as the largest potential unsecured creditor, carried effective veto power over the proposal, and would not advise Port if it was in favour of it prior to the meeting. In my view, CCRA would be naive to think it could deliver an inadequate proof of claim in these circumstances, the day before the meeting without it being challenged.

[31] I recognize that ***Re Totton***, *supra*, suggests there should be some latitude given to creditors in filling out proofs of claim, as many are completed by creditors without the benefit of legal assistance. I find those comments have limited application, however, to sophisticated and experienced creditors such as CCRA.

[32] Finally, CCRA says it is inconsistent for the trustee to have preserved their right to share in the funds set aside for unsecured creditors under the proposal, while rejecting their proof of claim. That may be a gift horse for CCRA, but it does not alter the fundamental defects in its proof of claim.

[33] In ***Re Rix*** (1984), 53 C.B.R. (N.S.) 67 (B.C.S.C.), Wallace J. at 74 observed that the ***Bankruptcy and Insolvency Act*** has placed responsibility and discretion to approve proofs of claim with trustees who are experienced professionals, and it is not desirable for the courts to interfere with how that discretion is exercised. I find the trustee here was within

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proper exercise of his discretion in disallowing CCRA's proof of claim under s. 135(2), and I would dismiss the appeal on that ground.

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[34] However, it is not clear from the evidence that the defects in the proof of claim alone formed the basis of the trustee's decision to disallow CCRA's claim at the time of the meeting. It appears that he initially disallowed it because it was contingent, as it was subject to the pending Notice of Objection and appeal. I therefore find it necessary to go on and consider the second ground on which CCRA bases its appeal: that the trustee and Chair erred in categorizing its debt as contingent.

[35] CCRA's argument is based on ss. 299(3), 299(4), 313(1) and 315(2) of the ***Excise Tax Act***, which read:

> S. 299(3) Assessment valid and binding - An assessment, subject to being vacated on an objection or appeal under this Part and subject to a reassessment, shall be deemed to be valid and binding.
>
> S. 299(4) Assessment deemed valid - An assessment shall, subject to being reassessed or vacated as a result of an objection or appeal under this Part, be deemed to be valid and binding, notwithstanding any error, defect or omission therein or in any proceeding under this Part relating thereto.
>
> S. 313(1) Debts to Her Majesty – All taxes, net taxes, interest, penalties, costs and other amounts payable under this Part are debts due to Her Majesty in right of Canada and are recoverable as such in

> the Federal Court or any other court of competent jurisdiction or in any other manner provided under this Part.
>
> S. 315(2) Payment of Remainder – Where the Minister mails a notice of assessment to a person, any amount assessed then remaining unpaid is payable forthwith by the person to the Receiver General.

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[36] CCRA says these provisions clearly create a valid and binding debt due from the moment of assessment, regardless of the pending objection and the appeal process. It says this argument is strengthened by the fact that the ***Excise Tax Act*** places no restrictions on execution proceedings if an assessment is under objection or appeal. Thus, nothing in the ***Bankruptcy and Insolvency Act*** can permit the trustee to disallow a debt based on an assessment under the ***Excise Tax Act***.

[37] CCRA says that if the trustee does question the validity of such a debt, he must do so under the procedures provided by the ***Excise Tax Act***. In support of this argument CCRA cites ***Re Norris*** (1989), 75 C.B.R. (N.S.) (Ont. C.A.). There, the CCRA had issued a notice of assessment against a company for failure to remit taxes and U.I. premiums. The director of the company was liable for the same debt under the ***Income Tax Act*** and made an assignment into bankruptcy. CCRA filed a proof of claim in the same amount as the assessment. The trustee

disallowed the claim. The Ontario Court of Appeal ruled against the trustee, and set the disallowance aside. It considered s. 152(8) of the ***Income Tax Act***, which is substantially equivalent to ss. 299(3) and 299(4) of the ***Excise Tax Act***, and held that it required a trustee who wished to question the assessment against a bankrupt to seek his remedy within the ***Income Tax Act***, stating at 99:

> To hold that the trustee in bankruptcy can disallow an assessment made pursuant to the ***Income Tax Act*** would be tantamount to clothing the trustee with the powers of the Tax Court. No interpretation of the ***Bankruptcy Act*** can support such a conclusion.

[38] CCRA also points to ***Re Bateman*** (1998), 10 C.B.R. (4th) 197 (N.S.S.C.), where a similar result obtained with respect to a bankrupt who sought to challenge an assessment under the ***Excise Tax Act***, in the course of an application to annul his assignment into bankruptcy.

[39] CCRA argues that the same result must follow here. The assessment creates a binding and valid debt until it is set aside under the procedures outlined in the ***Excise Tax Act***. The trustee here thus had no power to categorize its claim as contingent, and value its claim at nil for voting purposes under the ***Bankruptcy and Insolvency Act***.

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[40] However, I find a significant distinction between those cases and the situation before me. Those authorities deal with a trustee managing a bankrupt estate, in which the assets were vested in the trustee. There had evidently been no challenge to the assessment by the debtor prior to bankruptcy. Nor had the trustee filed a notice of objection.

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

[42] In ***Re Norris***, the court relied on the judgment in ***Re Carnat Construction Company Limited*** (1958), 37 C.B.R. 47 (Ont.

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S.C.). That judgment, in my view, supports a role for both the ***Excise Tax Act*** and the ***Bankruptcy and Insolvency Act*** in circumstances such as those before me. At 48, Smily J. stated:

> I am of the opinion that where an assessment under ***The Income Tax Act*** has been made against a debtor, and that assessment is questioned by a trustee in bankruptcy, that the trustee should follow the provisions of ***The Income Tax Act***. I think the provisions of ***The Income Tax Act*** are binding on the estate of the bankrupt debtor and I do not think that they are in conflict with the provisions of ***The Bankruptcy Act***. In my opinion there is no question that ***The Bankruptcy Act*** provisions must be complied with, by the filing of proof of claim by the Crown with respect to income tax, and that this assessment may be disallowed by the trustee, and that in such event the Crown is called upon to proceed under the provisions of ***The Bankruptcy Act*** and appeal from that disallowance. But in so far as determining the amount of the tax, I think that should be done in accordance with the provisions of ***The Income Tax Act***. The trustee may properly inquire into the matter to determine whether the assessment is properly made in order that he may decide whether or not there should be proceedings taken against that assessment which would, as I say, be complying with the terms of ***The Income Tax Act*** and thus provide for the procedure, such as filing objections, and so forth, and also disallow the claim. However, when that disallowance comes before the court, if it does, then I think the proper procedure is that the amount of the income tax be determined under the provisions of ***The Income Tax Act*** rather than by the court in bankruptcy deciding the matter on the merits.
>
> [emphasis added]

[43] My interpretation of that passage, applied to the circumstances of this case, is that the debtor or trustee are

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bound to follow the appeal process under the ***Excise Tax Act*** to ascertain the final amount of any debt owed to CCRA. However, if CCRA wishes to participate in concurrent proceedings under the ***Bankruptcy and Insolvency Act***, then it is bound to comply with the ***Bankruptcy and Insolvency Act*** process with respect to proving its claim, and that compliance includes recognition of the trustee's powers to determine a claim is contingent and value it accordingly. I do not read ***Re Norris*** as precluding a trustee from exercising his discretion under s. 135(1.1).

[44] I find support for that view in s. 4.1 of the ***Bankruptcy and Insolvency Act***, which evidently was not brought to the attention of the court in ***Re Norris***, and which specifically states that the ***Bankruptcy and Insolvency Act*** binds Her Majesty in the Right of Canada. As counsel for the trustee pointed out, there is no provision in s. 299 of the ***Excise Tax Act*** which expressly subordinates the ***Bankruptcy and Insolvency Act*** to it such as is found in s. 224(1.2) of the ***Income Tax Act,*** for example:

> <u>Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law</u>...where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment
>
> (a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an

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> amount assessed under subsection 227(10.1) or a similar provision...
>
> the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable...
>
> [emphasis added]

[45] In the circumstances I have described, I am satisfied that the trustee had the power to classify CCRA's claim as contingent. As Port's counsel points out, to hold otherwise could permit CCRA to issue a substantial but erroneous assessment against an innocent and profitable debtor and put it into bankruptcy and out of business before the validity of the assessment can be determined under the appropriate process provided by the ***Excise Tax Act***. That cannot be the intent of either the ***Excise Tax Act*** or the ***Bankruptcy and Insolvency Act***.

[46] There is no evidence of prejudice to CCRA in permitting Port to continue to operate pending resolution of the appeal process under the ***Excise Tax Act,*** which I am told may take up to a year. CCRA, during that period, is entitled to receive the lion's share of the profits set aside for unsecured creditors under the proposal. On the other hand, there is substantial prejudice to Port, its employees and its other

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creditors if it is prematurely forced into bankruptcy on the strength of an assessment that may be successfully challenged.

[47] I, accordingly, find that the trustee did not err in categorizing CCRA's claim as contingent. The result of the appeal with respect to the Chair's actions is the same as she simply acted on the trustee's decision. The record of the meeting shows the Chair did not act under s. 108(3) of the ***Bankruptcy and Insolvency Act***, and I find there is, therefore, no need to consider CCRA's application to have the vote declared invalid.

[48] The appeal is dismissed.

"K.E. Neilson, J."
The Honourable Madam Justice K.E. Neilson

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Tab 12

CITATION: Re Sherritt International Corporation 2020 ONSC 5822
COURT FILE NO.: CV-20-636938-00CL
DATE: 20200928

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SUPERIOR COURT OF JUSTICE – ONTARIO

(Commercial List)

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

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF SHERRITT INTERNATIONAL CORPORATION AND 11722573 CANADA LTD., AND INVOLVING SHERRITT INTERNATIONAL OIL AND GAS LIMITED, SHERRITT INTERNATIONAL (BAHAMAS) INC., SHERRITT POWER (BAHAMAS) INC., SICOG OIL AND GAS LIMITED (FORMERLY SHERRITT INTERNATIONAL (CUBA) OIL AND GAS LIMITED), SHERRITT UTILITIES INC., CANADA NORTHWEST OILS (EUROPE) B.V., CNWL OIL (ESPANA) S.A., AND MADAGASCAR MINERAL INVESTMENTS LTD.

BEFORE: Koehnen J.

COUNSEL: *Robert J. Chadwick, Caroline Descours and Andrew Harmes*, for the Applicants

C Lara Jackson, Jane Dietrich and Jeffrey Roy for The Export-Import Bank of Korea and Korea Resources Corporation

HEARD: July 29, and August 3, 2020

ENDORSEMENT

Overview

[1] Sherritt International Corporation applies for final approval of a plan of arrangement under sections 192(3) and (4) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended. Final approval is opposed by Export-Import Bank of Korea and Korea Resources Corporation. The Bank and Korea Resources are corporations owned by the Republic of South Korea.

[2] Sherritt, is a publicly traded Canadian resource company engaged primarily in mining, oil and gas, and power generation businesses through various subsidiaries and joint ventures.

[3] Sherritt has struggled for many years with high debt, volatile commodity prices, and uncertainty arising from its Cuban operations resulting from the vagaries of the relationship between the United States and Cuba.

[4] The Bank and Korea Resources oppose the plan arrangement on two grounds. First, they submit that their interest in Sherritt cannot be arranged under the CBCA because it is a term loan which is not a "security" for purposes of the CBCA. Second, they submit that the arrangement is not fair and reasonable to them.

[5] Both the language of the statute and other cases have held that debt of the sort the Bank and Korea Resources hold are subject to arrangement under the CBCA.

[6] The fairness objection is based on a complaint that the Bank and Korea Resources were placed into the same voting category as noteholders. Generally speaking, voting classification is determined by the nature of the legal interest that the creditor has against the corporation. Here, the legal interest of the term lenders and of the noteholders was the same: both had unsecured claims against Sherritt. No basis was advanced to demonstrate any conflict between the term lenders and the noteholders that would warrant the creation of a separate class for the term lenders.

[7] The only other basis on which the Bank and Korea Resources objected to the proposed plan was that it required the term lenders to compromise their claim against Sherritt for "absolutely no consideration" while shareholders were not having their rights arranged. The unfortunate reality of almost all arrangements is that creditors are required to compromise their debt without consideration.

[8] Although the proportionate compromise between shareholders and debtholders can be an issue in arrangements, the unsecured creditors taken as a whole approved the plan by a margin of approximately 89%. The noteholders would have as strong a complaint about the shareholders not making a compromise as the term lenders would. Had the noteholders voted alone, they would have approved the plan by a margin of 98.82%. That suggests that an overwhelming majority of creditors who were potentially affected by the lack of compromise by shareholders nevertheless approved the plan. While not determinative, a vote of security holders is good evidence of the fairness and reasonableness of a plan.

[9] I advised the parties of the disposition of the application on August 8, 2020 with reasons to follow. I indicated that I would provide reasons within 7 days. Counsel for the Bank and Korea Resources then advised that they had instructions not to bring any appeal of the application as a result of which I am releasing these reasons in the ordinary course as opposed to releasing them on a more expedited basis.

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[10] During oral argument, Sherritt's counsel asked me to review carefully the fairness opinion that Sherritt had obtained in respect of the proposed Plan. I did as counsel asked but give no weight to it in arriving at my conclusion.

[11] Fairness opinions are a common feature of judicial proceedings to approve steps a corporation proposes to take. They are, as they were in this case, often referred to with almost religious reverence as if they were the definitive answer to questions about fairness. Regrettably, fairness opinions can be fundamentally flawed as was the one in this case.

[12] It is in some respects easier to examine the limitations of the fairness opinion when it does not matter to the outcome of a case than it is to do so in circumstances where those limitations may be determinative. I do so in the hope of offering guidance about which forms of fairness opinion are helpful to courts and which are not.

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A. Are the Interests Capable of Arrangement?

[13] The interests of the Bank and Korea Resources in the plan arise out of a term loan that the parties have referred to as the Carry Finance Agreement or the CFA loan.

[14] The CFA loan arose as follows. Sherritt and two others, Korea Resources and Sumitomo Corporation formed a joint venture to build one of the world's largest lateritic nickel mining, processing and refining operations. The project is known as Ambatovy and is located in Madagascar. Sherritt participated in Ambatovy through a wholly owned, single purpose subsidiary known as Madagascar Minerals Investments Limited. The joint venture agreement governing Ambatovy provided that, if Madagascar Minerals did not meet its financial obligations towards Ambatovy, then the other two joint venture partners were obliged to satisfy the obligation in exchange for which Madagascar Minerals would be indebted to the other joint venturers and/or in exchange for which Madagascar Minerals would surrender a portion of its interest in Ambatovy to Korea Resources and Sumitomo. Madagascar Minerals defaulted on its contributions as a result of which Korea Resources and Sumitomo lent it funds and, over time, began to acquire a portion of its interest in Ambatovy.

[15] When Korea Resources was called on to fund the contributions of Madagascar Minerals, it sought assistance from the Bank. As part of those arrangements, the Bank advanced money to Madagascar Minerals. That debt was guaranteed by Sherritt and was secured by Sherritt's shares in Madagascar Mineral's and the latter's interest in Ambatovy. As a further part of those arrangements, Korea Resources, over time, paid down some of the debt owed to the Bank, in exchange for which Korea Resources acquired some of Madagascar Mineral's interest in Ambatovy.

[16] By the time of the plan of arrangement, the CFA lenders were owed approximately $152,000,000 and Madagascar Minerals' interest in Ambatovy had been reduced to approximately 12%. The CFA loans mature in 2023.

[17] Under the plan, Sherritt's guarantee of the CFA debt will be extinguished. Instead, the CFA lenders will receive each lender's pro rata share of Sherritt's interest in Ambatovy.

[18] The Bank and Korea Resources submit that a term loan is not capable of arrangement under the CBCA.

[19] The plan of arrangement is advanced under section 192(f) of the CBCA which includes within the definition of arrangement "an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate".

[20] The bank and Korea Resources submit that a loan is not a security under this definition.

[21] In support of this proposition, the Bank and Korea Resources rely on footnote 1 in *Policy Statement 15.1* of Industry Canada (Corporations Canada), "*Policy concerning Arrangements under section 192 of the CBCA*", (4 January 2010) which states:

> While "security holder" is not defined in the Act, the term "security"
> means a share of any class or series of shares or a debt obligation of a corporation. *"Debt obligation" is defined to mean a bond, debenture, note* ***or other evidence of indebtedness*** or guarantee of a corporation, whether secured or unsecured. A "holder" as defined in Part VII of the CBCA, which governs the transfer or transmission
> of a security, means a person in possession of a security issued or endorsed relying on the ejusdem generis principle of interpretation, the Director's position is that the term "security holder" would include debtholders such as debenture and bond holders but not ordinary unsecured creditors… (emphasis added)

[22] The Bank and Korea Resources similarly rely on the *ejusdem generis* principle and argue that "other evidence of indebtedness" is limited to debt obligations that have the same essential characteristics as a bond, debenture or note. That is to say, they are freestanding instruments that have value in and of themselves, can be freely transferred or exchanged and are enforceable without the need for evidence.

[23] The policy statement on which the Bank and Korea Resources rely, speaks of security holders not including "ordinary unsecured creditors." That is a broad group which, for example, would include trade suppliers. The debt owed to a trade supplier may well not fall into the definition of "security" for purposes of a plan of arrangement. A term loan agreement is, however, more akin to a debenture than it is to a trade supplier.

[24] On closer review of the language of the CBCA, the CFA loan does appear to fall within the scope of interests that are capable of arrangement under the statute.

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[25] Security is defined by section 2 of the CBCA as

> "security means a share of any class or series of shares **or a debt obligation** of a corporation and includes a certificate evidencing such a share or debt obligation;" (emphasis added)

[26] Debt obligation is in turn defined by the same section as:

> debt obligation means a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured.

[27] The broad definition of debt obligation to include a "note" or "other indebtedness" of the corporation would, on its face, include a term loan. While I was not taken to a "note" in the record, almost all term loans would entail some sort of document that constitutes what one would commonly understand as a note, that is to say a document that evidences an agreement by one person to pay another a stated amount on a particular date or dates at a particular rate of interest, perhaps with additional related terms. In addition, a loan agreement would also appear to amount to "evidence of indebtedness": *45133541 Canada Inc., Re*, 2009 QCCS 6440 at paras. 67-69.

[28] In addition, section 192 of the CBCA has been interpreted, in the context of a debt restructuring, as providing a "broad procedure aimed at facilitating the restructuring of corporations" and, as such, ought to be broadly and liberally interpreted: *45133541 Canada Inc., Re*, 2009 QCCS 6440 at paras. 61 and 120; *RGL Reservoir Management Inc., (Re),* 2017 ONSC 7496 [Commercial List] at para. 17.

[29] In the circumstances of this case, I see no reason to depart from a plain reading of the statute and find that the CFA debt is capable of being arranged under s. 192 of the CBCA.

B. Fairness of the Plan

[30] The Bank and Korea Resources submit that the plan is unfair for two reasons: (i) they were unfairly placed into the same voting category as other unsecured creditors; and (ii) the plan is substantively unfair.

(i) Voting Categories

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[31] The CFA lenders were placed into the same voting category as other unsecured noteholders of Sherritt. Those creditors approved the plan of arrangement by a vote of 89.02%, well above the two thirds majority for which the interim order provides.

[32] The Bank and Korea Resources point out that if the CFA lenders had been put into a separate voting class, approval of the plan of arrangement within that group would have been only 54.24%, well below the two thirds majority for which the interim order provides.

[33] Sherritt submits that it was appropriate to classify the CFA lenders together with unsecured noteholders because both have unsecured claims as against Sherritt.

[34] The commonly cited starting point of an analysis of voter classification in arrangements is the statement of Bowen, L.J. in *Sovereign Life Assurance Co. v Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.) at page 583 to the effect that:

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

[35] The legal principles surrounding consultation and voting classification were most usefully summarized by Paperny J. (as she then was) in *Re Canadian Airlines Corp*., [2000] A.J. No. 1693 (Alta. Q.B.), leave to appeal refused 2000 ABCA 149. In that case Justice Paperny canvassed the history of voting classification and distilled from the following relevant principles at para. 31:

(i) Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test.

(ii) The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation.

(iii) The commonality of these interests is to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible.

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(iv) In placing a broad and purposive interpretation on the *C.C.A.A.*, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.[1]

(v) Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

(vi) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

Ontario authorities have applied these principles consistently since: *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]), aff'd (2005), 78 O.R. (3d) 241; *Canwest Global Communications Corp.*, 2010 ONSC 4209 [Commercial List].

[36] Three key principles emerge from *Canadian Airlines* that have particular relevance to this case.

[37] First, securityholders with similar *legal* rights as against the applicant should vote in a single class: *Canadian Airlines* at paras. 31, 38; *Savage v. Amoco Acquisition Co*., [1988] A.J. No. 330 (C.A.) at paras 19 and 23; Re. As Farley J. noted in *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at paras. 13-14, aff'd on this point (2005), 78 O.R. (3d) 241 at paras. 13-14 and 30-36: "absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class."

[38] Before the plan of arrangement, the noteholders had an unsecured claim against Sherritt and those of its subsidiaries who had guaranteed a particular tranche of notes. The CFA lenders also had an unsecured claim against Sherritt.

[39] Under the plan of arrangement, the unsecured noteholders would continue to have an unsecured claim against Sherritt and certain of its subsidiaries. Their claim would, however, be reduced from approximately $628,000,000 to $433,000,000. The maturity date of the reduced debt would then be extended by several years. In addition, $75,000,000 of the debt would be placed into a more junior position than the current notes hold. The CFA lenders would not take any reduction on their debt but would lose the right to claim against Sherritt. Instead, the CFA lenders would receive Sherritt's interest in the Ambatovy joint venture.

[40] The second classification principle from *Canadian Airlines* with particular relevance here is that classes should be organized in a manner that is consistent with the facultative purpose of the arrangement provisions under the CBCA: *Canadian Airlines; CBCA Policy Statement*, at

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[1] While the *C.C.A.A.* was at issue in *Canadian Airlines,* neither side took issue with the proposition that similar principles were applicable to the compromise of creditor rights under the *CBCA*

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section 1.02 Creditors should not be fragmented into groups that would defeat the plan unless there is good reason to do so. Here, the Bank and Korea Resources urge me to place the CFA lenders into a separate voting class after the fact. That would result in the CFA lenders having approved the proposed plan by a margin of only 54% which the Bank and Korea Resources submit should lead me to reject the plan. Given the similarity of legal entitlements among the noteholders and the CFA lenders, it strikes me that acceding to that request would amount to fragmentation as opposed to creating classes of creditors whose interests are legitimately different.

[41] The third classification principle relevant here is that creditors should vote as a common class so long as their rights "are not so dissimilar as to make it impossible for them to consult together with the view to their common interest:" *CBCA Policy Statement* at section 3.10; *Canadian Airlines Corp*., at para. 17.

[42] In their factum, the CFA lenders underscored the differences between the two categories of debt. They note that the CFA Lenders' rights are based in contract and relate to Sherritt's interest in Ambatovy while the noteholders have no interest in Ambatovy. In addition, although the CFA debt is unsecured as against Sherritt, is secured as against Sherritt's interest in Ambatovy. This contrasts with the noteholders who are unsecured but enjoy the benefit of guarantees of certain Sherritt subsidiaries. Finally they note that the remedies of each group in the absence of a plan are different. The noteholders have an unsecured claim against Sherritt and its subsidiary guarantors while the CFA lenders have an unsecured claim against Sherritt and have a secured claim against Sherritt's interest in Ambatovy.

[43] Beyond describing these differences, the CFA lenders have advanced no reason to demonstrate that it would be impossible for the CFA lenders to consult with the unsecured noteholders with a view to their common interest. Although it might not be possible to demonstrate impossibility conclusively, the CFA lenders have not even pointed to conceptual issues that might arise that make it difficult or impossible for the CFA lenders and the noteholders to consult together.

[44] Indeed, if anything, I would have thought that any differences between the noteholders and the CFA lenders are ones that would give rise to a complaint by the noteholders given that the CFA lenders are not compromising the face amount of their debt while the noteholders are.

(ii) Substantive Fairness of the Plan

[45] The applicant bears the burden of satisfying the Court that an arrangement is fair and reasonable: *BCE*, at para. 119.

[46] In assessing the fairness and reasonableness of an arrangement, a court must be satisfied (a) that the arrangement has a valid business purpose, and (b) that the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. The Court need not determine that the proposed arrangement is the "most fair" or "best" proposal possible. Rather,

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the Court need only determine that it is fair and reasonable in the circumstances: *RGL*, at paras. 47 and 49; *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at paras. 138, 143, 155.

[47] No one disputes that the proposed plan has a valid purpose. The issue is whether the rights of the CFA lenders are being arranged in a fair and balanced way.

[48] Strong support by security holders is generally a good, but not conclusive, indicator of fairness. As Blair J., as he then was, stated in *St. Lawrence & Hudson Railway Co., Re,* [1998] O.J. No. 3934 (Ct. J. [Gen. Div. – Commercial List]) at para. 27

> What better litmus test, then – barring such things as fraud, or a clearly overwhelming majority, which prevents the true expression of the minority's will, or similar considerations of that nature – for assessing whether in the circumstances of a given arrangement "an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve the plan", than the votes of those whose interests are actually at stake? The votes of security holders at meetings to consider a proposed Plan are not conclusive, but a substantial vote in favour of the proposed plan of arrangement by the security holders affected is an important factor in the court's considerations. The "business judgment" of the security holders in determining their own interests is to be given great weight.

[49] Sherritt notes that the plan was approved by 89.02% of the security holders. The CFA lenders note that, had they constituted a separate voting class, only 54.24% of the CFA lenders would have approved the plan. In *BCE* the Supreme Court of Canada noted at para 150 that the absence of a majority or the presence of only a slim majority may give rise to doubts about whether the plan is fair and reasonable.

[50] Although votes are an indicator of fairness, they are not determinative. Just as courts must be alive to the possibility of a large majority being unfair to a minority, they must also be alive to the possibility of a tyranny of the minority. Although the approval of the CFA lenders did not reach a two thirds majority, they nevertheless approved the plan. It is worth noting that there is no statutory requirement for a two thirds majority.

[51] In *BCE,* the Supreme Court went on to note at para 152 – 154 that other indicia of fairness include the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights. This in turn is assessed against a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence.

[52] Taking these factors into account, I am satisfied that the plan is fair and reasonable to the CFA lenders. As noted earlier, the CFA lenders are not compromising the face value of their

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debt. They also continue to enjoy the same security after the plan of arrangement that they enjoyed before the plan.

[53] This contrasts markedly with the noteholders. They have reduced face value of their debt by approximately $195,000,000, have extended its maturity and have subordinated approximately $75,000,000 of their debt.

[54] The essence of the complaint by the Bank and Korea Resources is that the plan forces them to release Sherritt's guarantee for "absolutely no consideration" while the equity holders remain whole. The Bank and Korea Resources point out that this would not be the case in a liquidation, where the equity holders would receive nothing unless all the debt were paid in full. The noteholders, however, would have the same complaint, have made a more serious compromise of their rights yet approved the plan by a margin of 98.82%.

[55] It is also relevant to examine the true value of the guarantee that the CFA lenders are giving up. As noted, the CFA lenders had security in Sherritt's interest in Ambatovy. As a result of the plan of arrangement, each CFA lender will now receive its pro rata share of Sherritt's interest in Ambatovy. That puts them into the position they would have been in had they enforced the debt without putting them to the cost or inconvenience of enforcement.

[56] Sherritt's guarantee has limited value. It could not be called upon until the CFA debt matured in 2023. Even then it was a guarantee by Sherritt. Sherritt is a holding company. The productive assets of the Sherritt group are held in various subsidiaries. Those subsidiaries are located in different countries. In the absence of a voluntary payment by Sherritt, enforcement on the guarantee would require a judgment against Sherritt (assuming a judgment has not been precluded by a CCAA or similar proceeding) and then taking steps to seize Sherritt's interest in subsidiaries in a variety of countries. While some of the subsidiaries are located in countries associated with relatively low enforcement risk such as Canada, the United States and Australia; others are located in countries with higher enforcement challenges such as Cuba, China, and Zimbabwe. Moreover, many of the subsidiaries have guaranteed the noteholder debt. In those circumstances, the CFA lenders would rank ratably as unsecured creditors with the noteholders.

[57] In light of these factors, the guarantee falls considerably short of ensuring full recovery on the CFA loan.

[58] When I assess the proportionality of the compromise of the CFA lenders with the noteholders, it strikes me that the CFA lenders have come out considerably ahead of the noteholders who will have to sacrifice $195,000,000 of debt.

[59] I then compare this against the necessity for the arrangement. While neither party put in express evidence about the necessity of the arrangement, the undisputed evidence was that Sherritt experienced considerable challenges in servicing its debt. As one of the noteholders' counsel put it in argument, if the noteholders felt there were any better option available to them that sacrificing $195,000,000 in principal, they would take it.

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[60] In assessing the substantive fairness of the plan, I underscore that the objection of the Bank and Korea Resources was limited to the absence of consideration for loss of the guarantee. Regrettably, the compromise of most interests in an arrangement is done without consideration. This was not a case in which the Bank and Korea Resources suggested that Sherritt's interest in Ambatovy was inadequate to satisfy the debt. Nor was it a case in which the Bank complained that it was being repaid its loan by way of shares rather than cash. It appears that arrangements had been made from the outset between the Bank and Korea Resources that the latter would be buying out the Bank's shareholder interests. Given that Korea Resources is owned by the Republic of South Korea the bank faces relatively little exposure for default. Moreover, it was known to all participants in Ambatovy from the outset that, if one partner failed to make contributions as required, the others would be obliged to make those contributions and take a proportionate interest of the defaulting partner's share in return. As a result, the fact that Korea Resources that may be "obliged" to take a greater share in Ambatovy than it might want is a result of contractual arrangements, not a result of the plan.

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[61] In the circumstances described above, I am satisfied that Sherritt has met its burden and that the plan arranges the CFA lenders in a proportionate and substantively fair manner.

C. Fairness Opinion

[62] In paragraph 152 of *BCE* the Supreme Court noted that it was also relevant for courts to take into account fairness opinions from reputable experts.

[63] Sherritt filed a fairness opinion from Paradigm Capital in support of the arrangement. The Bank and Korea Resources made no submissions about the reliability of the fairness opinion. During oral argument, Sherritt's counsel placed heavy reliance on it and urged me to read it to gain comfort about the fairness of the proposal.

[64] I have read the fairness opinion as Sherritt's counsel asked me to. Regrettably it gives me no comfort.

[65] Fairness opinions are often presented to the court, as it was here, as being the product of a very particular form of expertise that the court does not have and on which the court must rely. They are often invoked with veneration and treated like an all-powerful talisman that should resolve any questions about fairness. The power of a talisman, however, lies more in the faith of the believer than the substance of the object.

[66] The simple presence of something called a fairness opinion is meaningless. Like any other evidence, its force lies entirely in its content and substance which, as this case demonstrates, must be carefully reviewed.

[67] Sherritt's counsel urged me to review pages 8-9 of the fairness opinion. Those are the two pages of the opinion that actually discuss fairness. The degree, however, to which one can

rely on the opinion depends not just on the two pages of fairness analysis but also on the "fine print" in the preceding seven pages. It requires careful reading because it often contains limitations and qualifications that affect the utility of the opinion. Such is the case here.

[68] I begin my review with the author of fairness opinion. The opinion was prepared by Paradigm Capital. Paradigm describes itself in the opinion as

> "an independent Canadian investment banking firm with a sales, trading, research and corporate finance focus, providing services for institutional investors and corporations… Paradigm Capital has extensive advisory, valuation, merger & acquisition and corporate governance experience."

[69] Section 4.04 of Corporations Canada's *Policy on Arrangements* states that the author of a fairness opinions for arrangements

> "..should generally be an accountant or person with a financial background who has experience in assessing liquidation values."

[70] While investment bankers may have experience with valuations in certain contexts, liquidation is not necessarily the context in which they typically operate. There is nothing in the fairness opinion that provides any support for Paradigm's expertise other than that stated in paragraph 68 above. There is no description of any expertise in assessing liquidation values

[71] Moreover, Paradigm describes itself in the fairness opinion as independent.

[72] I have considerable doubts about the degree to which Paradigm would constitute an independent witness on whose expertise the court can rely. The letter points out that one of the directors of Sherritt, John Warwick, is also a former investment banker at Paradigm and remains a special advisor to and shareholder of Paradigm. Sherritt's website describes Mr. Warwick as the former "Managing Director, Investment Banking, founding partner and Head of Corporate Finance of Paradigm." The opinion notes further that:

> "Paradigm Capital may, in the ordinary course of its business, provide financial advisory or investment banking services to Sherritt from time to time. Additionally, in the ordinary course of its business, Paradigm Capital may actively trade common shares and other securities of Sherritt for its own account and for its client accounts, and, accordingly, may at any time hold a long or short position in such securities."

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[73] It is difficult to see how an investment banking firm that has one of its founding partners, former Managing Directors, and current advisor and shareholder on the Sherritt board and that provides financial advisory and investment banking services to Sherritt can qualify as a source of independent expertise.

[74] I appreciate that a fairness opinion is not, technically speaking, an expert report under rule 53.03 of the Rules of Civil Procedure. There is no doubt, however, that fairness opinions are provided to courts as the evidence of independent experts. Anyone with any business experience would understand that an employee of Paradigm who, in the circumstances described above, proposed to provide an opinion other than one that was favourable to Sherritt would face overwhelming direct or indirect pressure. The simple fact of being retained as an expert contains its own implicit pressure. The dynamic is clear from the outset that the client wants an opinion favourable to itself. It is far easier to resist that pressure when the firm being retained has no long-term economic interest to pursue with the client. It is far more difficult to maintain that independence when there are personal and financial connections between the expert of the client.

[75] The next potential limitation on the utility of a fairness opinion turns on the question in respect of which the author is opining. Here, Paradigm gave an opinion about:

(i) whether the noteholders and the CFA lenders would be in a better position from a financial point of view under the arrangement than if the company were liquidated; and

(ii) an opinion as to the fairness of the arrangement from a financial point of view the company.

[76] A closer read of the opinion discloses that paradigm answered question number (i) by reviewing a liquidation analysis provided by management of Sherritt. Under the heading Assumptions and Limitations Paradigm states that it “has relied upon without independent verification” on information, including the liquidation analysis, received from Sherritt and has “not conducted any independent investigation to verify the completeness or accuracy of such information.”

[77] Although the opinion portion of the letter states that it has “analysed the Company’s management’s estimated ranges of recoveries from the various assets of Sherritt in a liquidation process,” it provides no further discussion or description of the liquidation analysis Sherritt provided or the analysis Paradigm brought to bear.

[78] Given the content of the letter, the exercise could have been as simple as taking a liquidation number provided by management, comparing it to a plan of arrangement number provided by management and concluding that one number was larger than the other, thereby leading to the opinion that the result under a plan of arrangement was preferable to the result under a liquidation. I am not sure a court requires an expert opinion for that level of analysis.

[79] The second question Paradigm was asked to answer was whether the arrangement was fair from a financial point of view to the company. The fairness opinion does not define the

company. By way of example it does not suggest that company was being defined as all of its stakeholders and that Paradigm was engaging in an exercise to determine whether the compromises amongst the various stakeholders were fair and reasonable. On the contrary, the assumptions and limitations section of the opinion points out that Paradigm is not providing an opinion "as to the fairness of the Arrangement, from a financial point of view, to the Noteholders and/or the CFA lenders." In that context fairness to the company would appear to mean fairness to Sherritt as a debtor. It is self-evident that any arrangement that decreases the amount of debt the debtor owes is fair to the debtor. The issue on a plan of arrangement is not whether reducing debt is fair to the debtor but whether it is fair to creditors.

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[80] As just noted, the assumptions and limitations section of the opinion states that Paradigm is not providing opinion "as to the fairness of the Arrangement, from a financial point of view, to the Noteholders and/or the CFA lenders." Section 4.05 of Corporations Canada's Policy on Arrangements states:

> … the Director believes that, ordinarily, for the fairness opinion to be meaningful, the person providing the opinion must be in a position to state that the arrangement is fair to each class of security holders affected by the arrangement.

[81] The Paradigm opinion expressly does not do that. That makes it of little value.

[82] I apologize if I am being mischaracterizing what Paradigm actually did in coming to its view. The difficulty is that all I have is the opinion itself and, when read carefully, stripped of its verbal ornamentation, the opinion can be summarized as saying, I am an expert, I have done analysis (that I am not going to explain or tell you about), I conclude the plan is fair, just trust me.

[83] In making these comments I do not intend any criticism of Paradigm. It described the nature of its opinions, disclosed its relationship with Sherritt and set out the limitations under which it operated. I am merely saying that conclusory fairness opinions with limitations of the sort set out above are of no help and are not a productive use of the court's time.

Disposition

[84] Despite my comments about the fairness opinion, I approve the plan of arrangement for the reasons set out earlier in these reasons.

[85] There was no dispute that Sherritt's debt posed a considerable challenge going forward. There was no suggestion that what the Bank and Korea Resources received was inadequate to satisfy the debt owing to them or alternatively that they were making a larger proportionate compromise than the noteholders. The only complaint was that the Bank and Korea Resources

were surrendering their guarantee without consideration when shareholders were not being compromised. The absence of consideration is a common feature of compromises in creditor arrangements. The noteholders were subject to the same disadvantage yet approved the plan by an overwhelming majority. In those circumstances, the security holder vote should be given considerable weight. To permit the objections of the Bank and Korea Resources to prevail in these circumstances would give way to the tyranny of the minority.

Koehnen J.

Date: September 28, 2020

2020 ONSC 5822 (CanLII)

Tab 13

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

JOINT PLAN OF COMPROMISE AND ARRANGEMENT

PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

FEBRUARY 15, 2019

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“**Director**” means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Sears Canada Entities, in such capacity;

“**Directors’ Priority Charge**” has the meaning given to such term in the Initial Order;

“**Directors’ Subordinated Charge**” has the meaning given to such term in the Initial Order;

“**Distribution Date**” means the date of any Plan Distribution;

“**Duplicate Claim**” means a Proven Affected Unsecured Claim against more than one of the Sears Canada Entities based on the same underlying obligation;

“**Effective Time**” means 12:01 a.m. on the Plan Implementation Date or such other time on the Plan Implementation Date as the Monitor shall determine or as otherwise ordered by the Court;

“**Eligible Voting Claims**” means a Voting Claim or an Unresolved Voting Claim;

“**Eligible Voting Creditors**” means, subject to Section 4.2(b), Affected Unsecured Creditors holding Voting Claims or Unresolved Voting Claims;

“**Employee**” means any (i) active or inactive union or non-union employee of any one or more of the Sears Canada Entities on or after the Filing Date, including an employee of any one or more of the Sears Canada Entities who received notice of termination of employment dated on or after the Filing Date or who resigned or otherwise ceased employment on or after the Filing Date; and (ii) former employee of any one of the Sears Canada Entities, including without limitation any former employee whose employment terminated with or without cause at any time, any former employee who received notice, on or after the Filing Date, of the cessation of his or her termination or severance payments, and any former employee who had an outstanding active action, claim or complaint as of the Filing Date;

“**Employee Claim**” means an “Employee Claim” as defined in the Claims Procedure Order (E&R);

“**Employee Priority Claims**” means, in respect of a Sears Canada Entity, the following claims of Employees of such Sears Canada Entity:

(a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Sears Canada Entity had become bankrupt on the Filing Date, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements; and

(b) claims for wages, salaries, commissions or compensation for services rendered by such Employees after the Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in connection with the Business during the same period, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements;

“**Employee Representative Counsel**” means Ursel, Phillips, Fellows, Hopkinson LLP as appointed pursuant to the Employee Representative Counsel Order made July 13, 2017, as amended;

“**Employee Representatives**” means Paul Webber, Nancy Demeter, Sheena Wrigglesworth, Barb Wilser, and Darrin Whitney, or such other representatives as may be duly appointed by Employee Representative Counsel;

“**Equity Claim**” has the meaning ascribed thereto in section 2 of the CCAA;

“**Undeliverable Distribution**” has the meaning ascribed thereto in Section 7.5(a);

“**Unionized Employee**” means any Employee represented by a union pursuant to a collective agreement in connection with such Employee’s employment with any of the Sears Canada Entities;

“**Unresolved Affected Unsecured Claim**” means an Affected Unsecured Claim that is an Unresolved Claim;

“**Unresolved Claim**” means a Claim, which at the relevant time, in whole or in part: (a) has not been Finally Determined to be a Proven Claim in accordance with the applicable Claims Procedure Order and this Plan; or (b) is validly disputed and/or remains subject to review in accordance with the applicable Claims Procedure Order, including as to validity and/or quantum;

“**Unresolved Claims Reserve**” means, in respect of a Debtor Group, the aggregate of the reserves of the applicable Available Cash for such Debtor Group, to be held in respect of each Debtor Group on an accounting basis, in an aggregate amount to be calculated by the Monitor on the Initial Distribution Date, and recalculated as at any subsequent Distribution Date, equal to the amount that would have been paid if the full amount of all Unresolved Claims in respect of such Debtor Group are Proven Claims as at such later date, or such lesser amount as may be ordered by the Court;

“**Unresolved Priority Claim**” means a Government Priority Claim or Employee Priority Claim that is an Unresolved Claim;

“**Unresolved Voting Claim**” means the amount of the Unresolved Affected Unsecured Claim of an Affected Unsecured Creditor as determined in accordance with the terms of the applicable Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with and subject to the limitations of the provisions of the Meetings Order, the Plan and the CCAA;

“**Unsecured Claim**” means a Claim that is not secured by any Lien;

“**Unsecured Creditor Class**” has the meaning ascribed thereto in Section 4.1;

“**Upfront Dealer Payment**” has the meaning ascribed thereto in Section 5.2(c);

“**Valid Transferee**” means the transferee or assignee of a Claim that has provided the Monitor with a Notice of Transfer or Assignment by no later than seven (7) days’ prior to the Initial Distribution Date and has had such Claim transferred or assigned to it in accordance with the applicable Claims Procedure Order and the Meetings Order;

“**Voting Claim**” means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor as Finally Determined in the manner set out in the applicable Claims Procedure Order or as provided pursuant to Section 3.2 of the Plan, entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

“**Warranty**” means a customer warranty offered pursuant to a valid and unexpired protection agreement issued by Sears Canada to its customer, and for greater certainty Warranty does not include any manufacturer’s warranty;

“**Warranty Administration Costs**” means all costs incurred in connection with the administration of the Warranty Claims Protocol and of all distributions, disbursements, and payments under the Plan in respect of Reimbursable Warranty Claims;

“**Warranty Claim**” means a Claim in respect of a Warranty;

Tab 14

Court File No. CV-21-00658423-00CL

Just Energy Group Inc. et al.

SUPPLEMENT TO THE TENTH REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR

June 1, 2022

F T I™
CONSULTING

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Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

SUPPLEMENT TO THE TENTH REPORT OF THE MONITOR

INTRODUCTION

1. Pursuant to an Order (as amended and restated, the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated March 9, 2021 (the "**Filing Date**"), Just Energy Group Inc. ("**Just Energy**") and certain of its affiliates (together with Just Energy, the "**Applicants**") and certain partnerships listed on Schedule "A" of the Initial Order (collectively, the "**Just Energy Entities**") were granted protection under the *Companies' Creditors Arrangement Act,* R.S.C., c. C-36, as amended (the "**CCAA**" and in reference to the proceedings, the "**CCAA Proceedings**"). Under the Initial

Order, FTI Consulting Canada Inc. was appointed as Monitor of the Just Energy Entities (in such capacity, the "**Monitor**").

2. Upon application by Just Energy, in its capacity as foreign representative (in such capacity, the "**Foreign Representative**"), the United States Bankruptcy Court for the Southern District of Texas (the "**U.S. Court**") granted the Final Recognition Order on April 2, 2021 under Chapter 15 of the United States Bankruptcy Code, which, among other things, gave full force and effect to the Initial Order in the United States.

3. On September 15, 2021, the Court granted the Claims Procedure Order (the "**Claims Procedure Order**") that approved the claims process for the identification, quantification, and resolution of Claims (as defined in the Claims Procedure Order) as against the Just Energy Entities and their respective directors and officers (the "**Claims Procedure**").

4. This report is supplementary to and should be read in conjunction with the Tenth Report of the Monitor dated May 18, 2022 (the "**Tenth Report**").

5. All references to monetary amounts in this report are in Canadian dollars unless otherwise noted. Any capitalized terms used but not defined herein shall have the meanings given to them in the Tenth Report.

6. Pursuant to the motion returnable on June 7, 2022 (the "**Meetings Order Motion**"), the Just Energy Entities are seeking the Meetings Order and the Authorization Order. In response to the Meetings Order Motion, responding motion records were filed by (i) Haidar Omarali, in his capacity as representative plaintiff on behalf of a certified class (the "**Class Members**") in *Haidar Omarali v. Just Energy Group et al*, Court File No. CV-15-52748300CP (the "**Omarali Action**") (the "**Omarali Motion Record**"), and (ii) Wittels McInturff Palikovic, Finkelstein Blankinship, Frei-Pearson, Garber LLP, and Shub Law Firm LLP, in their capacity as counsel to the proposed representative plaintiffs in *Donin v. Just Energy Group Inc. et al.*, Case No. 1:17-cv-05787-WFK-SJB and *Trevor Jordet v. Just Energy Solutions Inc.*, Case No. 2:18-cv-01496-MMB (together, the "**Donin/Jordet Actions**").

PURPOSE

7. The purpose of this Supplement to the Tenth Report (the "**Supplemental Report**") is to provide information to the Court in response to issues raised in the Omarali Motion Record and in respect of the Claims.

TERMS OF REFERENCE AND DISCLAIMER

8. In preparing this Supplemental Report, the Monitor has relied upon audited and unaudited financial information of the Just Energy Entities, the Just Energy Entities' books and records, and discussions and correspondence with, among others, management of and advisors to the Just Energy Entities as well as other stakeholders and their advisors (collectively, the "**Information**").

9. Except as otherwise described in this Supplemental Report:

   (a) the Monitor has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Auditing Standards pursuant to the Chartered Professional Accountants of Canada Handbook; and

   (b) the Monitor has not examined or reviewed the financial forecasts or projections referred to in this Supplemental Report in a manner that would comply with the procedures described in the *Chartered Professional Accountants of Canada Handbook*.

10. The Monitor has prepared this Supplemental Report to provide information to the Court in response to certain issues raised in the Omarali Motion Record and in support of the relief sought by the Applicants in the Meetings Order and Authorization Order. This Supplemental Report should not be relied on for any other purpose.

RESPONSES TO ISSUES RAISED IN OMARALI MOTION RECORD

11. The Omarali Motion Record includes the Affidavit of Vlad Andrei Calina affirmed May 26, 2022 (the "**Calina Affidavit**"). The Calina Affidavit suggests that inadequate disclosures were made by the Monitor in respect of (i) Texas House Bill 4492 ("**HB**

4492") and anticipated recoveries by the Just Energy Entities, (ii) the timing of the ERCOT Litigation (as defined below) and anticipated recoveries, and (iii) certain insurance policies for Just Energy's directors as requested.

HB 4492

12. The Monitor provided an initial update to the Court and stakeholders in respect of HB 4492 in the Monitor's Third Report to the Court dated September 8, 2021. The Monitor noted that the Governor of Texas signed HB 4492 on June 16, 2021, which provides a mechanism for the partial recovery of costs incurred by certain Texas energy market participants, including the Just Energy Entities, during the Texas weather event in February 2021. The Monitor also noted that the total amount that the Just Energy Entities might recover through HB 4492 was dependant on several factors.

13. In the Monitor's Fourth Report to the Court dated November 5, 2021, the Monitor noted that the Just Energy Entities anticipated recovering at least US$100 million of the costs from Electric Reliability Council of Texas, Inc. ("**ERCOT**"), however, such amount was dependent on several factors noted therein.

14. In the Monitor's Fifth Report to the Court dated February 4, 2022, the Monitor noted that the Just Energy Entities' expected recovery under HB 4492 had increased to approximately US$147.5 million.

15. The Monitor understands that ERCOT has not provided a definitive timeline for the payment of HB 4492 recoveries; however, based on discussions with the Just Energy Entities, the Monitor understands that HB 4492 recoveries are anticipated to be received by the Just Energy Entities during Summer 2022 prior to implementation of the proposed Plan of Compromise and Arrangement dated May 26, 2022 (as may be amended from time to time, the "**Plan**"), subject to any unforeseen delays.

16. The HB 4492 recoveries to the Just Energy Entities will constitute Cash on Hand under the Plan and will provide some of the funds necessary to make the cash distributions provided for under the Plan. One of the conditions precedent to implementation of the Plan (as described in the Tenth Report) is that the New Equity Offering Proceeds and

Cash on Hand shall be sufficient to pay the amounts to be distributed and reserved for under the Plan.

17. In summary, the recoveries under HB 4492 have been disclosed on a timely basis and are anticipated to be fully used under the Plan.

ERCOT Litigation

18. In the Monitor's Second Report to the Court dated May 21, 2021 (the "**Second Report**"), the Monitor noted that the Just Energy Entities had disputed the resettlement payments that the Just Energy Entities were required to pay to ERCOT as a result of the inflated prices during the Texas weather event. The Monitor also noted that ERCOT had dismissed one of the disputes filed by the Just Energy Entities, which triggered an alternative dispute resolution process.

19. In the Monitor's Eighth Report to the Court dated April 7, 2022, the Monitor noted that the Just Energy Entities had commenced litigation against ERCOT and the Public Utility Commission of Texas (the "**PUCT**") on November 12, 2021, in an effort to recover payments made by various Just Energy Entities to ERCOT for certain invoices relating to the Texas weather event in February 2021 (the "**ERCOT Litigation**"). The claim against the PUCT was dismissed by the U.S. Court. Further, the Monitor noted that it intends to be actively involved in supporting the ERCOT Litigation.

20. The ERCOT Litigation was the subject of the Applicants' recent motion to the Court, in which the Applicants sought and obtained an order authorizing the Foreign Representative to pursue the claims against ERCOT in the ERCOT Litigation pursuant to section 36.1 of the CCAA. Stakeholders were provided with notice of such motion and could have raised any questions or concerns regarding the ERCOT Litigation at such time.

21. In the Monitor's Ninth Report to the Court dated April 18, 2022, the Monitor noted that, in consultation with its Canadian and U.S. legal counsel, it is of the view that the Plaintiffs' claim has merit and that potential recoveries to the Just Energy Entities may result from the ERCOT Litigation, which justify the steps taken.

22. As with all litigation, the timeline to resolution and likelihood of success is unknown. At this juncture, ERCOT has moved to dismiss the ERCOT Litigation, and the continuation of such dismissal motion has been scheduled for June 8, 2022. Recoveries from such litigation, if any, could take years to realize. Accordingly, it is anticipated that the Plan will be implemented prior to the resolution of the ERCOT Litigation. The costs, risks and recovery, if any, in respect of the ERCOT Litigation following Plan implementation (which cannot be quantified at present and could be significant) will be borne by the restructured Just Energy Entities.

Insurance Policies

23. The Calina Affidavit also states that despite a request by counsel to the Class Members for copies of any applicable insurance policies for Just Energy's directors responsive to a claim by Class Members, no such policies were provided.

24. As set out in Exhibit "CC" to the Calina Affidavit, the Just Energy Entities took the position that (i) such request amounted to discovery, which was not in effect at such time, and (ii) the claim against Just Energy's directors was not valid given that the directors were not named in the initial action commenced by the Class Members, and the directors could not be found personally liable for the claims pled. Accordingly, the Just Energy Entities advised counsel to the Class Members that they were not prepared to produce the requested insurance policies.

25. Pursuant to section 40 of the Initial Order, the Monitor is prohibited from providing information to creditors that the Just Energy Entities advise is confidential, unless otherwise directed by the Court or on such terms as the Monitor and Applicants may agree. Just Energy advised the Monitor that the policies were confidential. Accordingly, such information was not provided to counsel to the Class Members.

INFORMATION ON THE CLAIMS AND VOTING

26. The Plan and Meetings Order provide that the representative plaintiff in the Omarali Action is entitled to one vote in the amount of $1 as such Claims are too remote and speculative to be assessed and admitted for voting purposes. The Plan and Meetings

Order provide similar treatment for the proposed representative plaintiffs in the Donin/Jordet Actions.

27. The Calina Affidavit provides that there are approximately 7,723 Class Members. Not including those Claimants that have filed contingent litigation claims, less than 2,200 unique claimants have filed a Proof of Claim or received a Statement of Negative Notice Claim in the Claims Procedure (which, for greater certainty, includes the Term Loan Lenders).[1] Further, based on the Proofs of Claim filed to date, less than 35 claimants have a De Minimis Claim (i.e., Claims less than $10).[2]

28. While the quantum of general unsecured claims that will be Accepted Claims is unknown at this time, the Just Energy Entities estimate that this will range from $66 million to $108 million in aggregate value.

29. Although the Monitor notes that the actual number of Class Members will not be established until the Claim is fully and finally adjudicated, granting each of the Class Members with their own vote would effectively provide a "veto" over the Plan, assuming such Class Members would vote against the Plan. The same issue and effective "veto" arises in respect of the Donin/Jordet Actions.

CONCLUSION

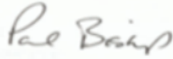
30. The foregoing information is provided to assist the Court in its determination of the Applicants' motion for the Meetings Order and Authorizations Order.

[1] This amount represents the Just Energy Entities' best estimate, in consultation with the Monitor, as at the date of the Tenth Report and includes unique claimants against one or more of the Just Energy Entities, but excludes potentially duplicative Claims and Claims that have been disallowed or withdrawn.

[2] This amount represents the Just Energy Entities' best estimate, in consultation with the Monitor, as at the date of the Tenth Report and is subject to change.

The Monitor respectfully submits to this Honourable Court this Supplement to the Tenth Report dated this 1st day of June, 2022.

FTI Consulting Canada Inc.,
in its capacity as Court-appointed Monitor of
Just Energy Group Inc. *et al*,
and not in its personal or corporate capacity

Per: 

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Paul Bishop
Senior Managing Director

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JUST ENERGY GROUP INC. et al.** (each, an "**Applicant**", and collectively, the "**Applicants**")

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

SUPPLEMENT TO THE TENTH REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS COURT-APPOINTED MONITOR

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Tab 15

Court File No. CV-17-11846-00CL

SEARS CANADA INC.,
AND RELATED APPLICANTS

TWENTY-NINTH REPORT OF FTI CONSULTING CANADA INC., AS MONITOR

February 6, 2019

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73. Affected Unsecured Creditors holding Voting Claims or Unresolved Voting Claims (collectively, "**Eligible Voting Claims**") (or such Affected Unsecured Creditors' proxy holders) will be allowed to vote on the Plan. However, the votes of Affected Unsecured Creditors holding Unresolved Voting Claims will be separately tabulated and reported to the Court, provided that the vote cast in respect of any Unresolved Voting Claim shall not be considered for Plan approval purposes unless and until it is finally determined to be a Proven Claim.

74. In respect of the Eligible Voting Claims of ERC Employees and PRC Retirees:

(a) Employee Representative Counsel shall be deemed to be a proxy holder in respect of each Eligible Voting Claim of ERC Employees in connection with their Employee Claims; and

(b) Pension Representative Counsel shall be deemed to be a proxy holder in respect of each Eligible Voting Claim of PRC Retirees (other than in connection with any Employee Claims or the Pension Claims filed in respect of the wind-up deficiency of the Pension Plan).

75. Only the Pension Plan Administrator or its designated proxy holder may vote the Pension Claims.

76. The Monitor will file a report to the Court by no later than two Business Days after the Meetings (i.e. by April 1, 2019) with respect to the results of the vote, including whether:

(a) the Required Majority in each Unsecured Creditor Class has approved the Plan; and

(b) the votes cast in respect of Unresolved Voting Claims, if applicable, would affect the result of the vote.

77. If the Plan is accepted by the Required Majority of each Unsecured Creditor Class, the Monitor anticipates bringing a motion seeking the Sanction Order on April 3, 2019. Materials must be filed by anyone opposing the Sanction Order by no later than 5:00 p.m. (Toronto time) four Business Days before the Sanction Hearing (*i.e.* by March 28, 2019).

78. The Meetings Order also proposes to amend the style of cause of these CCAA Proceedings to reflect a change in the legal name of the Applicant 9845488 Canada Inc. (formerly, "Initium Commerce Labs Inc."), which was recently effected on January 31, 2019 following a sale of the rights to its former name.

F. THE MONITOR'S COMMENTS AND RECOMMENDATIONS ON THE RELIEF SOUGHT

79. The Plan is a joint plan of compromise and arrangement of all of the Sears Canada Entities. Implementation of the Plan would effect a comprehensive settlement of various significant matters in the CCAA Proceedings, including the Pension Claims, and establish a mechanism for the funding of the pursuit of the Estate 2013 Dividend Claims. Effecting that settlement and these mechanisms through the Plan on a joint basis significantly simplifies matters as compared to having individual plans of arrangement for each of the Sears Canada Entities, or for the three individual debtor groups. Furthermore, in the Monitor's view, there is no apparent material prejudice to any creditor of any of the Sears Canada Entities from the Plan being a joint plan.

80. Finally, the structure of each of the resolutions embodied by the Plan would require any separate plans to be conditional upon each other in any case.

81. The granting of the Meetings Order would provide the forum for Affected Unsecured Creditors to consider and vote on the Plan, as well as the proposed settlements that underpin it.

82. As described earlier in this 29th Report, the Meeting Order and Plan provide for substantive consolidation of the Sears Parties and the SLH Parties, respectively.

83. The Monitor is of the view that this limited substantive consolidation for the purposes of the Plan is reasonable and appropriate and that there is no apparent material prejudice arising therefrom. As noted in part above:

    (a) Former SLH and Former Corbeil operated businesses that were separate and apart from each other and from that of Sears Canada, and each of the three debtor groups have separate and unrelated creditor pools;

(b) the Sears Parties' assets and operations were intertwined and cannot easily segregated. Moreover, each of the Sears Parties (other than Sears Canada) is a subsidiary of Sears Canada itself and all ultimately functioned to support its business;

(c) the consolidation of the SLH Parties recognizes that Former SLH's subsidiary 168886 existed solely to support the business of its parent and the operations of the two entities were highly integrated; and

(d) if the Sears Canada Entities were treated as one consolidated debtor group, estimated recoveries for unsecured creditors of the Sears Parties would increase only modestly by 0.3%, while by contrast those for the SLH Parties and Former Corbeil would decrease by more than 10.7% and 92.1%, respectively.

84. The Monitor has considered the factors set out in Section 22 of the CCAA when recommending the proposed classification of creditors under the Plan. In particular:

(a) each of the classes is composed solely of unsecured creditors; and

(b) the types of remedies available to the unsecured creditors against their respective debtors are substantially the same and their rights outside of the Plan would also be substantially the same after giving effect to the substantive consolidation of these entities, being the enforcement of a claim to a *pro rata* share of each debtor group's unencumbered assets.

85. In the Monitor's view, no alternative classification method is reasonable or required in the circumstances for the unsecured creditors of each of the Sears Canada Entities. The Monitor notes that the creditors of the Sears Parties and the SLH Parties will vote in separate classes in view of the different asset pools against which they claim. In the Monitor's view, this aspect of the classification is important as it ensures the SLH Parties' votes have meaningful input into the approval of the Plan, which would be lost if the SLH Parties' creditors were consolidated with the Sears Parties' creditors.

86. The Monitor further views the proposed inclusion of the Pension Parties (via the Pension Claim) in the same Unsecured Creditor Classes as other Affected Unsecured Creditors as equitable and reasonable in the circumstances and in light of such Creditors' relative rights with respect to the Applicants. Although the Pension Claim is valued for distribution purposes under the Plan at 2.5 times its "face" value, its voting claim has not been increased. The Pension Claim, at this increased amount, remains an unsecured claim and will receive its *pro rata* unsecured distribution under the Plan. The Pension Settlement that resulted in this increase for distribution purposes reflects a commercial resolution that was negotiated at the Mediation over many months.

87. With respect to the balance of the Meetings Order, the Monitor believes that:

(a) the Meetings Order provides for reasonable, wide and sufficient notice of the Meetings to be provided to Affected Unsecured Creditors;

(b) the Proxy Deadline is reasonable in the circumstances;

(c) it is reasonable and efficient in the circumstances that Pension Representative Counsel and Employee Representative Counsel be proxy holders for the Affected Unsecured Creditors that they represent. While such a deemed proxy may not be appropriate in every case, the circumstances of this case support the use of such a deemed proxy for efficiency. The Monitor has considered in particular: (i) the large volume of individual creditors that Pension Representative Counsel and Employee Representative Counsel represent, (ii) the potential recoveries based upon known distributable asset values at this time; (iii) the fact that the proposed Plan serves primarily to distribute the remaining assets of the Sears Canada Entities to creditors in accordance with their legal entitlements, and (iv) the reasonable assumption that, given the purpose of this Plan, individual employees and retirees are not likely to have divergent views and interests;

(d) it is reasonable and cost-effective in the circumstances that Below-Threshold Creditors not receive a direct mailing of the Meeting Materials in light of the costs

of mailing such materials individually as weighed against the anticipated distributions to such creditors; and

(e) the provisions of the Meetings Order governing the conduct of the Meetings as well as the timing of the service of materials with respect to the Sanction Hearing are customary, reasonable and appropriate.

88. Accordingly, the Monitor respectfully requests that its motion on behalf of the Sears Canada Entities for the Meetings Order be granted.

G. THE MONITOR'S ASSESSMENT OF THE PLAN

89. Subject to the terms of the limited settlement arrangements described above, the Plan provides the Affected Unsecured Creditors with *pro rata* recoveries in accordance with their entitlements as unsecured creditors. In the Monitor's view, the Plan is fair in its treatment of creditors. Where the Plan deviates from such direct pro rata treatment, such deviations are justified for practical and/or commercial reasons.

90. Implementation of the Plan would effect a settlement of various significant matters in the CCAA Proceedings, and as detailed below, would provide substantial incremental benefits to Affected Unsecured Creditors in comparison to the available alternatives.

Joint Plan and Substantive Consolidation

91. With respect to the partial substantive consolidation and the resulting joint plan, for the purposes of the Plan, the Monitor believes that it is appropriate and reasonable in the circumstances—particularly given the independence of the three debtor groups' respective businesses and the intertwined nature of the assets and operations of the Sears Parties and SLH Parties themselves, as detailed above.

Compliance with Statutory Requirements

92. A plan of compromise or arrangement can only be sanctioned by the Court if, among other things, it complies with all statutory requirements.

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

Court File No. CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

REPLY BOOK OF AUTHORITIES OF THE DIP LENDERS

MOTION FOR AUTHORIZATION ORDER, MEETINGS ORDER, AND OTHER RELIEF RETURNABLE JUNE 7, 2022

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