

COURT FILE NUMBER 1601 – 03113
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

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

AND IN THE MATTER OF THE COMPROMISE
OR ARRANGEMENT OF QUICKSILVER
RESOURCES CANADA INC., 0942065 B.C. LTD.
and 0942069 B.C. LTD.

DOCUMENT BENCH BRIEF OF THE APPLICANTS (for the
Application to be heard by the Honourable Madam
Justice K. M. Horner at 11:00 a.m. on Thursday,
December 15, 2016)

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, Quicksilver Canada Resources Inc. ("**Quicksilver Canada**") and 0942065 B.C. Ltd. (the "**Quicksilver Canada Entities**" or the "**Applicants**"), in support of an application for the sanction of the Applicants' Plan, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). The shares of the third party listed in the style of cause in this Action, 0942069 B.C. Ltd., were sold pursuant to a purchase and sale agreement approved by this Court on April 22, 2016, so it is no longer a party to these proceedings.

2. Capitalized terms used but not defined in this Bench Brief are intended to bear their meanings as defined in:

- (a) the Initial Order granted by the Honourable Mr. Justice D.B. Nixon on March 8, 2016 (the "**Initial Order**");
- (b) the Affidavit of Bob McGregor sworn November 7, 2016 (the "**November 7 McGregor Affidavit**");
- (c) the Creditors Meeting Order granted by the Honourable Madam Justice K.M. Eidsvik on November 17, 2016 (the "**Meeting Order**"); or
- (d) the Plan of Compromise and Arrangement of the Applicants, which was attached as Exhibit "2" to the November 7 McGregor Affidavit (the "**Plan**").

3. The Plan provides fair and reasonable treatment of the Applicants' creditors, and third parties. The Plan complies with the requirements of the CCAA. The classification of creditors for the purpose of voting on the Plan at the Meeting was proper and consistent with the CCAA, existing law and prior orders of this Court, including the Meeting Order.

4. The Plan is supported by: (a) the Applicants; (b) the Monitor; (c) the Represented Group of 31 terminated employees; and (d) an overwhelming majority of the creditors present at the Meeting on December 13, 2016, who voted in favour of the Plan (the only creditor who voted

against the Plan was MNP, as defined below, and the reason for its "no" vote was not to do with the merits of the Plan, but rather because it was requesting a holdback of the dividend otherwise payable to QRI).

5. The Monitor has concluded that the Plan will provide greater returns to the Applicants' creditors than a liquidation scenario because process costs would be greater in such a scenario than they are in the Plan scenario.

6. The Plan was approved by an overwhelming majority of Affected Creditors voting on the Plan at the Meeting held on January 6, 2014 in person or by proxy, as will be set out in the Monitor's Ninth Report, to be filed (the "**Ninth Report**").

7. The Applicants submit that the Plan is fair, reasonable, not oppressive and is in the best interests of each of the Applicants and the Persons affected by the Plan. The Plan represents a better result than any realistic alternative, including liquidation. The Monitor has opined that the Plan is fair and reasonable. The Plan was overwhelmingly approved at the Meeting.

II. FACTS

A. Background to Applicants' Financial Circumstances

8. Quicksilver Canada is a wholly-owned subsidiary of U.S.-based Quicksilver Resources Inc. ("**QRI**"), the ultimate parent company of the Applicants. At the commencement of these proceedings, the Quicksilver Group had operations in both the United States and Canada. Prior to its sale, 0942065 B.C. Ltd. was a wholly-owned subsidiary of Quicksilver Canada.

- Affidavit of J. David Rushford, sworn March 8, 2016 at paras. 4 - 5

9. QRI, which is not an applicant in these proceedings, is a public company whose common shares were traded on the New York Stock Exchange under the ticker symbol "KWK" until January, 2015. QRI's common shares then traded on the OTC market under the ticker symbol "KWKA" until March 17, 2015. The shares of QRI have traded on the OTC pink market under the symbol "KWKAQ" since that date.

- Affidavit of J. David Rushford, sworn March 8, 2016 at para. 7

10. On March 17, 2015, QRI and thirteen (13) of its direct and indirect subsidiaries in the Quicksilver Group (collectively, the "**Chapter 11 Debtors**"¹) sought relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**"). Quicksilver Canada, and its direct and indirect subsidiaries (collectively with Quicksilver Canada, the "**Quicksilver Canada Group**", which included 0942065 B.C. Ltd. and 0942069 B.C. Ltd.), were not included in the Chapter 11 filing.

- Affidavit of J. David Rushford, sworn March 8, 2016 at para. 8

11. At the commencement of these proceedings, Quicksilver Canada was an independent gas exploration, development, and production company with operations exclusively in Canada. All reserves, producing properties and exploration prospects of the Quicksilver Canada Group were located in Alberta and British Columbia.

- Affidavit of J. David Rushford, sworn March 8, 2016 at para. 24

12. In December 2011, Quicksilver Canada and its subsidiary Makarios Midstream Inc. ("**MMI**") entered into various agreements among themselves and with 0927530 B.C. Unlimited Liability Company ("**KKR Newco**"), a subsidiary of Kohlberg Kravis Roberts & Co. L.P. ("**KKR**"), as described below (collectively, the "**KKR Transaction**").

- Affidavit of J. David Rushford, sworn March 8, 2016 at para. 30

13. As part of the KKR Transaction, the Maxhamish Pipeline and the Fortune Creek compressor assets were transferred by Quicksilver Canada to a newly-formed partnership named the Fortune Creek Gathering and Processing Partnership (the "**Partnership**"). Initially, KKR Newco contributed \$125 million and Quicksilver Canada contributed the Maxhamish Pipeline and associated compressor assets to the Partnership, respectively, each in exchange for a 50% partnership interest in the Partnership, pursuant to a Contribution Agreement dated December 23, 2011 among Quicksilver Canada, the Partnership and KKR Newco. Quicksilver Canada also received a cash payment from the Partnership in an amount equal to approximately \$112 million

¹ The Chapter 11 Debtors are: Quicksilver Resources Inc. (QRI), Barnett Shale Operating LLC, Cowtown Drilling, Inc., Cowtown Gas Processing L.P., Cowtown Pipeline Funding, Inc., Cowtown Pipeline L.P., Cowtown Pipeline Management, Inc., Makarios Resources International Holdings LLC, Makarios Resources International Inc., QPP Holdings LLC, QPP Parent LLC, Quicksilver Production Partners GP LLC, Quicksilver Production Partners LP, and Silver Stream Pipeline Company LLC.

(being the \$125 million contribution by KKR Newco, less certain amounts required to complete work on the Maxhamish Pipeline and the compressor assets).

- Affidavit of J. David Rushford, sworn March 8, 2016 at para. 31

14. The Partnership and MMI were bankrupted on June 30, 2016 and MNP Ltd. ("**MNP**") is their Trustee in Bankruptcy.

B. The CCAA Proceedings

15. On March 8, 2016, Justice D.B. Nixon granted the Initial Order, which appointed FTI Consulting Canada Inc. as the CCAA Monitor of the Quicksilver Group (the "**Monitor**").

16. On March 29, 2016, Justice D.B. Nixon approved the sale of Quicksilver Canada's oil and gas assets located in Alberta and that sale closed shortly thereafter.

17. On April 22, 2016, Justice C.M. Jones approved the sale of the Applicants' remaining assets, all located in B.C., comprising: oil and gas assets located in Northeastern B.C., known as the "Horn River Assets"; a prospective LNG site on Vancouver Island; and the shares of 0942069 B.C. Ltd. That sale closed shortly thereafter.

18. The proceeds of the asset sales were sufficient to repay in full the Applicants' secured lenders, and they were repaid pursuant to an April 22, 2016 Distribution Order granted by Justice C.M. Jones. After that repayment, the only remaining creditors of the Applicants were their unsecured creditors.

19. On May 26, 2016, Justice K.M. Eidsvik granted a Claims Procedure Order, setting a Claims Bar Date of July 5, 2016.

20. On June 28, 2016, Justice J. Strekaf granted the Representation Order, among other things, appointing Susan Robinson Burns Q.C. as "**Representative Counsel**" on behalf of the 31 terminated employees comprising the Represented Group.

21. On November 17, 2016, Justice K.M. Eidsvik granted:

- (a) the Meeting Order, authorizing the Applicants to file and distribute the Plan and the Affected Creditors' Meeting Materials, and to call and hold a vote on the Plan on December 13, 2016; and
- (b) an Order approving the settlement agreement between the Applicants and the Represented Group.

22. On December 13, 2016, the Meeting was held, the results of which will be more fully addressed in the Ninth Report. The largest claim against the Applicants is the claim of QRI, which was approved as a Proven Claim by the Monitor. As a result of the Chapter 11 Plan of QRI, control of QRI's claim against the Applicants is now exercised by Eugene I. Davis, Liquidation Trustee, for the benefit of QRI's Chapter 11 creditors (the "**Liquidation Trustee**"). Accordingly, the Liquidation Trustee is the person who controls and who voted the claim. The law relating to the Liquidation Trustee's voting of that claim is set out below.

C. The Plan

1. The Purpose of the Plan

23. The following is a general overview of the fundamental aspects of the Plan.

24. As noted above, the Applicants have sold all of their assets. The proceeds from the sale of the Applicants' assets were previously used to repay the senior secured lenders in full and pay for goods and services provided to the Applicants throughout the CCAA proceedings. The overall purpose of the Plan is to provide an efficient timely distribution of the remaining available funds (the "**Available Funds**") to the Applicants' affected creditors as determined by the Claims Process.

2. Classification and Treatment of Creditors

25. The Plan contemplates a single class of creditors (the "**Unsecured Creditor Class**"). The Unsecured Creditor Class is made up of affected creditors (the "**Affected Creditors**") who are all creditors holding valid proven unsecured claims against the Applicants. The Affected Creditors were determined as a result of the Claims Process undertaken by the Applicants.

26. The Plan designates certain claims against the Applicants as unaffected claims ("**Unaffected Claims**"). Holders of Unaffected Claims will be paid in the ordinary course, will not be entitled to vote on the Plan and will not receive any distribution under the Plan. The Unaffected Claims are:

- (a) claims secured by charges granted in Orders in these CCAA proceedings;
- (b) claims enumerated in sections 5.1(2) and 19(2) of the CCAA;
- (c) Post-Filing Trade Payables;
- (d) Government Priority Claims; and
- (e) Employee Priority Claims.

27. The Available Funds shall be determined based on the total funds available at the Plan Implementation Date less amounts required for administration of the plan and wind-down of the estate (the "**Administrative Reserve**") and amounts held back for disputed claims (the "**Disputed Claim Reserve**"). At the current time there are no disputed claims and therefore it is anticipated that the Disputed Claim Reserve will be nil.

28. The Administrative Reserve shall be determined by the Applicants in consultation with the Monitor three business days prior to the Plan Implementation Date and is meant to include an amount to be held back to make the payments required by the Settlement Agreement. In the Eighth Report, the Monitor provided an illustrative, estimated calculation (subject to change), indicating that creditors may receive approximately 2.2% of the amount of their Proven Claims in the distribution expected to follow shortly after the Plan Implementation Date (the "**Initial Distribution**"). The Initial Distribution is expected to distribute approximately \$18 million in total.

29. There are various large additional potential cash recoveries that the Applicants continue to work on collecting. The following potential additional recoveries could result in additional distributions to the Affected Creditors after the Initial Distribution:

- (a) tax refunds related to GST and withholding taxes. The tax refunds are currently estimated to be approximately \$1.5 million (“**Potential Tax Refund**”), but the refunds are currently under review with the Canada Revenue Agency (“**CRA**”) and the amount may change materially depending on the results;
- (b) final statement of adjustments related to the Alberta Horseshoe Canyon asset sales. The Applicants are currently negotiating the final statement of adjustments with the purchaser, CPC Resources ULC (“**CPC**”). Currently the Applicants are of the view that they are owed approximately \$1.4 million (“**Alberta Asset Sale Adjustment Amount**”) from CPC related to the final statement of adjustments. CPC is currently disputing this amount and the two parties are in the process of discussing a process for the settlement of the dispute;
- (c) Quicksilver Canada expects a dividend of approximately \$817,000 from the bankrupt estate of the Partnership, arising from:
 - (i) Quicksilver Canada's payment of \$599,400 (“**OGCBC Payment**”) to the Oil and Gas Commissions of British Columbia (“**OGCBC**”) on behalf of the Partnership and in exchange for which Quicksilver Canada was granted a first secured priority ranking over the assets of the Partnership; and
 - (ii) Quicksilver Canada's payment of property taxes in the amount of \$218,298 (“**Partnership Property Tax Payment**”) related to the Partnership's assets on behalf of the Partnership;
- (d) Quicksilver Canada, through its 100% ownership of MMI and MMI's 50% interest in the Partnership, may have a claim to certain additional proceeds (“**Potential MMI Recoveries**”) generated through the bankruptcy of the Partnership, including any dividend the Partnership receives pursuant to its claim as an Affected Creditor into the Applicants' estate. Quicksilver Canada does not presently know the quantum of such a potential claim, and is assessing the legal merits of such a potential claim.

30. If additional funds, such as the amounts set out in the preceding paragraph, become available for distribution to Affected Creditors after the Initial Distribution Date, the Plan provides a mechanism for the Applicants to make additional *pro rata* distributions as frequently as the Monitor directs.

3. Releases Under the Plan

31. The Plan provides for releases on the Plan Implementation Date in favour of various parties including:

- (a) the Quicksilver Canada Entities and their respective Directors, Officers, current and former employees, advisors, legal counsel and agents (collectively the “**Quicksilver Canada Released Party**”); and
- (b) the Monitor and its current and former directors, officers and employees, legal counsel and agents (collectively the “**Monitor Released Party**”).

4. Notice to Creditors, the Meeting and the Vote

32. It is anticipated that these matters will be addressed in the Monitor's Ninth Report.

5. Conditions Precedent to Implementation of the Plan

33. Section 8.3 of the Plan provides a list of conditions precedent to implementation of the Plan, some of which have already been satisfied. The remaining outstanding conditions that have not yet been satisfied or waived are:

- (a) the Quicksilver Canada Entities shall have satisfied their respective Post-Filing Trade Payables in the ordinary course or provision shall have been made in respect thereof in the Administrative Reserve to the satisfaction of the Monitor;
- (b) all material consents, declarations, rulings, certificates or approvals of or by any Governmental Authority as may be considered necessary by the Quicksilver Canada Entities and the Monitor in respect of the Plan Transaction Steps shall have been obtained;

- (c) the Sanction Order shall have been granted by the Court by December 16, 2016, or such later date as shall be acceptable to Quicksilver Canada, in consultation with the Monitor, in form and substance satisfactory to the Quicksilver Canada Entities and the Monitor, and shall be a Final Order; and
- (d) the Plan Implementation Date shall have occurred by December 31, 2016, or such other date as the Quicksilver Canada Entities and the Monitor may have agreed.

D. The Monitor's Opinion on the Plan and the Surrounding Issues

34. In the Eighth Report, the Monitor opined as follows:

- (a) because the Applicants' assets have all been monetized and the only assets remaining are in the form of cash or potential collections of receivables, the difference in net realization of cash between a liquidation scenario and a Plan is insignificant (*i.e.*, cash has the same value in liquidation as it does in the Plan). However, the Plan and Meeting Order contemplate an efficient distribution of the Available Funds to the Creditors and significant time and effort has already been incurred drafting the Plan. Therefore the process costs associated with the Plan are likely less than incremental process costs, including potential bankruptcy costs/levies, if a liquidation were to be initiated. Lower process costs result in higher distribution to Affected Creditors;
- (b) the notice provisions contemplated in the Plan provide sufficient time and appropriate materials to allow Affected Creditors to attend the Creditors' Meeting and participate in voting either in person or by proxy;
- (c) the releases provided to the Quicksilver Canada Released Parties and the Monitor Released Parties are consistent with the CCAA, do not compromise or extinguish claims identified in section 5.1(2) of the CCAA and are rationally connected to the Plan and the work undertaken by the Quicksilver Canada Released Parties and the Monitor Released Parties in the CCAA Proceedings. The Monitor supports the releases provided to all of the Quicksilver Canada Released Parties and the

Monitor Released Parties as being fair, reasonable and appropriate in all of the circumstances;

- (d) the Plan and Meeting Order contemplate an efficient and timely distribution of the Available Funds to Affected Creditors and provide an appropriate mechanism to distribute additional funds that may become available to the Applicants Affected Creditors; and
- (e) the Applicants pursued the Plan with due diligence and in good faith. The Monitor is satisfied that the Plan represents a timely and efficient mechanism to distribute the Available Funds to its Affected Creditors. Nothing has come to the attention of the Monitor that would suggest that the Applicants have not been in compliance with the terms of the Initial Order, the Claims Procedure Order and/or the CCAA generally.

III. ISSUE

35. The sole issue to be determined in this application is whether the Sanction Order ought to be granted.

IV. LAW AND ARGUMENT

A. The Requirements for Plan Approval Have Been Met

36. Pursuant to section 6(1) of the CCAA, the Court has the discretion to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the company and its creditors.

- CCAA, Section 6(1)

[TAB 1]

37. The general requirements for court approval of a CCAA plan are well-established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

- *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 OR (3d) 500, 17 CBR (3d) 1 at para. 17 (Ont Ct J (Gen Div)) [TAB 2]
- *Lutheran Church – Canada, Re*, 2016 ABQB 419, 38 CBR (6th) 36 at para. 114 [TAB 3]

1. There has been Compliance with Statutory Requirements

(a) The Statutory Requirements

38. The first and second requirements of the test relate to compliance with the procedural requirements of the CCAA and court orders granted during the CCAA proceedings. With respect to the first part of the test, factors that may be considered by the courts include whether:

- (a) each applicant comes within the definition of "debtor company" under section 2 of the CCAA;
- (b) the applicants have total claims in excess of \$5 million;
- (c) the notice calling the creditors' meetings 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.

- *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at paras. 19-21 [TAB 2]
- *Canadian Airlines Corp., Re*, 2000 ABQB 442, 265 AR 201 at paras. 62-63, leave to appeal refused 2000 ABCA 238, *aff'd* 2001 ABCA 9, leave to appeal refused (2001), 295 AR 351 [TAB 4]

39. These requirements have all been satisfied. In particular:

- (a) at the granting of the Initial Order, this Honourable Court found that each of the Applicants was a "debtor company" to which the CCAA applies;
- (b) the Applicants' liabilities are far in excess of the \$5 million threshold under the CCAA;
- (c) the Plan was filed in accordance with the Meeting Order;
- (d) the Affected Creditors Meeting Materials were delivered and posted on the Monitor's Website in accordance with the terms of the Meeting Order;
- (e) the classification of the Applicants' creditors into one class for each of the Applicants was approved by this Honourable Court pursuant to the Meeting Order;
- (f) the Meeting was properly constituted and the voting was properly carried out in accordance with the Meeting Order; and
- (g) as described above, the Plan was approved by an overwhelming majority of Affected Creditors, in excess of the requisite double majority at the Meeting.

(b) The Liquidation Trustee's Vote of QRI's Claim

40. Due to the Chapter 11 Plan of QRI, QRI's claim against the Applicants is now held by the Liquidation Trustee for the benefit of QRI's Chapter 11 creditors (the "**Liquidation Trustee**"). Accordingly, the Liquidation Trustee is the person who controls and who voted the claim. The Liquidation Trustee voted in favour of the Plan.

41. Section 22(3) of the CCAA provides that "[a] creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company". While this subsection, which was added to the CCAA in 2007, appears not to have been judicially interpreted, its interpretation should be guided by that of section 54(3) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA"), which is functionally identical.

- CCAA, Section 22(3)

[TAB 1]

- BIA, Section 54(3) [TAB 6]

- *Ted Leroy Trucking [Century Services] Ltd, Re*, [2010] 3 SCR 379 at para. 47 [TAB 7]

42. Under the BIA/CCAA definition, two entities are deemed to be related if one entity controls the other entity. Accordingly, prior to the establishment of the Liquidation Trust, QRI as the ultimate parent company of the Applicants was a related party to QRCI. However, QRI's claim was assigned to the Liquidation Trustee, which voted the claim. Case law from the BIA context, and a review of the rights and duties imposed on the Liquidation Trustee as a fiduciary of all of QRI's creditors, demonstrate that the Liquidation Trustee properly voted QRI's claim and was not prohibited from doing so by Section 22(3) of the CCAA.

- CCAA, Section 2(2) [TAB 1]

- BIA, Section 4 [TAB 6]

43. Case law from the BIA context indicates that an unrelated third party to whom a claim has been assigned could still be prevented from voting if:

- (a) the third party is found to be acting as a proxy for the related party;
- (b) the arrangements between the third party and debtor are structured to avoid the ambit of section 54(3); or
- (c) the claim was transferred with implicit or explicit conditions on the manner of its exercise.

- *Oulahen, Re* (2000), 16 CBR (4th) 262 at paras. 7-8 (Ont. Ct. J. (Gen Div)), aff'd (2001), 24 CBR (4th) 1991 (Ont CA) [TAB 8]

- *SAAN Stores Ltd/Magasins SAAN Ltée*, [2005] CarswellOnt 1482, 12 CBR (5th) 35 at paras. 12-13 (Ont Sup Ct J [Commercial List]) [TAB 9]

44. All of those considerations relate to the possibility of collusion, or of an assignment of a claim in appearance but not in substance. No such considerations apply here. Further, the caselaw provides that the possibility of collusion between a debtor and a third party can be

eliminated by providing ample information regarding the nature of the third party's relationship with all interested parties. Such information is available here and proves there is no collusion.

45. The Liquidation Trustee is a party to the KWK Trust Agreement (the "**Trust Agreement**"), which, together with the first Amended Joint Chapter 11 Plan of Liquidation for Quicksilver Resources Inc. and its Affiliated Debtors (the "**QRI Plan**"), and the Order Confirming First Amended Joint Chapter 11 Plan of Liquidation for Quicksilver Resources Inc. and its Affiliated Debtors ("**QRI Order**"), are attached to the Ninth Report. These documents clearly establish the Liquidation Trustee acts independently as a fiduciary for the benefit of all the creditors of QRI:

- (a) under paragraph 2 of the KWK Trust Agreement, the Trustee is required to exercise its powers "solely in a fiduciary capacity consistent with, and in furtherance of, the purpose of the Liquidation Trust", the purpose of which is to "liquidat[e] the Liquidation Trust Assets in an expeditious but orderly manner for the benefit of" specified beneficiaries; and
- (b) under the Trust Agreement, the Liquidation Trustee can only engage in trade or business with the trust property to the extent reasonably necessary and consistent with the purpose of the Liquidation Trust; and
- (c) the Liquidation Trustee is subject to creditor oversight: a majority vote of either the Trustee Advisory Board or the Unsecured Advisory Group can constrain the Liquidation Trustee's actions.
 - Trust Agreement, at paras. 2.2, 2.3(v), 2.6(a),(c)-(d), 3.6(b), 5.1 and recital C
 - QRI Plan, sections 9.1 and 9.6.2
 - QRI Order at para L

46. Although legal title to QRI's shares of Quicksilver Canada also have been transferred to the Liquidation Trustee, its holding of such bare legal title is for the limited purpose of liquidation. The beneficial holders of those shares, and of all the assets held by the Liquidation

Trustee, are the creditors of QRI. As noted, the Liquidation Trustee is only permitted to engage in business with the trust property to the extent reasonably necessary and consistent with the purpose of the Liquidation Trust – realizing on the assets for the benefit of QRI's creditors.

47. Thus, the independent fiduciary who voted the QRI claim holds the claim and all the other assets in the trust for the limited purpose of realization. And, as a matter of form, the party voting the QRI claim at the Meeting was not the beneficial owner of the QRCI shares – the beneficial owner are QRI's creditors.

48. Based on all these considerations, the Liquidation Trustee cannot be considered “related to the company” within the meaning of Section 22(3) of the CCAA and its vote of QRI's claim was valid.

(c) Additional Statutory Requirements

49. Section 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims.

- CCAA, sections 6(3), 6(5) and 6(6) [TAB 1]
- *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 CBR (5th) 1, at para. 16 [TAB 5]

50. In accordance with the provisions of the CCAA, the Plan treats Government Priority Claims and Employee Priority Claims as Unaffected Claims. Such claims will not be compromised under the Plan and will be paid as required by the CCAA. The Applicants do not maintain any pension plans, and, accordingly, section 6(6) of the CCAA is not applicable in the circumstances.

51. Based on the above, it is submitted that the statutory requirements for the sanction of the Plan under section 6 of the CCAA have been satisfied.

2. Nothing Has Been Done or Purported to be Done That is Not Authorized by the CCAA

52. With respect to the second part of the test for sanction of a plan of compromise or arrangement under the CCAA, courts are entitled to rely on the reports of the Monitor and on other parties in assessing whether anything has been done or purported to have been done that is not authorized by the CCAA.

- *Canadian Airlines Corp., Re, supra*, at para. 64 [TAB 4]
- *Canwest Global Communications Corp., Re, supra*, at para. 17 [TAB 5]

53. The Monitor's Reports to the Court confirm that the Applicants have been acting in good faith and with due diligence, and have made no reference to any conduct or action by the Applicants that is not authorized by the CCAA. The Applicants have complied with the requirements of the CCAA and the Orders of this Honourable Court – this Honourable Court has so ruled on every stay extension order that has been granted. Accordingly, it is submitted that the second part of the plan sanction test has been met.

3. The Plan is Fair and Reasonable

54. When determining whether a plan is fair and reasonable, the court will measure the fairness and reasonableness of a plan against the available commercial alternatives, weigh the equities and balance the relative degrees of prejudice that would flow from granting or refusing the relief being sought under the CCAA:

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

- *Canadian Airlines Corp., Re, supra*, at paras. 3 and 178-179, citing *Olympia & York Developments Ltd. v. Royal Trust Co., supra*, at para. 29 [TAB 4]
- *Canwest Global Communications Corp., Re, supra*, at para. 19 [TAB 5]

55. In general, the court will not second-guess the business judgment of the stakeholders as expressed by their majority vote particularly where, as here, the plan has received overwhelming support. Justice Blair of the Ontario Superior Court's Commercial List summarized as follows:

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 objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. [...]

Those voting on the Plan (and I noted there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p. 510 of *Olympia & York Developments Ltd.*:

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

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests.

- *Re T. Eaton Co.* (1999), 15 CBR (4th) 311 (Ont S.C.J. (Comm. List)) at paras. 5 and 6 [TAB 10]
- *Canadian Airlines, supra*, at para. 97 [TAB 4]
- *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 DLR (4th) 135 at para. 61, leave to appeal refused (2008), 390 NR 393 (note) [*Metcalfe*] [TAB 11]

56. More recently, in *Sino-Forest Corp.*, Justice Morawetz set out the following relevant factors to be considered at a sanction hearing:

1. The claims must have been properly classified; there must be no secret arrangements to give an advantage to a creditor or creditors; the approval of the plan by the requisite majority of creditors is most important.
2. It is helpful if the monitor or some other disinterested person has prepared an analysis of anticipated receipts on liquidation or bankruptcy.
3. If other options or alternatives have been explored and rejected as workable, this will be significant.
4. Consideration of the oppression of rights of certain creditors.
5. Unfairness to shareholders.
6. The court will consider the public interest.

- *Sino-Forest Corp, Re.*, 2012 ONSC 7050 at para. 61 [TAB 12]

57. An analysis of these factors demonstrates that the Plan provides a fair and reasonable balance among its stakeholders.

(a) Classification and the Requisite Vote

58. As set out above, creditors were appropriately classified at the Meeting, and the classification was not opposed at the hearing to approve the Meeting Order.

59. As further set out above, the Plan received the support of the vast majority of the Affected Creditors. While court sanction is not a "rubber stamp process", the vote of creditors is important:

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 than the courts to gauge business risk.

- *Canadian Airlines, supra*, at para. 97 [TAB 4]

60. In the present case, all but one of Affected Creditors voted in favour of the Plan (and the creditor who voted against did so because it wanted another creditor's distribution held back). As such, substantially more than the required majority approved the Plan. This is a factor that supports a finding that the Plan is fair and reasonable.

(b) Bankruptcy and Liquidation Alternatives

61. The Monitor has considered the liquidation and bankruptcy alternatives and has stated that the economic result of the Plan is superior to what could be realized through a liquidation scenario.

- Eighth Monitor's Report, para.48

(c) Other Options and Alternatives

62. Because of the prolonged downturn in commodity prices, the Applicants had no viable alternative to selling their assets. The extensive marketing process for those assets was put in evidence before the Court at the Approval and Vesting Order applications (which were unopposed). The Plan represents the best available alternative remaining in these proceedings, and provides a better result for the Applicants' creditors than could be achieved through a bankruptcy or liquidation.

(d) Treatment of Creditors and Shareholders

63. The Plan treats Affected Creditors fairly and provides for the same distribution among all Affected Creditors. The overwhelming majority of the Applicants' Affected Creditors voted in favour of the Plan at the Meetings. These were exercises of those parties' business judgment, which should not be displaced.

(e) The Public Interest

64. The Plan treats all Affected Creditors equally. Unaffected Claims, which include, among others, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) of the CCAA and 5.1(2) of the CCAA, prior ranking secured claims and certain trade payables, will not be affected by the Plan. This is all in the public interest.

(f) Conclusion on Fairness Test

65. The foregoing factors, in addition to the fact that the Plan is supported by the Applicants, the Monitor, and the creditors who voted in favour of the Plan, demonstrate that the Plan is fair and reasonable and should be sanctioned by the Court.

B. The Releases in the Plan are Appropriate in the Circumstances

66. Canadian courts have on several occasions approved plans of compromise or arrangement in CCAA proceedings containing third party releases; indeed, in the 2008 *Metcalfe* decision, the Ontario Court of Appeal observed that “[t]hird party release have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen’s Bench in [*Canadian Airlines*]”.

- *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp, supra*, at paras. 74-75
- *Canwest Global Communications Corp., Re, supra*, at paras. 28-32 [TAB 5]
- *Sino-Forest Corporation, Re, supra*, at paras. 70-77 [TAB 12]
- *Cline Mining Corp, Re*, 2015 ONSC 622 at paras. 22-24 [TAB 13]

67. In *Metcalfe*, the Ontario Court of Appeal considered whether a plan of compromise or arrangement under the CCAA could contain a release of claims against parties other than the debtor company or its directors. Justice Blair held that “the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring”.

- *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp, supra*, at para. 43 [TAB 11]

68. CCAA courts have approved third party releases in the context of plans of arrangement and settlement agreements where the releases are rationally related to a resolution of the debtors’ claims, the releases will benefit creditors generally, and the releases are not overly broad. Factors considered by courts in determining whether to approve third party releases include:

- (a) whether the parties to be released are necessary and essential to the restructuring of the debtor;
- (b) whether the claims to be released are rationally related to the purpose of the plan and necessary for it;

- (c) whether the plan would fail without the releases;
- (d) whether the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;
- (e) whether the plan would benefit not only the debtor companies but creditors generally;
- (f) whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and
- (g) whether the releases are fair and reasonable and not overly broad.

- *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp, supra*, at paras. 70-71 [TAB 11]

69. The third party releases provided under the Plan are very limited, covering only those parties who are centrally involved with and necessary to the success of the Plan – the Applicants' directors, officers, employees and advisors, the Monitor and its representatives and advisors. The third party releases protect these Released Parties from potential claims relating to the Applicants that may be made in the future based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan.

70. The release of such parties is necessary for the successful restructuring of the Applicants. There is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

71. The Monitor considers the releases contained in the Plan to be fair and reasonable in the circumstances. The Applicants are not aware of any specific objections to the releases provided for in the Plan. Accordingly, it is submitted that the releases contained therein are appropriate in the circumstances and that this Court ought to approve the Plan.

72. As noted above, the Plan contains a clause that ensures that this Court will continue to have a supervisory role with respect to claims not released by the Plan, so as to ensure that

claimants will not be able to overreach and, after implementation of the Plan, bring claims that have been released by the Plan. Section 7.1 of the Plan states, in part:

Notwithstanding anything to the contrary herein, from and after the Plan Implementation Date, a Person may only commence an action against a Released Party in connection with (x) or (z) above if such Person has first obtained leave of the Court on notice to the applicable Released Party, the Applicants, the Monitor (unless previously discharged) and any applicable insurers...

73. By providing a summary process to ensure that only properly non-released claims will be brought against Released Parties in the future, this provision ensures that judicial resources and the resources of the Applicants will not be wasted. This Court, which is best suited to determine issues relating to the interpretation of the Plan, is designated to make such decisions. Such a provision was approved by this Honourable Court in the *Lone Pine* CCAA proceedings [TAB 14].

V. RELIEF SOUGHT

74. It is respectfully submitted that this Honourable Court ought to grant the Sanction Order and the relief set out therein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 14th day of December, 2016.

BENNETT JONES LLP

Estimated Time for
Argument: 25 minutes

Per:



Chris Simard and Aaron Rankin, Counsel for
the Applicants

TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, sections 2(2), 6, 22
2. *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 OR (3d) 500, 17 CBR (3d) 1 (Ont Ct J (Gen Div))
3. *Lutheran Church – Canada, Re*, 2016 ABQB 419, 38 CBR (6th) 36
4. *Canadian Airlines Corp., Re*, 2000 ABQB 442, 265 AR 201, leave to appeal refused 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal refused (2001), 295 AR 351
5. *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 CBR (5th) 1
6. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, section 54
7. *Ted Leroy Trucking [Century Services] Ltd, Re*, [2010] 3 SCR 379
8. *Oulahen, Re* (2000), 16 CBR (4th) 262 (Ont. Ct. J. (Gen Div)), aff'd (2001), 24 CBR (4th) 1991 (Ont CA)
9. *SAAN Stores Ltd/Magasins SAAN Ltée*, [2005] CarswellOnt 1482, 12 CBR (5th) 35 (Ont Sup Ct J [Commercial List])
10. *Re T. Eaton Co.* (1999), 15 CBR (4th) 311 (Ont S.C.J. (Comm. List))
11. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 DLR (4th) 135, leave to appeal refused (2008), 390 NR 393 (note)
12. *Sino-Forest Corp, Re*, 2012 ONSC 7050
13. *Cline Mining Corp, Re*, 2015 ONSC 622
14. *Lone Pine Resources*, CCAA Sanction Order filed January 9, 2014

TAB 1



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to November 21, 2016

À jour au 21 novembre 2016

Last amended on February 26, 2015

Dernière modification le 26 février 2015

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to November 21, 2016. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of November 21, 2016 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité – lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 21 novembre 2016. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 21 novembre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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R.S.C., 1985, c. C-36

L.R.C., 1985, ch. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Short Title

Titre abrégé

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

Interpretation

Définitions et application

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit

Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de chemin de fer ou de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

- (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

- (a) cash or cash equivalents, including negotiable instruments and demand deposits,
- (b) securities, a securities account, a securities entitlement or a right to acquire securities, or
- (c) a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations. (*secured creditor*)

demande initiale La demande faite pour la première fois en application de la présente loi relativement à une compagnie. (*initial application*)

état de l'évolution de l'encaisse Relativement à une compagnie, l'état visé à l'alinéa 10(2)a) portant, projections à l'appui, sur l'évolution de l'encaisse de celle-ci. (*cash-flow statement*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujéti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

- a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;
- b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;
- c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

intérêt relatif à des capitaux propres

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or

a) S'agissant d'une compagnie autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

obligation Sont assimilés aux obligations les débetures, stock-obligations et autres titres de créance. (*bond*)

réclamation S'entend de toute dette, de tout engagement ou de toute obligation de quelque nature que ce soit, qui constituerait une réclamation prouvable au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*. (*claim*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

surintendant des faillites Le surintendant des faillites nommé au titre du paragraphe 5(1) de la *Loi sur la faillite et l'insolvabilité*. (*Superintendent of Bankruptcy*)

surintendant des institutions financières Le surintendant des institutions financières nommé en application du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

tribunal

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chi-rographaire*)

Meaning of *related and dealing at arm's length*

(2) For the purpose of this Act, 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.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2^e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Application

(3) Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

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

R.S., c. C-25, s. 5.

Claims against directors — compromise

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

Exception

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

- (a)** relate to contractual rights of one or more creditors; or
- (b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

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

Resignation or removal of directors

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

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under 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

manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

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

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

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)d) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(C) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82.

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Scope of Act

8 This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27; 2012, ch. 16, art. 82.

Le tribunal peut donner des instructions

7 Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Champ d'application de la loi

8 La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131.

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

- (a)** the nature of the debts, liabilities or obligations giving rise to their claims;
- (b)** the nature and rank of any security in respect of their claims;
- (c)** the remedies available to the creditors in the absence of the compromise or arrangement being

admis par la compagnie, est, dans le cas où celle-ci est assujettie à une procédure pendante sous le régime de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Catégories de créanciers

Établissement des catégories de créanciers

22 (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

- a)** la nature des créances et obligations donnant lieu à leurs réclamations;
- b)** la nature et le rang de toute garantie qui s'y rattache;

sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

Monitors

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Contrôleurs

Attributions

23 (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

TAB 2

1993 CarswellOnt 182
Ontario Court of Justice (General Division)

Olympia & York Developments Ltd. v. Royal Trust Co.

1993 CarswellOnt 182, [1993] O.J. No. 545, 12 O.R. (3d) 500, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149

**Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re
plan of arrangement of OLYMPIA & YORK DEVELOPMENTS LIMITED
and all other companies set out in Schedule "A" attached hereto**

R.A. Blair J.

Heard: February 1 and 5, 1993

Oral reasons: February 5, 1993

Written reasons: February 24, 1993

Judgment: February 24, 1993

Docket: Doc. B125/92

Counsel: [List of counsel attached as Schedule "A" hereto.]

Subject: Corporate and Commercial; Insolvency

Headnote

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

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Sanctioning of plan — Unanimous approval of plan by all classes of creditors not being necessary where plan being fair and reasonable.

Under the protection of the *Companies' Creditors Arrangement Act* ("CCAA"), O & Y negotiated a plan of arrangement. The final plan of arrangement was voted on by the numerous classes of creditors: 27 of the 35 classes voted in favour of the plan, eight voted against it. O & Y applied to the court under s. 6 of the CCAA for sanctioning of its final plan.

Held:

The application was allowed.

In considering whether to sanction a plan of arrangement, the court must consider whether: (1) there has been strict compliance with all statutory requirements; (2) all materials filed and procedures carried out are authorized by the CCAA; and (3) the plan is fair and reasonable.

The court found that the first two criteria had been complied with. O & Y met the criteria for access to the protection of the CCAA, the creditors were divided into classes for the purpose of voting and those classes had voted on the plan. All meetings of creditors were duly convened and held pursuant to the court orders pertaining to them. Further, nothing had been done or purported to have been done that was not authorized by the CCAA.

In assessing whether a plan is fair and reasonable, the court must be satisfied that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders. One important measure of whether a plan is fair and reasonable is the parties' approval of the plan and the degree to which approval has been given. With the exception of the eight classes of creditors that did not vote to accept the plan, the plan met with the overwhelming approval of the secured creditors and unsecured creditors.

While s. 6 of the CCAA makes it clear that a plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class, the section does not make it clear whether the plan must be approved by *every* class of creditors before it can be sanctioned by the court. A court would not sanction a plan if the effect of doing so were to impose it upon a class or classes of creditors who rejected it and to bind them by it. However, in this case, the plan provided that the claims of the creditors who rejected the plan were to be treated as "unaffected claims" not bound by its provisions. Further, even if they approved the plan, secured creditors had the right to drop out at any time by exercising their realization rights. Finally, there was no prejudice to the eight classes of creditors that did not approve the plan because nothing was being imposed upon them that they had not accepted and none of their rights were being taken away.

Application for sanctioning of plan under *Companies' Creditors Arrangement Act*.

R.A. Blair J.:

1 On May 14, 1992, Olympia & York Developments Limited and 23 affiliated corporations ("the Applicants") sought, and obtained an Order granting them the protection of the *Companies' Creditors Arrangement Act* [R.S.C. 1985, c. C-36] for a period of time while they attempted to negotiate a Plan of Arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.

2 A Final Plan of Compromise or Arrangements has now been negotiated and voted on by the numerous classes of creditors. 27 of the 35 classes have voted in favour of the Final Plan; 8 have voted against it. The Applicants now bring the Final Plan before the Court for sanctioning, pursuant to section 6 of the *Companies' Creditors Arrangement Act*.

The Plan

3 The Plan is described in the motion materials as "the Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as "the Plan" or "the Final Plan". Its purpose, as stated in Article 1.2,

... is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

4 The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals — with some common themes — for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.

5 The contemplated O & Y restructuring has three principal components, namely:

1. The organization of O & Y Properties, a company to be owned as to 90% by OYDL and as to 10% by the Reichmann family, and which is to become OYDL's Canadian Real Estate Management Arm;

2. Subject to certain approvals and conditions, *and provided the secured creditors do not exercise their remedies against their security*, the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y properties, in exchange for shares; and,

3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

6 There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".

7 Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class by class basis, for dealing with the outstanding debt in question during the 5 year Plan period.

8 In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.

9 It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.

10 The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self-financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.

11 The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides,

a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically lifted; and,

b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders' Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, *and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.*

12 Finally, I note that Article 1.3 Of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants."

The Principles to be Applied on Sanctioning

13 In *Nova Metal Products Inc. v. Comiskey (Trustee of) (sub nom. Elan Corp. v. Comiskey)* (1990), 1 O.R. (3d) 289 (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the *Companies' Creditors Arrangement Act*, with this overview, at pp. 308-309:

Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (No. 1)* (1989), 102 A.R. 161 (Q.B.), at p. 165.

14 Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a Plan.

15 Section 6 of the CCAA reads as follows:

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

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

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

16 Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.

17 The general principles to be applied in the exercise of the Court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) there must be strict compliance with all statutory requirements;

(2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

18 In an earlier Ontario decision, *Re Dairy Corp. of Canada*, [1934] O.R. 436 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario *Companies Act*. The N.S.C.A. recently followed *Re*

Northland Properties Ltd. in Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245 (N.S.C.A.). Farley J. did as well in Re Campeau Corp., [1992] O.J. No. 237 (Ont. Ct. of Justice, Gen. Div.) [now reported at 10 C.B.R. (3d) 104].

Strict Compliance with Statutory Requirements

19 Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: See *Re Campeau, supra*.

20 At the outset, on May 14, 1992 I found that the Applicants met the criteria for access to the protection of the Act — they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings Creditors' Committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.

21 With the consent, and at the request of, the Applicants and the Creditors' Committees, The Honourable David H.W. Henry, a former Justice of this Court, was appointed "Claims Officer" by Order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or The Honourable M. Craig or The Honourable W. Gibson Gray — both also former Justices of this Court — as his designees, presided over the meetings of the Classes of Creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his Report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the Court Orders pertaining to them and the CCAA.

22 I am quite satisfied that there has been strict compliance with the statutory requirements of the *Companies' Creditors Arrangement Act*.

Unauthorized conduct

23 I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.

24 Since May 14, the court has been called upon to make approximately 60 Orders of different sorts, in the course of exercising its supervisory function in the proceedings. These Orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" Orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring costs throughout the "stay" period; they involved the confirmation of the sale of certain of the Applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of Creditors' Committees, the classification of creditors for purposes of voting, the creation and defining of the role of "Information Officer" and, similarly, of the role of "Claims Officer". They involved the endorsement of the information circular respecting the Final Plan and the mailing and notice that was to be given regarding it. The Court's Orders encompassed, as I say, the general supervision of the negotiation and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the Applicants and the creditors along the way.

25 While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of Compromise, I have, with one exception, been the Judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA.

26 In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.

27 This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

28 The Plan must be "fair and reasonable". That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the *Companies' Creditors Arrangement Act*. "Fairness" is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

29 From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs whose decision in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 116, that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

30 If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced — or, "reasonable" — manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it — technical and procedural compliance with the Act aside — the plan should be sanctioned if it is "fair and reasonable".

31 When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be addressed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.

32 On the appeal in *Re Northland Properties Ltd.*, *supra*, at p. 201, Chief Justice McEachern made the following comment in this regard:

... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

33 In *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. at 231 (C.A.), a case involving a scheme and arrangement under the *Joint Stock Companies Arrangements Act, 1870* [(U.K.), 33 & 34 Vict., c. 104], Lord Justice Bowen put it this way, at p. 243:

Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

Again at p. 245:

It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

34 Is the Final Plan presented here by the O & Y Applicants "fair and reasonable"?

35 I have reviewed the Plan, including the provisions relating to each of the Classes of Creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian — if not, worldwide — corporate history. It would be folly for me to suggest that I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.

36 One important measure of whether a Plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

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

38 This point has been made in numerous authorities, of which I note the following: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175, at p. 184 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195, at p. 205 (B.C.C.A.); *Re Langley's Ltd.*, [1938] O.R. 123 (C.A.), at p. 129; *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245; *École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987) Inc.* (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.).

39 In *Re Keddy Motors Inns Ltd.*, *supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

40 In *École Internationale*, *supra* at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.

41 In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take and compromise on the part of the participants in the negotiating and bargaining process." The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of May 14, 1992." Each creditors' committee had the benefit of independent and experienced legal counsel.

42 With the exception of the 8 classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the Applicants. This level of approval is something the court must acknowledge with some deference.

43 Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of 5 years.

44 The claims of creditors — in this case, secured creditors — who did not approve the Plan are specifically treated under the Plan as "unaffected claims" i.e. claims not compromised or bound by the provisions of the Plan. Section 6.2(C) of the Final Plan states that the applicants may apply to the court for a sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.

45 The claims of unsecured creditors under the Plan are postponed for 5 years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least annually, an amount out of OYDL's cash on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.

46 Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the Applicants are able to become the "self-sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan."

47 Speaking as co-chair of the Unsecured Creditors' Committee at the meeting of that Class of Creditors, Mr. Ed Lundy made the following remarks:

Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.

The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.

In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.

The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.

After such consideration, the members have indicated their intentions as follows ...

Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

48 After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26% of the creditors represented and voting at the meeting and 93.37% in value of the Claims represented and voting at the meeting.

49 As for the O & Y Applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.

50 In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible.

51 I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e. as much as they would have received had there not been a reorganization: See *Re NsC Diesel Power Inc.* (1990), 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.

52 The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contemplated arrangement under the OBCA. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the Court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.

53 For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".

54 Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

55 As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In 8 of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50%/75% test of section 6.

56 The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:

Class 2 — First Canadian Place Lenders

Class 8 — Fifth Avenue Place Bondholders

Class 10 — Amoco Centre Lenders

Class 13 — L'Esplanade Laurier Bondholders

Class 20 — Star Top Road Lenders

Class 21 — Yonge-Sheppard Centre Lenders

Class 29 — Carena Lenders

Class 33a — Bank of Nova Scotia Other Secured Creditors

57 While section 6 of the CCAA makes the mathematics of the approval process clear — the Plan must be approved by at least 50% of the creditors of a particular class representing at least 75% of the dollar value of the claims in that class — it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:

6. *Where a majority in number representing three-fourths in value of the creditors, or class of creditors ... agree to any compromise or arrangement ... the compromise or arrangement may be sanctioned by the court.* (Emphasis added)

58 What does "a majority ... of the ... class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?

59 This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the Applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.

60 At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See *Re Keddy Motor Inns Ltd.*, *supra*, at p. 20. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

61 In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this ... purpose": *Elan Corp. v. Comiskey*, *supra*, per Doherty J.A., at p. 307. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297:

It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies ... are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

62 Approaching the interpretation of the unclear language of section 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.

63 Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of section 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or *any* class of them, the court may, on the application in a summary way of the company or of any such creditor ... order a meeting of the creditors or class of creditors ... (Emphasis added)

64 It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or *any* class — as opposed to *all classes* — of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.

65 Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in *all* classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.

66 In *Re Wellington Building Corp.*, [1934] O.R. 653 (S.C.), Mr. Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value of *each class* should be obtained in support of the scheme before the Court could or should approve of it. (Emphasis added)

67 This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 600):

Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

68 Thus, the plan in *Re Wellington Building Corp.* went unsanctioned, both because the bondholders had unfairly been deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

69 On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in *Multidev Immobilia Inc. v. Société Anonyme Just Invest* (1988), 70 C.B.R. (N.S.) 91 (C.S. Que.). There, the arrangement had been accepted by all creditors except one secured creditor, Société Anonyme Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal was unconcerned because it had struck a separated agreement; and three classes of which Just Invest was a member, opposed.

70 The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the Court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved *as regards the other creditors who voted in favour of the Plan*. The other creditors

were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

71 While it might be said that *Multidev, supra*, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to sanction.

72 I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.

73 By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the Plan, secured creditors have the right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different affect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not accepted and none of their rights are being "confiscated".

74 From this perspective it could be said that the parties are merely being held to — or allowed to follow — their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: See *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (C.S. Que.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.

75 In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is nothing unfair in sanctioning the Final Plan without unanimity, in my view.

76 I am prepared to do so.

77 A draft Order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semi-colon, and capital letter has been vigilantly examined by the creditors and a battalion of advisors. I have been told by virtually every counsel who rose to make submissions, that the draft as it exists represents a very "fragile consensus", and I have no doubt that such is the case. Its wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan — The First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.

78 Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning Order should state this clearly and in a positive way. Paragraph 9 of his Factum states the argument succinctly. It says:

9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.

79 The basis for the concern of these "No" creditors is set out in the next paragraph of the Factum, which states:

10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.

80 The provision in the proposed draft Order which is the most contentious is paragraph 4 thereof, which states:

4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

81 Mr. Barrack seeks to have a single, but much debated word — "only" — inserted in the second line of that paragraph after the word "will", so that it would read "and will *only* be binding on ... the Applicants and the Creditors Holding Claims in Classes" [which have approved the Plan]. On this simple, single, word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.

82 In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:

35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:

4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.

36. It is also submitted that an additional paragraph should be added if any provisions of the proposed Sanction Order are granted beyond paragraph 4 thereof as follows:

This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

83 These suggestions are vigorously opposed by the Applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed Order is necessary in order to provided those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise — if arise they do.

84 The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate re-structuring. It may be, or it may not be, that the objecting Project Lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a re-organization and corporate re-structuring of this dimension it may simply not be realistic to expect that the world of the

secured creditor, which became not-so-perfect with the onslaught of the Applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.

85 I do, however, agree with the thrust of Mr. Barrack's submissions that the Sanction Order and the Plan can be binding only upon the Applicants and the creditors of the Applicants in respect of claims in classes which have approved the Plan, and trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in section 6.2(C), it stipulates that, where classes of creditors do not agree to the Plan,

(i) the Applicants shall treat such Class of Claims to be an Unaffected Class of Claims; and,

(ii) the Applicants *shall* apply to the Court "for a Sanction Order which sanctions the Plan *only insofar as it affects the Classes which have agreed to the Plan.*

86 The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft Order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.

87 In terms of the court's jurisdiction, section 6 directs me to sanction the Order, if the circumstances are appropriate, and enacts that, once I have done so, the Order "is binding ... on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors ... and on the company". As I see it, that is exactly what the draft Order presented to me does.

88 Accordingly, an order will go in terms of the draft Order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.

89 These reasons were delivered orally at the conclusion of the sanctioning Hearing which took place on February 1 and February 5, 1993. They are released in written form today.

Application allowed.

APPENDIX "A" — Counsel for Sanctioning Hearing Order

David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland	-- For the Olympia & York Applicants
Ronald N. Robertson, Q.C.	-- For Hong Kong & Shanghai Banking Corporation
David E. Baird, Q.C., and Ms Patricia Jackson	-- For Bank of Nova Scotia
Michael Barrack and S. Richard Orzy	-- For the First Canadian Place Bondholders, the Fifth Avenue Place Bondholders and the L'Esplanade Lauriere Bondholders
William G. Horton	-- For Royal Bank of Canada
Peter Howard and Ms J. Superina	-- For Citibank Canada
Frank J. C. Newbould, Q.C.	-- For the Unsecured/Under- Secured Creditors Committee

John W. Brown, Q.C., and J.J. Lucki	-- For Canadian Imperial Bank of Commerce
Harry Fogul and Harold S. Springer	-- For the Exchange Tower Bondholders
Allan Sternberg and Lawrence Geringer	-- For the O & Y Eurocreditco Debenture Holders
Arthur O. Jacques and Paul M. Kennedy	-- For Bank of Nova Scotia, Agent for Scotia Plaza Lenders
Lyndon Barnes and J.E. Fordyce	-- For Credit Lyonnais, Credit Lyonnais Canada
J. Carfagnini	-- For National Bank of Canada
J.L. McDougall, Q.C.	-- For Bank of Montreal
Carol V.E. Hitchman	-- For Bank of Montreal (Phase I First Canadian Place)
James A. Grout	-- For Credit Suisse
Robert I. Thornton	-- For I.B.J. Market Security Lenders
Ms C. Carron	-- For European Investment Bank
W.J. Burden	-- For some debtholders of O & Y Commercial Paper II Inc.
G.D. Capern	-- For Robert Campeau
Robert S. Harrison and A.T. Little	-- For Royal Trust Co. as Trustee

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TAB 3

2016 ABQB 419
Alberta Court of Queen's Bench

Lutheran Church - Canada, Re

2016 CarswellAlta 1484, 2016 ABQB 419, [2016] A.W.L.D. 3664,
[2016] A.W.L.D. 3694, 269 A.C.W.S. (3d) 218, 38 C.B.R. (6th) 36

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

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

B.E. Romaine J.

Heard: July 15, 2016

Judgment: August 2, 2016

Docket: Calgary 1501-00955

Counsel: Francis N.J. Taman, Ksena J. Court for District Group
Jeffrey L. Oliver, Frank Lamie for Monitor
Chris D. Simard, Alexis E. Teasdale for District Creditors' Committee
Douglas S. Nishimura for DIL Creditors' Committee
Errin A. Poyner for Elvira Kroeger and Randall Kellen
Allan A. Garber for Marilyn Huber and Sharon Sherman
Dean Hutchison for Concentra Trust
Christa Nicholson for Francis Taman, Bishop and McKenzie LLP

Subject: Churches and Religious Institutions; Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Appointment — Monitors and consultants

Creditors asserted monitor in proceedings under Companies' Creditors Arrangement Act ("CCAA") was acting as advocate of debtor without sufficient degree of neutrality — Creditors asserted that monitor had conflict of interest because in pre-filing report monitor disclosed that it provided consulting services to District between specified date and date of initial order; Monitor advised that it recently determined that related professional accounting firm DTL acted as auditor for District; and Monitor advised that DTL completed DIL audit for years — Requisite double majority, after significant disclosure and opportunities to review and question plans, voted in favour of plans — Creditors' Committees of DIL and District, who had duty to act in best interests of body of creditors, supported plans — Creditors asserted monitor breached its fiduciary duty by failing to disclose municipal planning documents — Creditors applied to replace monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors — Application dismissed — There was no reason arising from conflict or breach of duty to do so — Previous services did not on their face disqualify monitor from acting as monitor — It was not unusual for proposed monitor to be involved with debtor companies for period of time prior to CCAA filing — There was no realistic conflict arising from allegations — Monitor made full disclosure — Monitor went to great lengths to inform great number of creditors of ongoing proceedings, and to give its well-reasoned and measured opinion on myriad of issues in this complex proceeding — In retrospect, it may have been prudent for monitor to reference master-site development plan and approved area structure plan earlier, in substantially way it was later

referenced in Monitor's QFA on development, but that was hindsight observation and unlikely to resolve other than one of complaints — Timing of application was strategic — Proposed plans were within court's jurisdiction to sanction, were fair and reasonable, and were to be sanctioned — Monitor supported plans, and there was no reason to give monitor's opinion less than usual deference and weight — Plans provided greater benefit to creditors than forced liquidation in depressed real estate market — Balance of interests favoured approval of plans.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor

APPLICATION by creditors to replace monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors.

B.E. Romaine J.:

I. Introduction

1 This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately \$95.7 million, plus 12 trade creditors with claims of approximately \$957,000. There are 896 investors in the Church investment corporation with outstanding claims of \$22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

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

II. Factual Overview

A. Background

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

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

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

alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

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

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

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

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

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

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

5. Conclusion

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

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

112 I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

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

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

- (a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done that is not authorized by the *CCAA*; and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at para 17; *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 14.

115 It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

116 They submit:

(a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;

(b) the plans compromise third party claims;

(c) the plans provide no benefit to Depositors within the purpose of the *CCAA*;

(d) the plans contravene section 5.1(2) of the *CCAA*;

(e) the plans have not been advanced in good faith, with due diligence and full disclosure; and

(f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the CCAA?

117 The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

118 The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

119 The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

120 This argument contains its own contradictions. It anticipates multiple actions that may have to be resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

121 The opposing Depositors cite *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 240 O.A.C. 245, 2008 ONCA 587 (Ont. C.A.) (CanLii); leave dismissed [2008] SCC No. 32765 [2008 CarswellOnt 5432

(S.C.C.]) for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

122 The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

123 The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA*. That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

124 Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church — Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

125 There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

126 The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

127 The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

128 The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee

and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

129 If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

130 It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

131 While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

132 The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

- (a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;
- (b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;
- (c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and
- (d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

133 The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA*. As noted by the Supreme Court in *Ted Leroy Trucking Ltd., Re, 2010 SCC 60* (S.C.C.) [hereinafter *Century Services*], the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

134 The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

135 The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through

ECBS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA*'s purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the CCAA?

136 Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

137 As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

138 As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

139 The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

140 The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

141 Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

142 Farley, J. in *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

... is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved — subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will involve pain — if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

143 The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed in any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

144 Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Muscletech Research & Development Inc.*, *Re*, [2007] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para 18 commented:

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

145 The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Gold Texas Resources Ltd.*, *Re*, [1989] B.C.J. No. 167 (B.C. S.C. [In Chambers]) at page 4, to the effect that the court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority.... (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

146 The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

147 I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly 1 1/2 months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

148 The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

149 As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

150 I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

151 The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than \$5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under \$5,000 voted on the District plan.

152 Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately \$641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately \$66,500 (9% of the total claims of voting Convenience Creditors).

153 Approximately 1,294 Eligible Affected Creditors with total claims of approximately \$85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

154 Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

155 The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in CCAA restructurings: *Contech Enterprises Inc., Re*, 2015 BCSC 129 (B.C. S.C.); *Target Canada Co., Re*, 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]); *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750 (Ont. S.C.J.).

156 As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

157 The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

158 This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

159 The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

160 The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

161 The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

162 This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

163 In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

164 The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty Trustco Ltd., Re* [1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List])] at paras 3&4; *Muscletech* at para 18.

165 The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

166 However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

167 It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

168 The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

169 Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

170 As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

171 The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

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

7. Conclusion

172 As noted at para 18 of *Metcalfe*:

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

173 In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

174 The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

175 Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

176 The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

177 The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* "in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

178 The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Application dismissed.

TAB 4

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J.
No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

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

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

Paperny J.

Heard: June 5-19, 2000

Judgment: June 27, 2000 *

Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C., H.M. Kay, Q.C., R.B. Low, Q.C., and L. Goldbach*, for Petitioners.

S.F. Dunphy, P. O'Kelly, and E. Kolers, for Air Canada and 853350 Alberta Ltd.

D.R. Haigh, Q.C., D.N. Nishimura, A.Z.A. Campbell and D. Tay, for Resurgence Asset Management LLC.

L.R. Duncan, Q.C., and G. McCue, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midity.

F.R. Foran, Q.C., and P.T. McCarthy, Q.C., for Monitor, PwC.

G.B. Morawetz, R.J. Chadwick and A. McConnell, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.

C.J. Shaw, Q.C., for Unionized Employees.

T. Mallett and C. Feasby, for Amex Bank of Canada.

E.W. Halt, for J. Stephens Allan, Claims Officer.

M. Hollins, for Pacific Costal Airlines.

P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.

J. Thom, for Royal Bank of Canada.

J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.

R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not

oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

APPLICATION by airline for approval of plan of arrangement; COUNTER-APPLICATION by investment corporation for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

Paperny J.:

I. Introduction

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

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

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

and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately \$1.059 million.

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

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

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

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

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

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

III. Analysis

59 Section 6 of the CCAA provides that:

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

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

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

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

(1) there must be compliance with all statutory requirements;

(2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 172 and *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

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

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

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of \$5,000,000;

(c) the notice calling the meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

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

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

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

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

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

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

2. *Matters Unauthorized*

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

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

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

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

(a) consolidating all of the issued and outstanding common shares into one common share;

(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;

(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;

(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;

(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and

(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

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

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

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

71 The relevant portions of section 167 provide as follows:

167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,

(g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

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

Proposed Amendment in Schedule "D"

- (a) — consolidation of Common Shares
- (b) — change of designation and rights
- (c) — cancellation
- (d) — change in shares
- (e) — change of designation and rights
- (f) — cancellation

Subsection 167(1), ABCA

- 167(1)(f)
- 167(1)(e)
- 167(1)(g.1)
- 167(1)(f)
- 167(1)(e)
- 167(1)(g.1)

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

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

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

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

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

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co.*, *supra* in which Farley J. of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

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

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

Section 183 of the ABCA

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

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.)

aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Fair and Reasonable

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

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

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

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

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

a. Composition of the unsecured vote

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

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

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) and *Re Alabama, New Orleans, Texas & Pacific Junction Railway* (1890), 60 L.J. Ch. 221 (Eng. C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

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

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

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

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

102 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 192-3 aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:

I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.

Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed. There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in *Re Northland Properties Ltd.*

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

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

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keady Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities "feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.)). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

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

108 Resurgence represents 58.2% of the Unsecured Noteholders or \$96 million in claims. The total claim of the Unsecured Noteholders ranges from \$146 million to \$161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under \$50,000, ranges from \$116.3 million to \$449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

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

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

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

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

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

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with

the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

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

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

CRAL

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

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

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

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

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

International Routes

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are *not* treated as assets by airlines, but rather as rights in the control of the

Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

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

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

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

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

Tax Pools

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

Capital Loss Pools

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

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

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

d. Oppression

Oppression and the CCAA

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

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and

maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.).

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

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

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

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd.*, *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

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

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

Oppression allegations by Resurgence

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

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

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

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

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

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

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

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

154 The evidence demonstrates that the sales of the Toronto — Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

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

of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

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

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

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

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

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

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

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders

are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

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

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

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

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

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

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

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

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

e. The Public Interest

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

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

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

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C. S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd.*, *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Algoma Steel Corp. v. Royal Bank* (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it

in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

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

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

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

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.), *Quintette Coal*, *supra* and *Repap*, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to *Algoma Steel v. Royal Bank*, *supra* at 9 in which Farley J. endorsed this approach:

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

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

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

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

IV. Conclusion

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

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

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

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

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

Application granted; counter-applications dismissed.

Footnotes

- * Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

TAB 5

2010 ONSC 4209
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5510, 2010 ONSC 4209, 191 A.C.W.S. (3d) 378, 70 C.B.R. (5th) 1

**IN THE MATTER OF SECTION 11 OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities
David Byers, Marie Konyukhova for Monitor
Robin B. Schwill, Vince Mercier for Shaw Communications Inc.
Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for Special Committee of the Board of Directors
Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

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

Debtors were group of related companies that successfully applied for protection under Companies' Creditors Arrangement Act — Competitor agreed to acquire all of debtors' television broadcasting interests — Acquisition price was to be used to satisfy claims of certain senior subordinated noteholders and certain other creditors — All of television company's equity-based compensation plans would be terminated and existing shareholders would not receive any compensation — Remaining debtors would likely be liquidated, wound-up, dissolved, placed into bankruptcy, or otherwise abandoned — Noteholders and other creditors whose claims were to be satisfied voted overwhelmingly in favour of plan of compromise, arrangement, and reorganization — Debtors brought application for order sanctioning plan and for related relief — Application granted — All statutory requirements had been satisfied and no unauthorized steps had been taken — Plan was fair and reasonable — Unequal distribution amongst creditors was fair and reasonable in this case — Size of noteholder debt was substantial and had been guaranteed by several debtors — Noteholders held blocking position in any restructuring and they had been cooperative in exploring alternative outcomes — No other alternative transaction would have provided greater recovery than recoveries contemplated in plan — Additionally, there had not been any oppression of creditor rights or unfairness to shareholders — Plan was in public interest since it would achieve going concern outcome for television business and resolve various disputes.

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for related relief.

Pepall J.:

1 This is the culmination of the *Companies' Creditors Arrangement Act*¹ restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLTP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US \$440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US \$2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional \$38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLTP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLTP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLTP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLTP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLTP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLTP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding

thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of \$11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

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

(c) the Plan must be fair and reasonable.

See *Canadian Airlines Corp., Re*²

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding \$5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Canadian Airlines Corp., Re*³.

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Canadian Airlines Corp., Re*:

The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.⁴

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

- (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
- (b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Armbro Enterprises Inc., Re*⁵ Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

"I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."⁶

23 Similarly, in *Uniforêt inc., Re*⁷ a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater

recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*⁸, the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested.⁹

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Air Canada, Re*¹⁰ and *Calpine Canada Energy Ltd., Re*¹¹ I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1) (c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods Inc., Re*¹² and *Laidlaw, Re*¹³. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(e) create new classes of shares;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *A&M Cookie Co. Canada, Re*¹⁴ and *MEI Computer Technology Group Inc., Re*¹⁵

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Application granted.

Footnotes

- 1 R.S.C. 1985, c. C-36 as amended.
- 2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].
- 3 Ibid, at para. 64 citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993] O.J. No. 545 (Ont. Gen. Div.) and *Cadillac Fairview Inc., Re*, [1995] O.J. No. 274 (Ont. Gen. Div. [Commercial List]).
- 4 Ibid, at para. 3.
- 5 (1993), 22 C.B.R. (3d) 80 (Ont. Bkcty.).
- 6 *Ibid*, at para. 6.
- 7 (2003), 43 C.B.R. (4th) 254 (C.S. Que.).
- 8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).
- 9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.
- 10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).
- 11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).
- 12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).
- 13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).
- 14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/
- 15 [2005] Q.J. No. 22993 (C.S. Que.) at para. 9.

TAB 6



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to November 21, 2016

À jour au 21 novembre 2016

Last amended on February 26, 2015

Dernière modification le 26 février 2015

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to November 21, 2016. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of November 21, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité – lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 21 novembre 2016. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 21 novembre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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Creditor may assent or dissent

53 Any creditor who has proved a claim, whether secured or unsecured, may indicate assent to or dissent from the proposal in the prescribed manner to the trustee prior to the meeting, and any assent or dissent, if received by the trustee at or prior to the meeting, has effect as if the creditor had been present and had voted at the meeting.

R.S., 1985, c. B-3, s. 53; 1992, c. 1, s. 20, c. 27, s. 21.

Vote on proposal by creditors

54 (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Certain Crown claims

(2.1) For greater certainty, subsection 224(1.2) of the *Income Tax Act* shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of

Accord ou désaccord du créancier

53 Tout créancier qui a prouvé une réclamation — garantie ou non — peut, de la manière prescrite, indiquer au syndic, avant l'assemblée, s'il approuve ou désapprouve la proposition; si cette approbation ou désapprobation est reçue par le syndic avant l'assemblée ou lors de celle-ci, elle a le même effet que si le créancier avait été présent et avait voté à l'assemblée.

L.R. (1985), ch. B-3, art. 53; 1992, ch.1, art. 20, ch. 27, art. 21.

Vote sur la proposition

54 (1) Les créanciers peuvent, conformément aux autres dispositions du présent article, décider d'accepter ou rejeter la proposition ainsi qu'elle a été faite ou modifiée à l'assemblée ou à un ajournement de celle-ci.

Mode de votation

(2) La votation est régie par les règles suivantes :

a) tous les créanciers non garantis, ainsi que les créanciers garantis dont les réclamations garanties ont fait l'objet de la proposition, ont le droit de voter s'ils ont prouvé leurs réclamations;

b) les créanciers votent par catégorie, selon celle des catégories à laquelle appartiennent leurs réclamations respectives; à cette fin, toutes les réclamations non garanties forment une seule catégorie, sauf si la proposition prévoit plusieurs catégories de réclamations non garanties, tandis que les catégories de réclamations garanties sont déterminées conformément au paragraphe 50(1.4);

c) le vote des créanciers garantis n'est pas pris en considération pour l'application du présent article; il ne l'est que pour l'application du paragraphe 62(2);

d) la proposition est réputée acceptée par les créanciers seulement si toutes les catégories de créanciers non garantis — mis à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — votent en faveur de son acceptation par une majorité en nombre et une majorité des deux tiers en valeur des créanciers non garantis de chaque catégorie présents personnellement ou représentés par fondé de pouvoir à l'assemblée et votant sur la résolution.

Certaines réclamations de la Couronne

(2.1) Il demeure entendu que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* n'a pas pour effet d'assimiler, pour l'application du paragraphe (2), aux réclamations garanties les réclamations de Sa Majesté du chef du

Her Majesty in right of Canada or a province for amounts that could be subject to a demand under

- (a) subsection 224(1.2) of the *Income Tax Act*;
- (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- (c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
 - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Where no quorum in a class

(2.2) Where there is no quorum of secured creditors in respect of a particular class of secured claims, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

Related creditor

(3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

Voting by trustee

(4) The trustee, as a creditor, may not vote on the proposal.

R.S., 1985, c. B-3, s. 54; 1992, c. 27, s. 22; 2000, c. 30, s. 143; 2007, c. 36, s. 19; 2009, c. 33, s. 21.

Canada ou d'une province pour des montants qui pourraient faire l'objet d'une demande aux termes d'une des dispositions suivantes :

- a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;
- b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;
- c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :
 - (i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,
 - (ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Absence de quorum

(2.2) À défaut de quorum des créanciers garantis dans le cas d'une des catégories de créances garanties, les créanciers garantis qui possèdent une réclamation appartenant à cette catégorie sont réputés avoir voté en faveur du projet de la proposition.

Créancier lié

(3) Un créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition.

Vote par le syndic

(4) Le syndic, en tant que créancier, ne peut voter sur la proposition.

L.R. (1985), ch. B-3, art. 54; 1992, ch. 27, art. 22; 2000, ch. 30, art. 143; 2007, ch. 36, art. 19; 2009, ch. 33, art. 21.

(c) the event that causes an assignment by the person to be deemed; (*moment de la faillite*)

title transfer credit support agreement means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

transfer at undervalue means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; (*opération sous-évaluée*)

trustee or **licensed trustee** means a person who is licensed or appointed under this Act. (*syndic* ou *syndic autorisé*)

R.S., 1985, c. B-3, s. 2; R.S., 1985, c. 31 (1st Supp.), s. 69; 1992, c. 1, s. 145(F), c. 27, s. 3; 1995, c. 1, s. 62; 1997, c. 12, s. 1; 1999, c. 28, s. 146, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25, c. 9, s. 572; 2004, c. 25, s. 7; 2005, c. 3, s. 11, c. 47, s. 2; 2007, c. 29, s. 91, c. 36, s. 1; 2012, c. 31, s. 414; 2015, c. 3, s. 6(F).

Designation of beneficiary

2.1 A change in the designation of a beneficiary in an insurance contract is deemed to be a disposition of property for the purpose of this Act.

1997, c. 12, s. 2; 2004, c. 25, s. 8; 2005, c. 47, s. 3.

Superintendent's division office

2.2 Any notification, document or other information that is required by this Act to be given, forwarded, mailed, sent or otherwise provided to the Superintendent, other than an application for a licence under subsection 13(1), shall be given, forwarded, mailed, sent or otherwise provided to the Superintendent at the Superintendent's division office as specified in directives of the Superintendent.

1997, c. 12, s. 2.

3 [Repealed, 2005, c. 47, s. 4]

Definitions

4 (1) In this section,

entity means a person other than an individual; (*entité*)

related group means a group of persons each member of which is related to every other member of the group; (*groupe lié*)

du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

syndic ou **syndic autorisé** Personne qui détient une licence ou est nommée en vertu de la présente loi. (*trustee* or *licensed trustee*)

tribunal Sauf aux alinéas 178(1)a) et a.1) et aux articles 204.1 à 204.3, tout tribunal mentionné aux paragraphes 183(1) ou (1.1). Y est assimilé tout juge de ce tribunal ainsi que le greffier ou le registraire de celui-ci, lorsqu'il exerce les pouvoirs du tribunal qui lui sont conférés au titre de la présente loi. (*court*)

union de fait Relation qui existe entre deux conjoints de fait. (*common-law partnership*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

L.R. (1985), ch. B-3, art. 2; L.R. (1985), ch. 31 (1^{er} suppl.), art. 69; 1992, ch. 1, art. 145(F), ch. 27, art. 3; 1995, ch. 1, art. 62; 1997, ch. 12, art. 1; 1999, ch. 28, art. 146, ch. 31, art. 17; 2000, ch. 12, art. 8; 2001, ch. 4, art. 25, ch. 9, art. 572; 2004, ch. 25, art. 7; 2005, ch. 3, art. 11, ch. 47, art. 2; 2007, ch. 29, art. 91, ch. 36, art. 1; 2012, ch. 31, art. 414; 2015, ch. 3, art. 6(F).

Désignation de bénéficiaires

2.1 La modification de la désignation du bénéficiaire d'une police d'assurance est réputée être une disposition de biens pour l'application de la présente loi.

1997, ch. 12, art. 2; 2004, ch. 25, art. 8; 2005, ch. 47, art. 3.

Bureau de division

2.2 Sauf dans le cas de la demande de licence prévue au paragraphe 13(1), les notifications et envois de documents ou renseignements à effectuer au titre de la présente loi auprès du surintendant le sont au bureau de division spécifié par ses instructions.

1997, ch. 12, art. 2.

3 [Abrogé, 2005, ch. 47, art. 4]

Définitions

4 (1) Les définitions qui suivent s'appliquent au présent article.

entité Personne autre qu'une personne physique. (*entity*)

unrelated group means a group of persons that is not a related group. (*groupe non lié*)

Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are *related persons* if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;

(b) an entity and

(i) a person who controls the entity, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the entity, or

(iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two entities

(i) both controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or

(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Relationships

(3) For the purposes of this section,

groupe lié Groupe de personnes dont chaque membre est lié à chaque autre membre du groupe. (*related group*)

groupe non lié Groupe de personnes qui n'est pas un groupe lié. (*unrelated group*)

Définition de personnes liées

(2) Pour l'application de la présente loi, des personnes sont liées entre elles et constituent des *personnes liées* si elles sont :

a) soit des particuliers unis par les liens du sang, du mariage, d'une union de fait ou de l'adoption;

b) soit une entité et, selon le cas :

(i) la personne qui la contrôle, si elle est contrôlée par une seule personne,

(ii) toute personne qui est membre du groupe lié qui la contrôle,

(iii) toute personne unie de la manière indiquée à l'alinéa a) à une personne visée aux sous-alinéas (i) ou (ii);

c) soit, selon le cas, deux entités :

(i) contrôlées par la même personne ou le même groupe de personnes,

(ii) dont chacune est contrôlée par une seule personne et si la personne qui contrôle l'une d'elles est liée à celle qui contrôle l'autre,

(iii) dont l'une est contrôlée par une seule personne qui est liée à un membre du groupe lié qui contrôle l'autre,

(iv) dont l'une est contrôlée par une seule personne qui est liée à chacun des membres du groupe non lié qui contrôle l'autre,

(v) dont l'une est contrôlée par un groupe lié dont l'un des membres est lié à chacun des membres du groupe non lié qui contrôle l'autre,

(vi) dont l'une est contrôlée par un groupe non lié dont chaque membre est lié à au moins un membre du groupe non lié qui contrôle l'autre.

Liens

(3) Pour l'application du présent article :

(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;

(b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;

(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

(f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

(g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the

a) lorsque deux entités sont liées à la même entité au sens où l'entend le paragraphe (2), elles sont réputées liées entre elles;

b) lorsqu'un groupe lié est en mesure de contrôler une entité, il est réputé être un groupe lié qui contrôle l'entité, qu'il fasse ou non partie d'un groupe plus considérable par lequel l'entité est en fait contrôlée;

c) la personne qui a, en vertu d'un contrat, en equity ou autrement, un droit de participation aux capitaux propres d'une entité, soit immédiatement, soit à l'avenir, et de façon absolue ou conditionnelle, ou le droit d'acquiescer un tel droit, ou de contrôler ainsi les droits de vote de l'entité, est réputée, sauf si le contrat stipule que le droit ne peut être exercé qu'au décès d'une personne qui y est désignée, occuper la même position à l'égard du contrôle de l'entité que si elle était titulaire de ce droit;

d) la personne qui détient un droit de participation aux capitaux propres de deux ou plusieurs entités est réputée être liée à elle-même à titre de titulaire du droit de participation dans chacune de ces entités;

e) des personnes sont unies par les liens du sang si l'une est l'enfant ou autre descendant de l'autre ou si l'une est le frère ou la sœur de l'autre;

f) des personnes sont unies par les liens du mariage si l'une est mariée à l'autre ou à une personne qui est unie à l'autre par les liens du sang ou de l'adoption;

f.1) des personnes sont unies par les liens d'une union de fait si l'une vit en union de fait avec l'autre ou avec une personne qui est unie à l'autre par les liens du sang ou de l'adoption;

g) des personnes sont unies par les liens de l'adoption si l'une a été adoptée, en droit ou de fait, comme enfant de l'autre ou comme enfant d'une personne unie à l'autre par les liens du sang, autrement qu'à titre de frère ou de sœur.

Question de fait

(4) La question de savoir si des personnes non liées entre elles n'avaient pas de lien de dépendance, à tel ou tel moment, est une question de fait.

Présomption

(5) Les personnes liées entre elles sont réputées avoir un lien de dépendance tant qu'elles sont ainsi liées et il en va

persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

R.S., 1985, c. B-3, s. 4; 2000, c. 12, s. 9; 2004, c. 25, s. 9(F); 2005, c. 47, s. 5; 2007, c. 36, s. 2.

Her Majesty

Binding on Her Majesty

4.1 This Act is binding on Her Majesty in right of Canada or a province.

1992, c. 27, s. 4.

PART I

Administrative Officials

Superintendent

Appointment

5 (1) The Governor in Council shall appoint a Superintendent of Bankruptcy to hold office during good behaviour for a term of not more than five years, but the Superintendent may be removed from office by the Governor in Council for cause. The Superintendent's term may be renewed for one or more further terms.

Salary

(1.1) The Superintendent shall be paid the salary that the Governor in Council may fix.

Extent of supervision

(2) The Superintendent shall supervise the administration of all estates and matters to which this Act applies.

Duties

(3) The Superintendent shall, without limiting the authority conferred by subsection (2),

(a) receive applications for licences to act as trustees under this Act and issue licences to persons whose applications have been approved;

(b) monitor the conditions that led to a trustee being issued a licence to determine whether those conditions continue to exist after the licence has been issued and take the appropriate action if he or she determines that the conditions no longer exist;

(c) where not otherwise provided for, require the deposit of one or more continuing guaranty bonds or continuing suretyships as security for the due accounting of all property received by trustees and for the due

de même, sauf preuve contraire, pour l'application des alinéas 95(1)b) ou 96(1)b).

L.R. (1985), ch. B-3, art. 4; 2000, ch. 12, art. 9; 2004, ch. 25, art. 9(F); 2005, ch. 47, art. 5; 2007, ch. 36, art. 2.

Sa Majesté

Obligation de Sa Majesté

4.1 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

1992, ch. 27, art. 4.

PARTIE I

Fonctionnaires administratifs

Surintendant

Nomination

5 (1) Le gouverneur en conseil nomme à titre inamovible un surintendant des faillites pour un mandat renouvelable d'au plus cinq ans, sous réserve de révocation motivée de la part du gouverneur en conseil.

Traitement

(1.1) Le surintendant des faillites reçoit le traitement que fixe le gouverneur en conseil.

Surveillance

(2) Le surintendant contrôle l'administration des actifs et des affaires régis par la présente loi.

Fonctions

(3) Le surintendant, sans que soit limitée l'autorité que lui confère le paragraphe (2) :

a) reçoit les demandes de licences autorisant l'exercice des fonctions de syndic dans le cadre de la présente loi et délivre les licences aux personnes dont les demandes ont été approuvées;

b) contrôle l'observation constante par le syndic des conditions de délivrance de sa licence et, s'il constate une inobservation, prend les mesures qu'il estime indiquées;

c) lorsqu'il n'y est pas autrement pourvu, exige le dépôt d'un ou de plusieurs cautionnements continus pour garantir qu'il sera dûment rendu compte de tous les biens reçus par les syndics et assurer l'exécution

TAB 7

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Headnote

Tax — Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal

— Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative

context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts

follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed

trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3)

was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*,

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that

subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

- 1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
- 2 The amendments did not come into force until September 18, 2009.

TAB 8

2000 CarswellOnt 947
Ontario Court of Justice, General Division (In Bankruptcy)

Oulahen, Re

2000 CarswellOnt 947, 16 C.B.R. (4th) 262, 95 A.C.W.S. (3d) 804

**In the Matter of the Proposal of Paul Robert Oulahen
of the City of Toronto in the Province of Ontario**

Farley J.

Heard: March 1 and 17, 2000

Judgment: March 17, 2000

Docket: 31-367172

Proceedings: affirmed (March 12, 2001), Doc. CA C33944 (Ont. C.A.)

Counsel: *M. Kate Stephenson*, for Debtor, Oulahen.

Ronald E. Carr, for Opposing Creditor, Williams.

Subject: Insolvency

Headnote

Bankruptcy --- Meeting of creditors — Voting — Who may vote

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 54(3).

MOTION by debtor for court approval of proposal to creditors.

Farley J. :

1 The debtor Paul Oulahen was seeking court approval of this proposal to his creditors. The creditor Richard Williams was opposing court approval on the basis, *inter alia*, that those creditors voting in favour of the proposal were prevented from doing so because they were assignees of persons related to Oulahen.

2 There were four material creditors of Oulahen when he filed his Notice of Intention to Make a Proposal on October 19, 1999 and when the Proposal was filed on November 18, 1999. After that but before the first meeting of creditors, the claims of his wife Norah, his father James and mother-in-law had been assigned to friends of his wife and his father. Catherine Ecker, the assignee of his wife, filed a claim for \$1,194,862; Peter Kilkenny, the assignee of his father, one for \$295,883.01; and Cheryl Wren, the assignee of his mother-in-law, one for \$26,794.62. Each assignee acquired the claim for a substantial discount - \$15,000 by way of uncashed cheque and demand note in the case of Ecker, \$5,000 by Kilkenny and \$250 by Wren. Williams' claim was for \$159,512.03. The assignees voted in favour of the proposal; Williams voted against on December 22, 1999. This meeting was chaired by Marie Josee Sicard of the Office of the Official Receiver. Sicard ruled that, notwithstanding Williams' objections, the assignees were entitled to vote in favour of the proposal notwithstanding that the assignment had taken place after the filing of the Notice of Intention and the assignors were persons related to Oulahen.

3 Sections 54(3) of the *Bankruptcy and Insolvency Act*, R.S.C 1985. c.B.-3 as amended provides:

s.54(3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

In my view the restriction pertains to the creditor but not to the debt claim per se.

4 In each case the assignees had filed an affidavit for the purposes of this motion in identical form *mutatis mutandis* as to paragraph 3:

3. In or about mid-November of 1999, Norah [James Oulahen, father of debtor] asked me if I wanted to possibly make some money, and at the same time do her a favour. She said that Paul was probably going to go bankrupt. She explained that he might be able to avoid bankruptcy if he could present a payment proposal that would be accepted by his creditors, but that was likely going to be impossible because some of his creditors were related to him, and so they would not be able to vote in favour of any proposal. Norah [James Oulahen] said that the other major creditor would likely vote against the proposal.

The hearing on March 1st was adjourned to March 17th to allow the assignees and others to testify viva voce as to the understandings, if any, involved in these assignments. Ecker and Kilkenny were able to do so. In their affidavits the assignees had stated that they voted in favour of the proposal because it gave a better return to the creditors than would a bankruptcy.

5 Ecker testified that she felt that she was free to vote against the proposal and that if she had done so, her friend Norah would be happy to know that this situation had finished. I have no doubt that Ecker was well intentioned, but based on the circumstances and her general testimony, including the whole premise of the favour as outlined in the affidavit in context of the circumstances, I would have to conclude that there was an unspoken understanding that the favour (implicit that the favour would be voting for the proposal) was a guiding light - and that loyalty to her friend Norah would prevail over any monetary gain.

6 In the case of Kilkenny, he acknowledged straightforwardly that he was going to vote for the proposal as a favour for his friend James Oulahen and that there was an understanding implicit that he would so vote in favour of the proposal.

7 Thus in the case of these two assignees, while they were not related to Oulahen, they were in essence acting as proxy for Norah and James Oulahen who were related and so prohibited from voting in favour. This assignment arrangement was therefore nothing more than a device to inappropriately attempt to avoid the provisions of s.54(3). I would wish to make it clear that a *bona fide* assignment with no strings attached as to voting in favour of a proposal would not create such a proxy problem. However any such assignment would have to be carefully scrutinized as to its merits and its warts.

8 Given that conclusion, I do not see that it is necessary to deal further with the other grounds which may be advanced against the court approving the Proposal. I would conclude that it would be inappropriate to so approve the proposal given that, even ignoring the vote of Ecker and Kilkenny, the proposal would have been defeated by a substantial margin but if the votes of Ecker and Kilkenny were treated as voted, then they could only be voted against the proposal.

9 I would however, think it helpful to note the following points:

(i) Sicard in acting as chair at the creditors' meeting would not have been in the same position as I have been to determine the ineligibility of the assignees to vote;

(ii) there is the possibility that Wren's claim may be statute barred;

(iii) it is passing strange that the trustee of the proposal allowed the claim for Ecker for voting purposes at \$1,194,86 when it appears fairly obvious from the documentation of this debt acquired from the Royal Bank of Canada by Norah was in fact a reduced amount of \$150,000 (that is, that would have been all the Royal Bank would have been able to claim) after its February 18, 1993 reduction deal with Oulahen and Norah before it assigned its claim for the \$150,000 remaining outstanding to Norah on February 3, 1999 in return for \$15,000); in fact the replacement

trustee of the proposal after a rather instant review reduced the Ecker claim subsequent to the vote to \$150,000 and this was concurred in by the prior trustee;

(iv) Oulahan's accounting and record keeping including expense attribution and allocation could benefit from a more realistic approach to the subject matter;

(v) the Ecker promissory note presented her by Norah is somewhat confusing and contradictory;

(vi) there is nothing to prevent Oulahan, even as a bankrupt, from immediately making a subsequent proposal to his creditors (see s.50(1)(d)) and in this regard I would assume that his creditors would have to take a very realistic view of an improved proposal.

10 The motion for approval of the proposal of November 18, 1999 is dismissed. I am grateful for the thoughtful presentation of both counsel.

Motion dismissed.

TAB 9

2005 CarswellOnt 1482
Ontario Superior Court of Justice [Commercial List]

SAAN Stores Ltd./Magasins SAAN Ltée, Re

2005 CarswellOnt 1482, [2005] O.J. No. 1471, 12 C.B.R. (5th) 35, 138 A.C.W.S. (3d) 793

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

And In the Matter of a Plan of Compromise and Arrangement of SAAN Stores Ltd. - Les Magasins SAAN Ltée

Farley J.

Heard: April 7, 2005
Judgment: April 7, 2005
Docket: 05-CL-5695

Counsel: Frank J.C. Newbould, Q.C., Roger Jaipargas, Larry Ellis for SAAN Stores Ltd.
Robert J. Chadwick, Melaney Wagner for Quebecor
Mario Forte, Jennifer Stam for RSM Richter Inc.
Michael Miller, Sam De Caprio for 6301533 Canada Inc.
E.A. Sellers for Gendis Inc.

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.e Miscellaneous](#)

Headnote

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

Eligibility of creditor to vote — Debtor was involved in proceedings under Companies' Creditors Arrangement Act — Creditor brought motion for instructions regarding classification of creditors and eligibility of creditor 630 Inc. to vote on proposal — Creating class of creditors for landlords inappropriate — Fragmentation in creditor classes to be avoided — 630 Inc., which had acquired certain debt of debtor, entitled to vote in proposal, despite lack of information of 630 Inc.'s role in debt acquisition process and relations with other creditors — 630 Inc. ordered to provide further information regarding debt acquisition.

Table of Authorities

Cases considered by *Farley J.*:

Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce (1992), 11 C.B.R. (3d) 161, 90 D.L.R. (4th) 285, 1992 CarswellOnt 164 (Ont. Gen. Div.) — considered

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

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

Statutes considered:

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

Generally — referred to

s. 65.2(5) [en. 1992, c. 27, s. 30] — considered

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

Generally — referred to

MOTION by creditor for directions regarding classification of creditors of company under *Companies' Creditors Arrangement Act*, and disqualification of certain creditors from voting.

Farley J.:

- 1 Motion by Quebecor ("Q") as to classification of creditors and as to disqualification from voting.
- 2 All counsel were extremely good at cooperating to ensure that this motion was heard on a timely basis because of the importance of it as to the vote required on SAAN's ("S's") restructuring and compromise plan — and as a result whether or not S will survive — especially with the financial condition it is now in and the need for interim funding. Mr. Chadwick should be singled out for being an exemplar in this regard (and he graciously and modestly acknowledged the great contribution of his colleague Ms. Wagner).
- 3 With respect to the question of a separate class for the landlords, I respectfully disagree with the proposition that there is "a lack [of] commonality of interest with other unsecured creditors based on the fact that their claims are calculated differently than the claims of all other creditors" (para. 33 factum). Section 65.2(5) of the BIA provides that landlords may have a separate class *or* be in a general unsecured class. It would not appear to me that there is any particular basis in this case for the proposition as in *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce* [1992 CarswellOnt 164 (Ont. Gen. Div.)] re the difficulty of calculating the landlords' claims as there is the formula under the BIA. Rather it would seem desirable to avoid fragmentation, unless fragmentation of classes is necessary. See *San Francisco Gifts Ltd., Re* [2004 CarswellAlta 1241 (Alta. Q.B.)]; *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* [1991 CarswellOnt 220 (Ont. Gen. Div.)]. Landlords are to remain in the general class of unsecureds.
- 4 I did raise with Mr. Newbould the need for appropriate disclosure and information to the creditors as in certain areas there seemed to be deficiencies. He indicated that that would be remedied right away.
- 5 I also indicated that if there were other matters which surfaced in between now and the sanction hearing, if in fact the proposal was accepted by the statutory majority, with or without amendment, and these matters affected in a relevant way the vote, then these considerations would have to be taken into account at the sanction hearing as to whether the proposal was fair, reasonable and equitable in the circumstances. In that regard as a precaution, it would be desirable to keep a separate tally of the votes of 6301533 Canada Inc. ("630") and Gendis ("G") aside from their inclusion in the general tally if I conclude that they are permitted to vote.

6 Part of the difficulty in this case is that from the very start of the proceedings all things have been a scramble and the intensity of the scramble has intensified in the last month, it would seem caused by the frailty of S's financial situation and the need for interim funding (which has now been cobbled together with multiple conditions and linkage). The scramble has caused many lawyers to lose sleep as they worked virtually round the clock. No doubt other participants have also been sleep deprived. Thus in fairness some of the documentation has been a little sketchy and/or ambiguous. As well suspicions, for good or bad reasons, have abounded — unfortunately it also appears that the scramble has been to the detriment of good lines of communication to address those suspicions.

7 Thus some of Q's concerns — namely for example that S and 630 had the same (registered) office — namely the law firm of Goodman & Carr — was satisfactorily answered in that Elliott ("E") in essence took over the failed Chahine negotiations with G and used the same base documentation as that law firm.

8 It does not seem to me that in the circumstances anyone can doubt the need for interim financing. GMAC which is undoubtedly operating at arm's length would not provide the full amount needed and it further required S to get a further subordinate \$6 million which S did almost in extremis with a cobbling together of \$2 million from each of G, Jana and 630 in what might be equated to a "Rube Goldberg invention" (for those old enough to remember that comic strip). Apparently that GMAC deal was the origin of the requirement that 630 vote in favour of the proposal. On that basis I find that that agreement to so vote has an innocent explanation.

9 There would not appear on this record to be any evidence of shareholdings giving control which would lead to the result that by definition there were related parties which were automatically "disqualified".

10 G's claim of approximately \$2 million is apparently made up primarily of its landlord claim for the distribution centre in Winnipeg of some \$1.975 million. In addition there is a convoluted arrangement whereby 630 agreed to pay G \$125,000 as part of the acquisition which payment amount S guaranteed and granted G a general security interest. In my view there has been no proper explanation as to this \$125,000 arrangement and it would be undesirable in these circumstances for G to vote that part of its claim (I note that there may well be a good explanation and I do not fault G which was alerted to this motion at the very last minute). The Rube Goldberg invention handle may also be applied to the acquisition deal itself whereby E got control of S. However, the landlord claim of G appears to be regular and it would not appear appropriate to disqualify G from voting in favour of the proposal. However the question of releases should be fully dealt with including an analysis of potential claims and strength thereof — vis-à-vis G, its officers and directors. The lawsuit by GKP would not appear to be materially relevant to the proposal. The warrant would appear to be a kicker in the acquisition transaction and may be equated with potential deferred consideration as opposed to scarce present cash. I do not see it as a taint in these circumstances.

11 With respect to 630, the fact that it has agreed to elect to take a 2009 dividend would appear to be the result of negotiations to make the proposal more palatable to the other creditors.

12 However the relationship of 630 in the overall acquisition situation remains a question mark. Conceivably it paid \$250,000 cash in the overall deal and a promissory note for \$125,000 which was guaranteed by S as above noted. In return it got G's intercompany indebtedness of some \$15.8 million. S however paid the E interests \$650,000 in expenses for which apparently it received no benefit. It is therefore unclear on the simplest of analysis (which may not appreciate all intricacies) why 630 was needed if S was having to foot the expenses of its own takeover as opposed to using some of this money to have the intercompany debt cancelled. I note that E's affidavit was provided this afternoon (and therefore incapable of being cross-examined on — again no fault is attributed given the compressed timing necessary). However E's affidavit does not address why 630 was involved in the acquisition transaction and why E, it appears, required S to provide the support for 630's \$125,000 obligation to G and the necessity to have 630 acquire the intercompany debt. On the record before me I must conclude that there is a strong relationship which is unexplained.

13 However in the circumstances it would not appear that 630's unsecured claim is tainted by that relationship pursuant to the *Oulahen* or *Northland* principles. Therefore I would not disqualify 630 from voting — but this relationship and the necessity/desirability of involving 630 in the acquisition transaction whereby it acquired the intercompany debt must be fully described in comprehensible language to the creditors.

14 In that respect I note that the Proposal of S indicates that it is giving background but it does not go back further than the CCAA filing on January 6, 2005. The Trustee's description did generally refer to the attempts by G to get rid of S but does not deal with the aborted negotiations with the Chahine interests (it was indicated in passing that there may have been a contact over the years between Chahine and the principal of 630) which led to the introduction of E. However 630's involvement is not discussed. I appreciate the terribly difficult balancing act between giving too little and too much information (particularly when there is a necessity to avoid confusion by deluging creditors with an avalanche of information); I do not fault in any way the Trustee in this regard but I find it necessary for 630's involvement in the deal and any relationship of any nature relevant to that involvement to be adequately explained.

Order accordingly.

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TAB 10

1999 CarswellOnt 4661
Ontario Superior Court of Justice [Commercial List]

T. Eaton Co., Re

1999 CarswellOnt 4661, [1999] O.J. No. 5322, 15 C.B.R. (4th) 311, 95 A.C.W.S. (3d) 219

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

In the Matter of a Plan of Compromise or Arrangement of the T. Eaton Company Limited, Applicant

Farley J.

Judgment: November 23, 1999

Docket: 99-CL-3516

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under general corporate legislation

Company brought application for court's approval for plan under Business Corporations Act — Application granted — To be approved, plan must strictly comply with all statutory requirements, determination must be made that nothing has been done or purported to be done that is not authorized by Act, and plan must be fair and reasonable — Perfection is not required for plan to be fair and reasonable, as plan is compromise — Both classes of creditors as well as shareholders voted overwhelmingly in favour of plan — Alternative plan was not presented — Concern was raised regarding amount going to shareholders under plan, and plan could be "closer to perfection", but plan was fair and reasonable — Business Corporations Act, R.S.O. 1990, c. B.16.

APPLICATION by company for court approval of plan under *Business Corporations Act*.

Subject:

Farley J.:

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

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

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

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

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

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

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

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

Those voting on the Plan (and I noted there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p. 510 of *Olympia & York Developments Ltd.*:

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

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests ...

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

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

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

9 What is of concern is the question of the size of the pot going to the shareholders. That was a bone of contention amongst the various creditors - but as I have observed, no one advanced a competing plan. I would also like to make it clear that I have no doubt that many of the shareholders have suffered significant losses as a result of the demise of Eaton's and I know that it is painful for them. It is not my intention to increase that pain but I do think that it is important for at least future situations that in devising and considering plans persons recognize that there is a natural and legal "hierarchy of interest to receive value in a liquidation or liquidation related transaction" and that in that hierarchy the shareholders are at the bottom. See my endorsement of November 22, 1999 in *Re Royal Oak Mines Inc.* [(1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List])]:

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

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

11 I also think it helpful to note my observations in *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), at pp.11-16 and especially the analysis *Sorsbie v. Tea Corp.*, [1904] 1 Ch. 12 (Eng. C.A.) as well as the other cases referred to therein.

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

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

Application granted.

TAB 11

2008 ONCA 587
Ontario Court of Appeal

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

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240
O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD
ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS
V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE
& MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND
6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-
PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO
(Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II
CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD
ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS
XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA
INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO
(Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA
INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE
MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC.,
DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS
R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED,
PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE
INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTEM INC.,
INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE
MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC.,
CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA
PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008

Judgment: August 18, 2008 *

Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Peter F.C. Howard, Samaneh Hosseini for Bank of America N.A., Citibank N.A., Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank AG, HSBC Bank Canada, HSBC

Bank USA, National Association, Merrill Lynch International, Merrill Lynch Capital Services, Inc., Swiss Re Financial Products Corporation, UBS AG
Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.
Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)
Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
Mario J. Forte for Caisse de Dépôt et Placement du Québec
John B. Laskin for National Bank Financial Inc., National Bank of Canada
Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.
Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank
Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
Neil C. Saxe for Dominion Bond Rating Service
James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP
Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

R.A. Blair J.A.:

A. Introduction

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

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

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

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

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

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

(1) Legal Authority for the Releases

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

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

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

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

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

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J.

noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

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

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

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

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

The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), per Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

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

... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".³ Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

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

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

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

Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

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

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

The Statutory Wording

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

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

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

59 Sections 4 and 6 of the CCAA state:

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

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

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

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

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

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

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

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

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

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

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.⁵ Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

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

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

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes⁶ and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

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

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in

the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

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

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

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

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

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

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

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

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

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings —

including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

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

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,⁷ of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

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

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc. (1999)*, 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada (2001)*, 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re (2005)*, 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

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

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

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

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

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

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

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

53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey (1990)*, 1 O.R. (3d) 289 at 297, the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

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

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor

agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

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

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

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

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

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

[42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

.....

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

.....

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

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

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

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

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

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

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

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

The 1997 Amendments

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

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

Exception

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

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

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

Powers of court

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

Resignation or removal of directors

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

1997, c. 12, s. 122.

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

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

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

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

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

The Deprivation of Proprietary Rights

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

The Division of Powers and Paramountcy

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

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

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

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

Conclusion With Respect to Legal Authority

TAB 12

2012 ONSC 7050
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 15913, 2012 ONSC 7050, 224 A.C.W.S. (3d) 21

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

Morawetz J.

Heard: December 7, 2012
Judgment: December 12, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Sino-Forest Corporation
Derrick Tay, Jennifer Stam, Cliff Prophet, for Monitor, FTI Consulting Canada Inc.
Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholders
Kenneth Rosenberg, Kirk Baert, Max Starnino, A. Dimitri Lascaris, for Class Action Plaintiffs
Won J. Kim, James C. Orr, Michael C. Spencer, Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP, Comité Syndicale Nationale de Retraite Bâtirente Inc.
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young Inc.
Peter Green, Ken Dekkar, for BDO Limited
Edward A. Sellers, Larry Lowenstein, for Board of Directors of Sino-Forest Corporation
John Pirie, David Gadsden, for Poyry (Beijing)
James Doris, for Plaintiff in New York Class Action
David Bish, for Underwriters
Simon Bieber, Erin Pleet, for David Horsley
James Grout, for Ontario Securities Commission
Emily Cole, Joseph Marin, for Allen Chan
Susan E. Freedman, Brandon Barnes, for Kai Kit Poon
Paul Emerson, for ACE/Chubb
Sam Sasso, for Travelers

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Applicant debtor corporation was integrated forest plantation operator and forest products company with majority of assets in People's Republic of China and complicated corporate structure — In 2011, reports of financial impropriety of corporation had significant negative effect, resulting in corporation defaulting under note indentures and subsequent agreement of noteholders supporting restructuring of corporation in March 2012 — At same time corporation obtained initial order under Companies' Creditors Arrangement Act, and subsequent orders included grant of extensions of stay of proceedings, claims procedure order, and class action proceedings in Ontario as well as other jurisdictions — On August 31, 2012, court approved filing of plan to discharge all affected claims, distribute consideration in respect of proven claims and transfer ownership of corporate business to two new corporations

whose shares would be distributed to all affected creditors — Plan was approved by 99 per cent of affected creditors — Corporation brought motion for order sanctioning plan of compromise and reorganization — Motion granted — Considering relevant factors on sanction hearing, sanction of order was warranted, as corporation established strict compliance with all statutory requirements and prior court orders, did nothing not authorized by Act and had fair and reasonable plan — Monitor concluded plan was preferable alternative to liquidation or bankruptcy — Plan provided fair and reasonable balance among corporation's stakeholders and provided corporation simultaneous ability to continue as going concern for all stakeholders — Plan adequately considered public interest providing certainty to corporate employees, suppliers, customers and other stakeholders — Selection of \$150 million cap on indemnified noteholders class action reflected business judgment of parties' assessment risk related to Ontario class action and was commercially reasonable — Reasonable connection existed between claims being compromised and overall purpose of plan.

MOTION by debtor corporation for order sanctioning plan of compromise and reorganization.

Morawetz J.:

1 On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

2 The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

3 With the exception of one party, SFC's position is either supported or is not opposed.

4 Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Sino-Forest Corp., Re, 2012 ONSC 7041* (Ont. S.C.J. [Commercial List])). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

5 The defined terms have been taken from the motion record.

6 SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision") (*2012 ONSC 4377, 92 C.B.R. (5th) 99* (Ont. S.C.J. [Commercial List])), which was subsequently upheld by the Court of Appeal for Ontario (*2012 ONCA 816* (Ont. C.A.)).

7 Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

8 The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

9 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

10 The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

11 Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

12 SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

13 SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

14 SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

15 On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

16 SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

17 Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

18 The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings, preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

19 SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012 [2012 CarswellOnt 14701 (Ont. C.A.)], and unless further extended, will expire on February 1, 2013.

20 On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

21 On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

22 As of the date of filing, SFC had approximately \$1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

23 After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

24 *Sino-Forest Corp., Re* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of \$6.5 billion for general damages, \$174.8 million in connection with a prospectus issued in June 2007, \$330 million in relation to a prospectus issued in June 2009, and \$319.2 million in relation to a prospectus issued in December 2009; second, there is a \$1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

25 The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

26 In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

27 Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

28 The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of \$6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

29 The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

30 The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of \$100 million against SFC's directors and officers (this amount was later reduced to \$84 million).

31 SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

32 On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

33 In reasons released on July 27, 2012 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

34 On August 31, 2012 [2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List])], an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

35 According to SFC's counsel, the Plan endeavours to achieve the following purposes:

- (a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;
- (b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;
- (c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and
- (d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

36 Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

37 SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found

to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

38 SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

39 The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

40 Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. \$300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

41 Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

42 With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of \$150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the \$150 million Indemnified Noteholder Class Action Limit.

43 The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

44 The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

45 The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

46 The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	<i>Number of Votes</i>	<i>%</i>	<i>Value of Votes</i>	<i>%</i>
<i>Total Claims Voting For</i>	250	98.81%	\$ 1,465,766,204	99.97%

<i>Total Claims Voting Against</i>	3	1.19%	\$	414,087	0.03%
<i>Total Claims Voting</i>	253	100.00%	\$	1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	<i>Vote For</i>	<i>Vote Against</i>	<i>Total Votes</i>
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	<i>Number of Votes</i>	<i>%</i>	<i>Value of Votes</i>	<i>%</i>
<i>Total Claims Voting For</i>	12	92.31%	\$ 8,375,016	96.10%
<i>Total Claims Voting Against</i>	1	7.69%	\$ 340,000	3.90%
<i>Total Claims Voting</i>	13	100.00%	\$ 8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire \$150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	<i>Number of Votes</i>	<i>%</i>	<i>Value of Votes</i>	<i>%</i>
<i>Total Claims Voting For</i>	263	98.50%	\$ 1,474,149,082	90.72%
<i>Total Claims Voting Against</i>	4	1.50%	\$ 150,754,087	9.28%
<i>Total Claims Voting</i>	267	100.00%	\$ 1,624,903,169	100.00%

47 E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

48 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

49 Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to be dealt with at a further court-approval hearing.

Law and Argument

50 Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

51 To establish the court's approval of a plan of compromise, the debtor company must establish the following:

- (a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;
- (b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), leave to appeal denied, 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 (S.C.C.) and *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750, 79 C.B.R. (5th) 307 (Ont. S.C.J.)).

52 SFC submits that there has been strict compliance with all statutory requirements.

53 On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the \$5 million statutory threshold.

54 The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

55 SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

56 Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Canadian Airlines Corp., Re*.

57 Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Canadian Airlines Corp., Re*, and *Nortel Networks Corp., Re*, [2009] O.J. No. 2166 (Ont. S.C.J. [Commercial List]). Further, courts should resist classification approaches that potentially jeopardize viable plans.

58 In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

59 I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

60 SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

61 In *Nelson Financial Group Ltd., Re*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;
3. If other options or alternatives have been explored and rejected as workable, this will be significant;
4. Consideration of the oppression rights of certain creditors; and
5. Unfairness to shareholders.
6. The court will consider the public interest.

62 The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

63 In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

64 I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

65 The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

66 In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global Communications Corp., Re* and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bkcty.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

67 In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

68 As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

69 With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the \$150 million agreed-upon amount reflects risks faced by both sides. The selection of a \$150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

70 Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

71 The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 45 C.B.R. (5th) 163 (Ont. C.A.) stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

72 In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

73 Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

74 In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial, Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), and *Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]). Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

75 With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

76 It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

77 I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

78 Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that

is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

79 Having considered the foregoing, I am satisfied that SFC has established that:

- (i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;
- (ii) nothing has been done or purported to be done that is not authorized by the CCAA; and
- (iii) the Plan is fair and reasonable.

80 Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

Motion granted.

TAB 13

2015 ONSC 622
Ontario Superior Court of Justice

Cline Mining Corp., Re

2015 CarswellOnt 3285, 2015 ONSC 622, 23 C.B.R. (6th) 194, 252 A.C.W.S. (3d) 8

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

In the Matter of a Plan of Compromise and Arrangement of Cline Mining
Corporation, New ELK Coal Company LLC and North Central Energy Company

G.B. Morawetz R.S.J.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: CV-14-10781-00CL

Counsel: Robert J. Chadwick, Logan Willis for Applicants, Cline Mining Corporation et al.
Michael DeLellis, David Rosenblatt for FTI Consulting Canada Inc., Monitor of the Applicants
Jay Swartz for Secured Noteholders

Subject: Insolvency

Headnote

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

Insolvent mining companies (applicants) were involved in Companies' Creditors Arrangement Act proceedings — Applicants brought motion to approve plan of arrangement which involved release of certain claims and recapitalization of applicants — Motion granted — Plan was fair and reasonable in circumstances — Plan represented compromise and treated affected creditors fairly — Third party releases were rationally related to purpose of plan and were necessary for successful restructuring — Release of directors and officers was appropriate — Monitor supported applicants' position and plan had unanimous support from creditors.

MOTION by insolvent companies for approval or plan of arrangement and other relief.

G.B. Morawetz R.S.J.:

1 Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

- a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and
- b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

2 Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants

as a unified corporate enterprise and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

3 Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

4 The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

5 The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

6 The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corp., Re*, 2014 ONSC 6998 (Ont. S.C.J.) and need not be repeated.

7 The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. \$3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of \$210,000 (with \$90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of \$100,000 payable in eight years from the Plan implementation date.

8 As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

9 The Applicants served the Amended Plan on the Service List on January 20, 2015.

10 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

11 Equity claimants will not receive any consideration or distributions under the Plan.

12 The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

13 The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

14 The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

15 The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

16 The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

17 None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

18 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

19 The general requirements for court approval of the CCAA Plan are well established:

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

(see *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]))

20 Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

21 In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

- a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;
- b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;
- c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;
- d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;
- e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

22 The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *SkyLink*, *supra*; and *Sino-Forest Corp.*, Re, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), leave to appeal denied, 2013 ONCA 456 (Ont. C.A.)).

23 The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

24 I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

25 Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

26 The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

27 The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

28 I am satisfied that in these circumstances, it is appropriate to grant the releases.

29 The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

30 The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

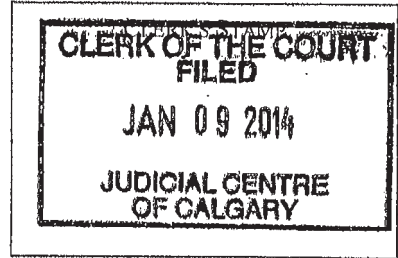
31 The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

32 Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

33 For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

Motion granted.

TAB 14



COURT FILE NUMBER

1301 - 11352

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

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

IN THE MATTER OF THE **BUSINESS CORPORATIONS ACT**, R.S.A. 2000, c. B-9, as amended

I hereby certify this to be a true copy of the original Order

Dated this 9 day of Jan 2014
S. G. [Signature]
for Clerk of the Court

AND IN THE MATTER OF LONE PINE RESOURCES CANADA LTD., LONE PINE RESOURCES (HOLDINGS) INC., LONE PINE RESOURCES INC., WISER OIL DELAWARE, LLC AND WISER DELAWARE LLC.

DOCUMENT

SANCTION ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500, 855- 2nd Street SW
Calgary, Alberta T2P 4K7

Attention: Chris Simard
Telephone No.: 403-298-4485
Fax No.: 403-265-7219
Client File No.: 68261.10

DATE ON WHICH ORDER WAS PRONOUNCED:

January 9, 2014

LOCATION OF HEARING OR TRIAL:

Calgary

NAME OF JUDGE WHO MADE THIS ORDER:

The Honourable Mme. Justice B.E. Romaine

UPON the Application of Lone Pine Resources Canada Ltd. ("**LPR Canada**"), Lone Pine Resources (Holdings) Inc. ("**LPR Holdings**"), Lone Pine Resources Inc. ("**LPRI**"), Wisier Oil Delaware, LLC ("**Wisier Oil**") and Wisier Delaware LLC ("**Wisier**") (collectively, the "**Applicants**", and each, an "**Applicant**") for an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), sanctioning the First Amended and Restated Plan of Compromise and Arrangement dated December 27, 2013, which was previously filed with the Court as part of the plan supplement dated December 27, 2013 (the "**Plan Supplement**") and is attached as Schedule "A", as may be further amended, varied or supplemented from time to time in accordance with the terms thereof (the "**Plan**");

AND UPON reading the pleadings and proceedings herein, including the notice of this Application, the Affidavit No. 5 of Tim S. Granger sworn December 9, 2013 (the "**Granger Affidavit No. 5**"), the Sixth Report of PricewaterhouseCoopers Inc. (the "**Monitor**") dated December 10, 2013, and the Eighth Report of the Monitor dated January 7, 2014; AND UPON hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Syndicate, counsel for the Initial Consenting Noteholders, counsel for certain shareholders of LPRI, and counsel for other interested parties and stakeholders;

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINED TERMS

1. Any capitalized terms not otherwise defined in this Sanction Order shall have the meanings ascribed to such terms in the Plan and/or the Meeting Order granted by the Court on December 13, 2013 (the "**Meeting Order**"), as the case may be.

SERVICE, NOTICE AND MEETING

2. Service of this Application and supporting documents is hereby deemed to be good and sufficient, the time for notice is hereby abridged to the time provided, and no other person is required to have been served with notice of this Application.
3. There has been good and sufficient notice, service and delivery of the Affected Unsecured Creditors Meeting Materials and the Noteholder Meeting Materials (including,

without limitation, the Meeting Order, the Plan and the Plan Supplement) to all Persons upon which notice, service and delivery was required.

4. The Meetings were duly convened and held, all in conformity with the CCAA and the Orders of this Court, including, without limitation, the Meeting Order.
5. The hearing in respect of the Sanction Order was open to all of the Affected Creditors and all other Persons with an interest in the Applicants and that such Affected Creditors and other Persons were permitted to be heard at the hearing in respect of the Sanction Order; and prior to the hearing, all of the Affected Creditors and all other Persons on the Service List were given adequate notice thereof.

SANCTION OF THE PLAN

6. The relevant class of Affected Creditors of each of the Applicants for the purposes of voting to approve the Plan is each Applicant's Affected Unsecured Creditors.
7. The Plan has been approved by the Required Majorities in conformity with the CCAA and the Meeting Order.
8. The Applicants have complied with the provisions of the CCAA and the Orders of the Court in all material respects.
9. The Applicants have acted and are acting in good faith and with due diligence, and have not done or purported to do (nor does the Plan do or purport to do) anything that is not authorized by the CCAA.
10. The Plan, and all the terms and conditions thereof, and matters and transactions contemplated thereby, are fair, reasonable, not oppressive and are in the best interests of each of the Applicants and the Persons affected by the Plan.
11. The Plan is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

PLAN IMPLEMENTATION

12. The Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved and shall be deemed to be implemented, binding and effective upon and with respect to the Applicants, all Affected Creditors, the Directors and Officers, the Released Parties and all other Persons named or referred to in, or subject to the Plan, in accordance with the provisions of the Plan as of the Plan Implementation Date at the Effective Time.
13. The Plan shall be binding upon and enure to the benefit of the Applicants, the Released Parties, all Affected Creditors, any Person having a Released Claim and all other Persons named or referred to in, affected by, or subject to the Plan, including, without limitation, their respective heirs, executors, administrators, and other legal representatives, successors, and assigns.
14. Each of the Applicants and the Monitor are authorized and directed to take all steps and actions, and to do all things, necessary or appropriate to implement the Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, deliveries, allocations, instruments and agreements contemplated pursuant to the Plan, and such steps and actions are hereby authorized, ratified and approved. Furthermore, none of the Applicants, the Directors or Officers, or the Monitor shall incur any liability as a result of acting in accordance with terms of the Plan or the Sanction Order. In addition, to the extent not previously given, all necessary approvals of and from the shareholders, members, directors, managers or officers of the Applicants, as applicable (including all necessary resolutions, whether ordinary, special or otherwise, of the shareholders, members, directors, managers or officers of the Applicants, as applicable) to take all actions under the Plan or contemplated thereby shall be deemed to have been made, given, passed or obtained, and no agreement between or among the shareholders or members of any Applicant, or any of them, or between a shareholder or member and another Person, that limits or purports to limit in any way the right to vote shares or membership interests held by such shareholder(s) or member(s) with respect to any of the

steps or transactions contemplated by the Plan, shall be effective, and all such agreements shall be deemed to be of no force or effect.

15. Each of the Applicants, DTC, the Monitor, the Note Indenture Trustee, and any other Person required to make any distributions, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan are hereby directed to complete such distributions, deliveries or allocations and to take any such related steps and/or actions in accordance with the terms of the Plan, and such distributions, deliveries and allocations, and steps and actions related thereto, are hereby approved.
16. Upon the satisfaction or waiver, as applicable, of the conditions precedent set out in Section 9.1 of the Plan in accordance with the terms of the Plan, as confirmed by the Applicants and Goodmans LLP (on behalf of the Majority Initial Consenting Noteholders) to the Monitor in writing, the Monitor is authorized and directed to deliver to the Applicants and Goodmans LLP a certificate substantially in the form attached hereto as Schedule "B" (the "**Monitor's Certificate**") signed by the Monitor, certifying that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Sanction Order. As soon as possible following the Plan Implementation Date, the Monitor shall file the Monitor's Certificate with this Court.
17. The steps, compromises, releases, discharges, cancellations, extinguishments, transactions, arrangements and reorganizations to be effected on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated in the Plan, without any further act or formality, beginning at the Effective Time (or in such other manner or sequence or such other time or times on the Plan Implementation Date as the Applicants, the Monitor and the Majority Initial Consenting Noteholders may agree).
18. The Applicants, the Monitor and the Initial Consenting Noteholders are hereby authorized and empowered to exercise all such consent and approval rights in the manner set forth in the Plan, whether prior to or after implementation of the Plan.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

19. Pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, (i) all Affected Claims of any nature shall be fully, finally, irrevocably and forever compromised, discharged and released, (ii) the ability of any Person to proceed against the Applicants or any of the Released Parties in respect of or relating to any Affected Claims shall be forever discharged and restrained, and (iii) all proceedings with respect to, in connection with or relating to such Affected Claims be permanently stayed, subject only to the right of Affected Creditors to receive distributions pursuant to this Plan in respect of their Affected Claims, if any;
20. Pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date and at the time specified in Section 5.5 of the Plan, all accrued and unpaid interest owing on, or in respect of, or as part of, Affected Unsecured Claims shall be fully, finally, irrevocably and forever compromised, settled, released, discharged, extinguished, cancelled and barred for no consideration and no Person shall have any entitlement to any such accrued and unpaid interest.
21. On the Plan Implementation Date, the ability of any Person to proceed against any Released Party in respect of any Released Claim shall be forever discharged, barred and restrained, and all proceedings with respect to, in connection with, or relating to any such matter shall be permanently stayed; provided that nothing herein will release or discharge (w) the right to enforce the obligations of any Person under the Plan, (x) any Released Party if the Released Party is determined by a Final Order of a court of competent jurisdiction to have committed fraud or wilful misconduct, (y) the Applicants, the Directors or the Officers from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA, or (z) any Director or Officer from any Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA, as determined by a Final Order of the Court. However, notwithstanding anything to the contrary herein, from and after the Plan Implementation Date, a Person may only commence an action against a Released Party in connection with (x) or (z) above if such Person has first obtained leave of this Court on notice to the applicable Released Party, the Applicants, the Monitor (unless previously discharged), the Initial

Consenting Noteholders and any applicable insurers; *provided that* no Person shall be prevented from commencing such an action against a Released Party where such an action must be taken in order to comply with statutory time limitations in order to preserve such Person's rights at law, *provided further that* no further steps shall be taken by such Person except in accordance with the other provisions of this Plan (including the requirement herein to obtain the leave of the Court at the first available opportunity), and notice in writing of such action be given to the applicable Released Party, the Applicants, the Monitor (unless previously discharged), the Initial Consenting Noteholders and any applicable insurers at the first available opportunity.

22. Each Affected Creditor and each Person holding a Released Claim is hereby deemed to have (i) consented to all of the provisions of the Plan, in its entirety, and (ii) executed and delivered to the Applicants and any other Released Party all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.
23. Any securities or other consideration issued, transferred or distributed pursuant to the Plan shall be issued, transferred or distributed free and clear of any Encumbrances.
24. Section 36.1 of the CCAA, Sections 95 to 101 of the BIA and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any payments, distributions, transfers, allocations or transactions made or completed in connection with the Recapitalization, whether before or after the Filing Date, including, without limitation, to any and all of the payments, distributions, transfers, allocations or transactions contemplated by and to be implemented pursuant to, or in accordance with, the Plan.
25. The New Shares shall be and are hereby deemed to have been validly authorized, created, and, upon issuance pursuant to the Plan, issued and outstanding as fully-paid and non-assessable shares in the capital of LPRC and LPRI, as applicable, on the Plan Implementation Date and at the time specified in Section 5.5 of the Plan.
26. The Court was advised prior to the hearing in respect of the Sanction Order that the New Shares will not be registered under the United States Securities Act of 1933, as amended,

and that the Sanction Order (including the within determination that the terms and conditions of the Plan and the matters and transactions contemplated thereby, are fair and reasonable) will be relied upon by the Applicants as an approval of the fairness of the terms and conditions of the exchange of Affected Unsecured Claims for LPRC Class A Voting Common Shares and LPRI Class A Voting Common Shares under the Plan (the "**Debt Exchange**") for the purpose of relying on the exemption from the registration requirements of such Act pursuant to Section 3(a)(10) thereof for the issuance of such New Shares. For certainty, the within determination that the terms and conditions of the Plan and the matters and transactions contemplated thereby are fair and reasonable includes a determination that the terms and conditions of the Debt Exchange are fair to the Affected Unsecured Creditors affected thereby.

27. Pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, the Existing Parent Shares and all other Equity Interests shall be and are hereby fully, finally, irrevocably and forever cancelled for no consideration.
28. Without limiting the provisions of the Claims Procedure Order, any Person that did not file a Proof of Claim, a Notice of Dispute or a Notice of Dispute of Revision or Disallowance (each as defined in the Claims Procedure Order), as applicable, by the Claims Bar Date (as defined in the Claims Procedure Order) or such other date provided for in the Claims Procedure Order, as applicable, whether or not such Affected Creditor received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim and shall not be entitled to any distribution under the Plan, and such Person's Claim shall be and is hereby forever barred and extinguished. Nothing in the Plan extends or shall be interpreted as extending or amending the Claims Bar Date or any other bar date deadline provided for in the Claims Procedure Order, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order, the Plan, or the Sanction Order.
29. Each of the Proofs of Claim attached as Appendix "A" to the Eighth Report of the Monitor dated January 7, 2014 shall be and are hereby declared to be Equity Claims.

This declaration is without prejudice to and not determinative of whether such claims may also be:

- (a) Insured Claims (and thereby Unaffected Claims, as those terms are defined in the Plan); or
- (b) claims that are not otherwise released under section 7.1 of the Plan;

and thereby, and to that extent only, not affected by the treatment of Equity Claims set forth in section 3.5 of the Plan.

THE MONITOR

- 30. The Monitor, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Plan, shall be and is hereby authorized, directed and empowered to perform its functions and fulfill its obligations under the Plan to facilitate the implementation of the Plan.
- 31. (i) In carrying out the terms of this Sanction Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Sanction Order and/or the Plan, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicants and any information provided by the Applicants without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.
- 32. Upon completion by the Monitor of its duties in respect of the Applicants pursuant to the CCAA, the Plan and the Orders (including this Sanction Order), the Monitor may file with the Court a certificate stating that all of its duties in respect of the Applicants pursuant to the CCAA, the Plan and the Orders (including this Sanction Order) have been completed and thereupon, PricewaterhouseCoopers Inc. shall be deemed to be discharged from its duties as Monitor and released of all claims relating to its activities as Monitor.

RESERVES AND CHARGES

33. The amount of the Disputed Distribution Claims Reserve shall be the amount determined by the Applicants at or prior to the Plan Implementation Date, subject to the approval of the Monitor and the Initial Consenting Noteholders.
34. On the Plan Implementation Date, following completion of the steps in the sequence provided for in Section 5.5 of the Plan, each of the Charges shall be terminated, discharged, and released.

NEW CREDIT FACILITY

35. On the Plan Implementation Date, the Applicants shall, and are hereby authorized to, execute and deliver the New Credit Facility, which New Credit Facility shall be consistent with the terms and conditions of the November 11, 2013 Commitment Letter executed by LPR Canada, as borrower, by the other Applicants, as guarantors, and by Morgan Stanley Capital Group Inc., Alberta Treasury Branches and Société Générale, as arrangers and lenders (collectively, the "Arrangers"), or otherwise on terms and conditions acceptable to the Applicants, the Arrangers, the Monitor and the Initial Consenting Noteholders.
36. The implementation of the Plan shall be deemed approval of the New Credit Facility in all respects, and all transactions contemplated thereunder, and all actions to be taken, undertakings to be made, and obligations to be incurred by the Applicants in connection therewith, including the payment of all fees, indemnities, costs and expenses provided for therein. On the Plan Implementation Date, the New Credit Facility shall constitute legal, valid, binding and authorized obligations of the Applicants, enforceable in accordance with their terms. The loans to be extended pursuant to the New Credit Facility are being extended, and shall be deemed to have been extended, in good faith, for legitimate business purposes and for reasonably equivalent value.
37. The Arrangers and the Applicants are hereby authorized to make all filings and recordings, and to obtain all governmental approvals and consents necessary to establish

and perfect the liens and security interests to be provided under the New Credit Facility under the provisions of the applicable federal, provincial, or other law.

STAY OF PROCEEDINGS

38. The Stay Period, as ordered and defined in paragraph 14 of the Initial Order, and as extended in paragraph 2 of the Order granted herein on October 24, 2013 and in paragraph 3 of the Order granted herein on November 27, 2013, is hereby extended until and including the earlier of (i) the Plan Implementation Date, and (ii) January 31, 2014.
39. Subject to performance by the Applicants of their obligations under the Plan, all obligations, agreements or leases to which any of the Applicants is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no party to any such obligation, agreement or lease shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation, agreement or lease, (including any right of set-off, dilution or other remedy), or make any demand against the Applicants or any other Person under or in respect of any such obligation, agreement or lease by reason:
- (a) of any event which occurred prior to, and not continuing after, the Plan Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled any other party thereto to enforce those rights or remedies;
 - (b) that the Applicants sought or obtained relief under the CCAA or by reason of any steps or actions taken as part of the CCAA Proceeding or this Sanction Order or prior Orders;
 - (c) of any default or event of default arising as a result of the financial condition or insolvency of the Applicants;
 - (d) of the completion of any of the steps, actions or transactions contemplated under the Plan; or

- (e) of any steps, compromises, settlements, releases, discharges, extinguishments, cancellations, transactions, arrangements or reorganizations effected pursuant to the Plan.
40. From and after the Plan Implementation Date, any and all Persons shall be and are hereby barred, stopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any matter which is released pursuant to Article 7 of the Plan.
41. On the Plan Implementation Date, following completion of the steps in the sequence provided for in Section 5.5 of the Plan, all debentures, notes, certificates, agreements, invoices and other instruments evidencing Affected Claims (including, for greater certainty, the Notes) shall not entitle any holder thereof to any compensation or participation and shall be and are hereby deemed to be cancelled and shall be and are hereby deemed to be null and void.

SEALING

42. Each of Exhibit "3" (Sales Process Summary) and Exhibit "12" (Detailed List of Shareholdings of the Dentons Shareholders) of the Granger Affidavit No. 5, shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*.

EFFECT, RECOGNITION AND ASSISTANCE

43. On the Plan Implementation Date, at the time or times and in the manner provided for in Section 5.5 of the Plan, the Persons to be appointed to the board of directors of LPRI and LPRC shall be the Persons on the certificate that has been filed with the Court by the Applicants, provided that such certificate and the Persons listed thereon shall be subject to the prior written consent of the Majority Initial Consenting Noteholders. Concurrently with the appointment of such directors, all directors serving immediately prior to the Effective Time shall be deemed to resign.

44. To the extent that any Person (including any of the Applicants or the Monitor) seeks any advice or direction with respect to any matter arising from or under the Plan or this Sanction Order, such motion shall be brought in the Court of Queen's Bench of Alberta.
45. This Sanction Order shall have full force and effect in all provinces and territories of Canada, outside Canada and against all Persons against whom it may be enforceable.
46. LPR Canada, as the foreign representative of the Applicants and of the within proceedings, is hereby authorized and directed, *ex post facto*, to seek (i) recognition of the Plan and this Sanction Order, and (ii) confirmation that the Plan and this Sanction Order are binding and effective in the United States.
47. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States, or in any other foreign jurisdiction, to give effect to this Sanction Order and to assist the Applications, or any of them, the Monitor and their respective agents in carrying out the terms of this Sanction Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, or any of them, and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Sanction Order, or to assist the Applicants, or any of them, and the Monitor and their respective agents in carrying out the terms of this Sanction Order.
48. This Sanction Order shall be posted on the Website at <http://www.pwc.com/ca/en/car/lpr> and only be required to be served upon the parties on the Service List and those parties who appeared at the hearing of the motion for this Sanction Order.

B. E. Romaine

J.C.Q.B.A. or Clerk of the Court

SCHEDULE "A"