

TAB 16

2007 CarswellOnt 1029, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22

2007 CarswellOnt 1029, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22

Muscletech Research & Development Inc., Re

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LIS-
TED ON SCHEDULE "A" HERETO (Applicants)

Ontario Superior Court of Justice [Commercial List]

Ground J.

Heard: February 15, 2007

Judgment: February 22, 2007

Docket: 06-CL-6241

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Counsel: Fred Myers, David Bish for Applicants, CCAA

Derrick Tay, Randy Sutton for Iovate Companies

Natasha MacParland, Jay Schwartz for RSM Richter Inc.

Steven Gollick for Zurich Insurance Company

A. Kauffman for GNC Oldco

Sheryl Seigel for General Nutrition Companies Inc. and other GNC Newcos

Pamela Huff, Beth Posno for Representative Plaintiffs

Jeff Carhart for Ad Hoc Tort Claimants Committee

David Molton, Steven Smith for Brown Rudnick

Brent McPherson for XL Insurance America Inc.

Alex Ilchenko for Walgreen Co.

Lisa La Horey for E&L Associates, Inc.

Subject: Insolvency

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

Insolvent company advertised, marketed and sold health supplements and weight loss and sports nutrition products and was attempting to restructure under Companies' Creditors Arrangement Act — Large number of product liability and other lawsuits related to company's products was commenced principally in United States by numerous claimants — Applicants were 15 corporations involved in production and trade-marking of company's products who were defendants in United States' litigation and who sought global resolution of claims — Applicants brought motion pursuant to s. 6 of Act for sanction of liquidation plan funded entirely by third parties and which included third party releases — Plan was unanimously approved by all classes of creditors and appointed monitor — At hearing on motion issue arose as to jurisdiction of court to authorize third party releases as one of plan terms — Motion granted — On consideration of all relevant factors plan was fair and reasonable and exercise of discretion pursuant to s. 6 of Act to sanction plan was warranted — Applicants strictly complied with all statutory requirements, adhered to all previous orders, were insolvent within meaning of s. 2 of Act and had total claims within meaning of s. 12 of Act in excess of \$5,000,000 — Creditors' and monitor's approval of plan supported conclusion that plan was fair and reasonable — On balancing of prejudice to various parties, without plan creditors would receive nothing and third parties would continue to be mired in extensive and possibly conflicting litigation in United States — Third party releases were condition precedent to establishment of contributed funds and were reasonable — Opposition to sanction of plan by prospective representative plaintiffs in five class actions was without merit — Representative plaintiffs had opportunity to submit individual proofs of claim but chose not to do so.

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

Insolvent company advertised, marketed and sold health supplements and weight loss and sports nutrition products and was attempting to restructure under Companies' Creditors Arrangement Act — Large number of product liability and other lawsuits related to company's products was commenced principally in United States by numerous claimants — Applicants were 15 corporations involved in production and trade-marking of company's products who were defendants in United States' litigation and who sought global resolution of claims — Applicants brought motion pursuant to s. 6 of Act for sanction of liquidation plan funded entirely by third parties and which included third party releases — Plan was unanimously approved by all classes of creditors and appointed monitor — At hearing on motion issue arose as to jurisdiction of court to authorize third party releases as one of plan terms — Motion granted — Position of plan opponents that court lacked jurisdiction to grant third party releases was without merit — Whole plan of compromise was funded by third parties and would not proceed without resolution of all claims against third parties — Act did not prohibit inclusion in plan of settlement of claims against third parties — Jurisdiction of courts to grant third party releases was recognized in both Canada and United States.

Statutes considered:

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

Generally — referred to

s. 2 — referred to

s. 6 — pursuant to

s. 12(1) "claim" — referred to

MOTION by insolvent company for sanction of liquidation plan.

Ground J.:

1 The motion before this court is brought by the Applicants pursuant to s. 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for the sanction of a plan (the "Plan") put forward by the Applicants for distributions to each creditor in the General Claimants Class ("GCC") and each creditor in the Personal Injury Claimants Class ("PICC"), such distributions to be funded from the contributed funds paid to the Monitor by the subject parties ("SP") as defined in the Plan.

2 The Plan is not a restructuring plan but is a unique liquidation plan funded entirely by parties other than the Applicants.

3 The purpose and goal of the Applicants in seeking relief under the CCAA is to achieve a global resolution of a large number of product liability and other lawsuits commenced principally in the United States of America by numerous claimants and which relate to products formerly advertised, marketed and sold by MuscleTech Research and Development Inc. ("MDI") and to resolve such actions as against the Applicants and Third Parties.

4 In addition to the Applicants, many of these actions named as a party defendant one or more of: (a) the directors and officers, and affiliates of the Applicants (i.e. one or more of the Iovate Companies); and/or (b) arm's length third parties such as manufacturers, researchers and retailers of MDI's products (collectively, the "Third Parties"). Many, if not all, of the Third Parties have claims for contribution or indemnity against the Applicants and/or other Third Parties relating to these actions.

The Claims Process

5 On March 3, 2006, this court granted an unopposed order (the "Call For Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and Third Parties.

6 The Call For Claims Order required people who wished to advance claims to file proofs of claim with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which any and all such claims would be forever barred. The Call For Claims Order was approved by unopposed Order of the United States District Court for the Southern District of New York (the "U.S. Court") dated March 22, 2006. The Call For Claims Order set out in a comprehensive manner the types of claims being called for and established an elaborate method of giving broad notice to anyone who might have such claims.

7 Pursuant to an order dated June 8, 2006 (the "Claims Resolution Order"), this court approved a process for the resolution of the Claims and Product Liability Claims. The claims resolution process set out in the Claims Resolution Order provided for, *inter alia*: (a) a process for the review of proofs of claim filed with the Monitor; (b) a process for the acceptance, revision or dispute, by the Applicants, with the assistance of the Monitor, of Claims and/or Product Liability Claims for the purposes of voting and/or distribution under the Plan; (c) the appointment of a claims officer to resolve disputed claims; and (d) an appeal process from the determination of the claims officer. The Claims Resolution Order was recognized and given effect in the U.S. by Order of the U.S. Court dated August 1, 2006.

8 From the outset, the Applicants' successful restructuring has been openly premised on a global resolution of the

Product Liability Claims and the recognition that this would be achievable primarily on a consensual basis within the structure of a plan of compromise or arrangement only if the universe of Product Liability Claims was brought forward. It was known to the Applicants that certain of the Third Parties implicated in the Product Liability Actions were agreeable in principle to contributing to the funding of a plan, provided that as a result of the restructuring process they would achieve certainty as to the resolution of all claims and prospective claims against them related to MDI products. It is fundamental to this restructuring that the Applicants have no material assets with which to fund a plan other than the contributions of such Third Parties.

9 Additionally, at the time of their filing under the CCAA, the Applicants were involved in litigation with their insurer, Zurich Insurance Company ("Zurich Canada") and Zurich America Insurance Company, regarding the scope of the Applicants' insurance coverage and liability for defence expenses incurred by the Applicants in connection with the Product Liability Actions.

10 The Applicants recognized that in order to achieve a global resolution of the Product Liability Claims, multi-party mediation was more likely to be successful in providing such resolution in a timely manner than a claims dispute process. By unopposed Order dated April 13, 2006 (the "Mediation Order"), this court approved a mediation process (the "Mediation") to advance a global resolution of the Product Liability Claims. Mediations were conducted by a Court-appointed mediator between and among groups of claimants and stakeholders, including the Applicants, the Ad Hoc Committee of MuscleTech Tort Claimants (which had previously received formal recognition by the Court and the U.S. Court), Zurich Canada and certain other Third Parties.

11 The Mediation facilitated meaningful discussions and proved to be a highly successful mechanism for the resolution of the Product Liability Claims. The vast majority of Product Liability Claims were settled by the end of July, 2006. Settlements of three other Product Liability Claims were achieved at the beginning of November, 2006. A settlement was also achieved with Zurich Canada outside the mediation. The foregoing settlements are conditional upon a successfully implemented Plan that contains the releases and injunctions set forth in the Plan.

12 As part of the Mediation, agreements in respect of the funding of the foregoing settlements were achieved by and among the Applicants, the Iovate Companies and certain Third Parties, which funding (together with other funding being contributed by Third Parties) (collectively, the "Contributed Funds") comprises the funds to be distributed to affected creditors under the Plan. The Third Party funding arrangements are likewise conditional upon a successfully implemented Plan that contains the releases and injunctions set forth in the Plan.

13 It is well settled law that, for the court to exercise its discretion pursuant to s. 6 of the CCAA and sanction a plan, the Applicants must establish that: (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.

14 On the evidence before this court I am fully satisfied that the first two requirements have been met. At the outset of these proceedings, Farley J. found that the Applicants met the criteria for access to the protection of the CCAA. The Applicants are insolvent within the meaning of Section 2 of the CCAA and the Applicants have total claims within the meaning of Section 12 of the CCAA in excess of \$5,000,000.

15 By unopposed Order dated December 15, 2006 (the "Meeting Order"), this Court approved a process for the calling and holding of meetings of each class of creditors on January 26, 2007 (collectively, the "Meetings"), for the purpose of voting on the Plan. The Meeting Order was approved by unopposed Order of the U.S. Court dated January 9, 2007. On December 29, 2006, and in accordance with the Meeting Order, the Monitor served all creditors of the Applicants, with a

copy of the Meeting Materials (as defined in the Meeting Order).

16 The Plan was filed in accordance with the Meeting Order. The Meetings were held, quorums were present and the voting was carried out in accordance with the Meeting Order. The Plan was unanimously approved by both classes of creditors satisfying the statutory requirements of the CCAA.

17 This court has made approximately 25 orders since the Initial Order in carrying out its general supervision of all steps taken by the Applicants pursuant to the Initial CCAA order and in development of the Plan. The U.S. Court has recognized each such order and the Applicants have fully complied with each such order.

The Plan is Fair and Reasonable

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

19 In the case at bar, all of such considerations, in my view must lead to the conclusion that the Plan is fair and reasonable. On the evidence before this court, the Applicants have no assets and no funds with which to fund a distribution to creditors. Without the Contributed Funds there would be no distribution made and no Plan to be sanctioned by this court. Without the Contributed Funds, the only alternative for the Applicants is bankruptcy and it is clear from the evidence before this court that the unsecured creditors would receive nothing in the event of bankruptcy.

20 A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

21 With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

22 The sanction of the Plan was opposed only by prospective representative plaintiffs in five class actions in the United States. This court has on two occasions denied class action claims in this proceeding by orders dated August 16, 2006 with respect to products containing prohormone and dated December 11, 2006 with respect to Hydroxycut products. The first of such orders was appealed to the Ontario Court of Appeal and the appeal was dismissed. The second

of such orders was not appealed. In my reasons with respect to the second order, I stated as follows:

...This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Re Ephedra Products Liability Litigation* (2005) U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be \$ 30, entitling each claimant to a distribution of about \$ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering \$ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

[35] In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez et al. v. Metabolife International Inc.* (2003) U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

23 The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defend-

ants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.

The representative Plaintiffs also appear to challenge the jurisdiction of this court to authorize the Third Party Releases as one of the terms of the Plan to be sanctioned. I remain of the view expressed in paragraphs 7-9 of my endorsement dated October 13, 2006 in this proceeding on a motion brought by certain personal injury claimants, as follows:

With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

Moreover, 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. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs of Claim settling [sic] out in detail their claims against numerous Third Parties.

It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) Paperny J. stated at p. 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.

24 The representative Plaintiffs have referred to certain decisions in the United States that appear to question the jurisdiction of the courts to grant Third Party Releases. I note, however, that Judge Rakoff, who is the U.S. District Court

Judge is seized of the *MuscleTech* proceeding, and Judge Drain stated in a hearing in *Re TL Administration Corporation* on July 21, 2005:

It appears to us to be clear that this release was, indeed, essential to the settlement which underlies this plan as set forth at length on the record, including by counsel for the official claimants committee as well as by the other parties involved, and, as importantly, by our review of the settlement agreement itself, which from the start, before this particular plan in fact was filed, included a release that was not limited to class 4 claims but would extend to claims in class 5 that would include the type of claim asserted by the consumer class claims.

Therefore, in contrast to the Blechman release, this release is essential to confirmation of this plan and the distributions that will be made to creditors in both classes, class 4 and class 5.

Secondly, the parties who are being released here have asserted indemnification claims against the estate, and because of the active nature of the litigation against them, it appears that those claims would have a good chance, if not resolved through this plan, of actually being allowed and reducing the claims of creditors.

At least there is a clear element of circularity between the third-party claims and the indemnification rights of the settling third parties, which is another very important factor recognized in the Second Circuit cases, including *Manville*, *Drexel*, *Finely*, *Kumble* and the like.

The settling third parties it is undisputed are contributing by far the most assets to the settlement, and those assets are substantial in respect of this reorganization by this Chapter 11 case. They're the main assets being contributed.

Again, both classes have voted overwhelmingly for confirmation of the plan, particularly in terms of the numbers of those voting. Each of those factors, although they may be weighed differently in different cases, appear in all the cases where there have been injunctions protecting third parties.

The one factor that is sometimes cited in other cases, i.e., that the settlement will pay substantially all of the claims against the estate, we do not view to be dispositive. Obviously, substantially all of the claims against the estate are not being paid here. On the other hand, even, again, in the Second Circuit cases, that is not a dispositive factor. There have been numerous cases where plans have been confirmed over opposition with respect to third-party releases and third-party injunctions where the percentage recovery of creditors was in the range provided for under this plan.

The key point is that the settlement was arrived at after arduous arm's length negotiations and that it is a substantial amount and that the key parties in interest and the court are satisfied that the settlement is fair and it is unlikely that substantially more would be obtained in negotiation.

25 The reasoning of Judge Rakoff and Judge Drain is, in my view, equally applicable to the case at bar where the facts are substantially similar.

26 It would accordingly appear that the jurisdiction of the courts to grant Third Party Releases has been recognized both in Canada and in the United States.

27 An order will issue sanctioning the Plan in the form of the order submitted to this court and appended as Schedule B to this endorsement.

Schedule "A"

- HC Formulations Ltd.
- CELL Formulations Ltd.
- NITRO Formulations Ltd.
- MESO Formulations Ltd.
- ACE Formulations Ltd.
- MISC Formulations Ltd.
- GENERAL Formulations Ltd.
- ACE US Trademark Ltd.
- MT Canadian Supplement Trademark Ltd.
- MT Foreign Supplement Trademark Ltd.
- HC Trademark Holdings Ltd.
- HC US Trademark Ltd.
- 1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)
- HC Canadian Trademark Ltd.
- HC Foreign Trademark Ltd.

Schedule "B"

Court File No. 06-CL-6241

ONTARIO
 SUPERIOR COURT OF JUSTICE
 (COMMERCIAL LIST)

THE HONOURABLE) THURSDAY, THE 15TH
)
 MR. JUSTICE GROUND) DAY OF FEBRUARY, 2007

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Applicants

Sanction Order

THIS MOTION, made by MuscleTech Research and Development Inc. ("MDI") and those entities listed on Schedule "A" hereto (collectively with MDI, the "Applicants") for an order approving and sanctioning the plan of compromise or arrangement (inclusive of the schedules thereto) of the Applicants dated December 22, 2006 (the "Plan"), as approved by each class of Creditors on January 26, 2007, at the Meeting, and which Plan (without schedules) is attached as Schedule "C" to this Order, and for certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING: (a) the within Notice of Motion, filed; (b) the Affidavit of Terry Begley sworn January 31, 2007, filed; and (c) the Seventeenth Report of the Monitor dated February 7, 2007 (the "Seventeenth Report"), filed, and upon hearing submissions of counsel to: (a) the Applicants; (b) the Monitor; (c) Iovate Health Sciences Group Inc. and those entities listed on Schedule "B" hereto; (d) the Ad Hoc Committee of MuscleTech Tort Claimants (the "Committee"); (e) GN Oldco, Inc. f/k/a General Nutrition Companies; (f) Zurich Insurance Company; (g) GNC Corporation and other GNC newcos; and (h) certain representative plaintiffs in purported class actions involving products containing the ingredient prohormone, no one appearing for the other persons served with notice of this Motion, as duly served and listed on the Affidavit of Service of Elana Polan, sworn February 2, 2007, filed,

Definitions

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan.

Service and Meeting of Creditors

2. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Plan and the Monitor's Seventeenth Report to all Creditors.
3. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Meeting Materials (as defined in the Meeting Order) to all Creditors, and that the Meeting was duly convened, held and conducted, in conformity with the CCAA, the Meeting Order and all other Orders of this Court in the CCAA Proceedings. For greater certainty, and without limiting the foregoing, the vote cast at the Meeting on behalf of Rhodrick Harden by David Molton of Brown Rudnick Berlack Israelis LLP, in its capacity as representative counsel for the Ad Hoc Committee of MuscleTech Tort Claimants, is hereby confirmed.
4. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the within Notice of Motion and Motion Record, and of the date and time of the hearing held by this Court to consider the within Motion, such that: (i) all Persons have had an opportunity to be present and be heard at such hearing; (ii) the within Motion is properly returnable today; and (iii) further service on any interested party is hereby dispensed with.

Sanction of Plan

5. **THIS COURT ORDERS AND DECLARES** that:
 - (a) the Plan has been approved by the requisite majorities of the Creditors in each class present and voting, either in person or by proxy, at the Meeting, all in conformity with the CCAA and the terms of the Meeting Order;

(b) the Applicants have acted in good faith and with due diligence, have complied with the provisions of the CCAA, 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;

(c) the Applicants have adhered to, and acted in accordance with, all Orders of this Court in the CCAA Proceedings; and

(d) the Plan, together with all of the compromises, arrangements, transactions, releases, discharges, injunctions and results provided for therein and effected thereby, including but not limited to the Settlement Agreements, is both substantively and procedurally fair, reasonable and in the best interests of the Creditors and the other stakeholders of the Applicants, and does not unfairly disregard the interests of any Person (whether a Creditor or otherwise).

6. **THIS COURT ORDERS** that the Plan be and is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

Plan Implementation

7. **THIS COURT ORDERS** that the Applicants and the Monitor, as the case may be, are authorized and directed to take all steps and actions, and to do all things, necessary or appropriate to enter into or implement the Plan in accordance with its terms, and enter into, implement and consummate all of the steps, transactions and agreements contemplated pursuant to the Plan.

8. **THIS COURT ORDERS** that upon the satisfaction or waiver, as applicable, of the conditions precedent set out in Section 7.1 of the Plan, the Monitor shall file with this Court and with the U.S. District Court a certificate that states that all conditions precedent set out in Section 7.1 of the Plan have been satisfied or waived, as applicable, and that, with the filing of such certificate by the Monitor, the Plan Implementation Date shall have occurred in accordance with the Plan.

9. **THIS COURT ORDERS AND DECLARES** that as of the Plan Implementation Date, the Plan, including all compromises, arrangements, transactions, releases, discharges and injunctions provided for therein, shall inure to the benefit of and be binding and effective upon the Creditors, the Subject Parties and all other Persons affected thereby, and on their respective heirs, administrators, executors, legal personal representatives, successors and assigns.

10. **THIS COURT ORDERS AND DECLARES** that, as of the Plan Implementation Date, the validity or invalidity of Claims and Product Liability Claims, as the case may be, and the quantum of all Proven Claims and Proven Product Liability Claims, accepted, determined or otherwise established in accordance with the Claims Resolution Order, and the factual and legal determinations made by the Claims Officer, this Court and the U.S. District Court in connection with all Claims and Product Liability Claims (whether Proven Claims and Proven Product Liability Claims or otherwise), in the course of the CCAA Proceedings are final and binding on the Subject Parties, the Creditors and all other Persons.

11. **THIS COURT ORDERS** that, subject to the provisions of the Plan and the performance by the Applicants and the Monitor of their respective obligations under the Plan, and effective on the Plan Implementation Date, all agreements to which the Applicants are a party shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person shall, following the Plan Implementation Date, accelerate, termin-

ate, rescind, refuse to perform or otherwise repudiate its obligations under, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such agreement, by reason of:

- (a) any event that occurred on or prior to the Plan Implementation Date that would have entitled any Person thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Applicants);
- (b) the fact that the Applicants have: (i) sought or obtained plenary relief under the CCAA or ancillary relief in the United States of America, including pursuant to Chapter 15 of the *United States Bankruptcy Code*, or (ii) commenced or completed the CCAA Proceedings or the U.S. Proceedings;
- (c) the implementation of the Plan, or the completion of any of the steps, transactions or things contemplated by the Plan; or
- (d) any compromises, arrangements, transactions, releases, discharges or injunctions effected pursuant to the Plan or this Order.

12. **THIS COURT ORDERS** that, from and after the Plan Implementation Date, all Persons (other than Unaffected Creditors, and with respect to Unaffected Claims only) shall be deemed to have waived any and all defaults then existing or previously committed by the Applicants, or caused by the Applicants, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "Agreement"), existing between such Person and the Applicants or any other Person and any and all notices of default and demands for payment under any Agreement shall be deemed to be of no further force or effect; provided that nothing in this paragraph shall excuse or be deemed to excuse the Applicants from performing any of their obligations subsequent to the date of the CCAA Proceedings, including, without limitation, obligations under the Plan.

13. **THIS COURT ORDERS** that, as of the Plan Implementation Date, each Creditor shall be deemed to have consented and agreed to all of the provisions of the Plan in their entirety and, in particular, each Creditor shall be deemed:

- (a) to have executed and delivered to the Monitor and to the Applicants all consents, releases or agreements required to implement and carry out the Plan in its entirety; and
- (b) to have agreed that if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Creditor and the Applicants as of the Plan Implementation Date (other than those entered into by the Applicants on or after the Filing Date) and the provisions of the Plan, the provisions of the Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

14. **THIS COURT ORDERS AND DECLARES** that any distributions under the Plan and this Order shall not constitute a "distribution" for the purposes of section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada) and section 107 of the *Corporations Tax Act* (Ontario) and the Monitor in making any such payments is not "distributing", nor shall be considered to have "distributed", such funds, and the Monitor shall not incur any liability under the above-mentioned statutes for making any payments ordered and is hereby

forever released, remised and discharged from any claims against it under section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada) and section 107 of the *Corporations Tax Act* (Ontario) or otherwise at law, arising as a result of distributions under the Plan and this Order and any claims of this nature are hereby forever barred.

Approval of Settlement and Funding Agreements

15. **THIS COURT ORDERS** that each of the Settlement Agreements be and is hereby approved.
16. **THIS COURT ORDERS** that each of the Confidential Insurance Settlement Agreement and the Mutual Release be and is hereby approved.
17. **THIS COURT ORDERS** that copies of the Settlement Agreements, the Confidential Insurance Settlement Agreement and the Mutual Release shall be sealed and shall not form part of the public record, subject to further Order of this Honourable Court; provided that any party to any of the foregoing shall have received, and is entitled to receive, a copy thereof.
18. **THIS COURT ORDERS AND DIRECTS** the Monitor to do such things and take such steps as are contemplated to be done and taken by the Monitor under the Plan and the Settlement Agreements. Without limitation: (i) the Monitor shall hold and distribute the Contributed Funds in accordance with the terms of the Plan, the Settlement Agreements and the escrow agreements referenced in Section 5.1 of the Plan; and (ii) on the Plan Implementation Date, the Monitor shall complete the distributions to or on behalf of Creditors (including, without limitation, to Creditors' legal representatives, to be held by such legal representatives in trust for such Creditors) as contemplated by, and in accordance with, the terms of the Plan, the Settlement Agreements and the escrow agreements referenced in Section 5.1 of the Plan.

Releases, Discharges and Injunctions

19. **THIS COURT ORDERS AND DECLARES** that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Subject Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan (and without which it would not be possible to complete the global resolution of the Product Liability Claims upon which the Plan and the Settlement Agreements are premised), and that, effective on the Plan Implementation Date, all such releases, discharges and injunctions are hereby sanctioned, approved and given full force and effect, subject to: (a) the rights of Creditors to receive distributions in respect of their Claims and Product Liability Claims in accordance with the Plan and the Settlement Agreements, as applicable; and (b) the rights and obligations of Creditors and/or the Subject Parties under the Plan, the Settlement Agreements, the Funding Agreements and the Mutual Release. For greater certainty, nothing herein or in the Plan shall release or affect any rights or obligations under the Plan, the Settlement Agreements, the Funding Agreements and the Mutual Release.
20. **THIS COURT ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan or in the Call For Claims Order, the Subject Parties and their respective representatives, predecessors, heirs, spouses, dependents, administrators, executors, subsidiaries, affiliates, related companies, franchisees, member companies, vendors, partners, distributors, brokers, retailers, officers, directors, shareholders, employees, attorneys, sureties, insurers, successors, indemnitees, servants, agents and assigns (collectively, the "Released Parties"), as applicable, be and are hereby fully, finally, irrevocably and unconditionally released and forever discharged from any and all Claims and Product Liability Claims, and any

and all past, present and future claims, rights, interests, actions, liabilities, demands, duties, injuries, damages, expenses, fees (including medical and attorneys' fees and liens), costs, compensation, or causes of action of whatsoever kind or nature whether foreseen or unforeseen, known or unknown, asserted or unasserted, contingent or actual, liquidated or unliquidated, whether in tort or contract, whether statutory, at common law or in equity, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly: (A) any proof of claim filed by any Person in accordance with the Call For Claims Order (whether or not withdrawn); (B) any actual or alleged past, present or future act, omission, defect, incident, event or circumstance from the beginning of the world to the Plan Implementation Date, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, any alleged personal, economic or other injury allegedly based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, the research, development, manufacture, marketing, sale, distribution, fabrication, advertising, supply, production, use, or ingestion of products sold, developed or distributed by or on behalf of the Applicants; or (C) the CCAA Proceedings; and no Person shall make or continue any claims or proceedings whatsoever based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, the substance of the facts giving rise to any matter herein released (including, without limitation, any action, cross-claim, counter-claim, third party action or application) against any Person who claims or might reasonably be expected to claim in any manner or forum against one or more of the Released Parties, including, without limitation, by way of contribution or indemnity, in common law, or in equity, or under the provisions of any statute or regulation, and that in the event that any of the Released Parties are added to such claim or proceeding, it will immediately discontinue any such claim or proceeding.

21. **THIS COURT ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan or in the Call For Claims Order, all Persons (regardless of whether or not such Persons are Creditors), on their own behalf and on behalf of their respective present or former employees, agents, officers, directors, principals, spouses, dependents, heirs, attorneys, successors, assigns and legal representatives, are permanently and forever barred, estopped, stayed and enjoined, on and after the Plan Implementation Date, with respect to Claims, Product Liability Claims, Related Claims and all claims otherwise released pursuant to the Plan and this Sanction Order, from:

- (a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties or any of them;
- (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or any of them or the property of any of the Released Parties;
- (c) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties;
- (d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind; and

(e) taking any actions to interfere with the implementation or consummation of the Plan.

Discharge of Monitor

22. **THIS COURT ORDERS** that RSM Richter Inc. shall be discharged from its duties as Monitor of the Applicants effective as of the Plan Implementation Date; provided that the foregoing shall not apply in respect of: (i) any obligations of, or matters to be completed by, the Monitor pursuant to the Plan or the Settlement Agreements from and after the Plan Implementation Date; or (ii) matters otherwise requested by the Applicants and agreed to by the Monitor.

23. **THIS COURT ORDERS** that, subject to paragraph 22 herein, the completion of the Monitor's duties shall be evidenced, and its final discharge shall be effected by the filing by the Monitor with this Court of a certificate of discharge at, or as soon as practicable after, the Plan Implementation Date.

24. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Monitor in the CCAA Proceedings and as foreign representative in the U.S. Proceedings, as disclosed in its reports to the Court from time to time, including, without limitation, the Monitor's Fifteenth Report dated December 12, 2006, the Monitor's Sixteenth Report dated December 22, 2006, and the Seventeenth Report, are hereby approved and that the Monitor has satisfied all of its obligations up to and including the date of this Order, and that in addition to the protections in favour of the Monitor as set out in the Orders of this Court in the CCAA Proceedings to date, the Monitor shall not be liable for any act or omission on the part of the Monitor, including with respect to any reliance thereof, including without limitation, with respect to any information disclosed, any act or omission pertaining to the discharge of duties under the Plan or as requested by the Applicants or with respect to any other duties or obligations in respect of the implementation of the Plan, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Monitor. Subject to the foregoing, and in addition to the protections in favour of the Monitor as set out in the Orders of this Court, any claims against the Monitor in connection with the performance of its duties as Monitor are hereby released, stayed, extinguished and forever barred and the Monitor shall have no liability in respect thereof.

25. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court and on prior written notice to the Monitor and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any proposed action or proceeding.

26. **THIS COURT ORDERS** that the Monitor, its affiliates, and their respective officers, directors, employees and agents, and counsel for the Monitor, are hereby released and discharged from any and all claims that any of the Subject Parties or their respective officers, directors, employees and agents or any other Persons may have or be entitled to assert against the Monitor, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of issue of this Order in any way relating to, arising out of or in respect of the CCAA proceedings.

Claims Officer

27. **THIS COURT ORDERS** that the appointment of The Honourable Mr. Justice Edward Saunders as Claims Officer (as defined in the Claims Resolution Order) shall automatically cease, and his roles and duties in the CCAA Proceedings and in the U.S. Proceedings shall terminate, on the Plan Implementation Date.

28. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Claims Officer pursuant to the Claims Resolution Order, and as disclosed in the Monitor's Reports to this Court, are hereby approved and that the Claims Officer has satisfied all of his obligations up to and including the date of this Order, and that any claims against the Claims Officer in connection with the performance of his duties as Claims Officer are hereby stayed, extinguished and forever barred.

Mediator

29. **THIS COURT ORDERS** that the appointment of Mr. David Geronemus (the "Mediator") as a mediator in respect of non-binding mediation of the Product Liability Claims pursuant to the Order of this Court dated April 13, 2006 (the "Mediation Order"), in the within proceedings, shall automatically cease, and his roles and duties in the CCAA Proceedings and in the U.S. Proceedings shall terminate, on the Plan Implementation Date.

30. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Mediator pursuant to the Mediation Order, and as disclosed in the Monitor's reports to this Court, are hereby approved, and that the Mediator has satisfied all of his obligations up to and including the date of this Order, and that any claims against the Mediator in connection with the performance of his duties as Mediator are hereby stayed, extinguished and forever barred.

Escrow Agent

31. **THIS COURT ORDERS** that Duane Morris LLP shall not be liable for any act or omission on its part as a result of its appointment or the fulfillment of its duties as escrow agent pursuant to the escrow agreements executed by Duane Morris LLP and the respective Settling Plaintiffs that are parties to the Settlement Agreements, excluding the Group Settlement Agreement (and which escrow agreements are attached as schedules to such Settlement Agreements), and that no action, application or other proceedings shall be taken, made or continued against Duane Morris LLP without the leave of this Court first being obtained; save and except that the foregoing shall not apply to any claim or liability arising out of any gross negligence or wilful misconduct on its part.

Representative Counsel

32. **THIS COURT ORDERS** that Representative Counsel (as defined in the Order of this Court dated February 8, 2006 (the "Appointment Order")) shall not be liable, either prior to or subsequent to the Plan Implementation Date, for any act or omission on its part as a result of its appointment or the fulfillment of its duties in carrying out the provisions of the Appointment Order, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on its part, and that no action, application or other proceedings shall be taken, made or continued against Representative Counsel without the leave of this Court first being obtained.

Charges

33. **THIS COURT ORDERS** that, subject to paragraph 33 hereof, the Charges on the assets of the Applicants provided for in the Initial CCAA Order and any subsequent Orders in the CCAA Proceedings shall automatically be fully and finally terminated, discharged and released on the Plan Implementation Date.

34. **THIS COURT ORDERS that:** (i) the Monitor shall continue to hold a charge, as provided in the Administrative Charge (as defined in the Initial CCAA Order), until the fees and disbursements of the Monitor and its counsel have been paid in full; and (ii) the DIP Charge (as defined in the Initial CCAA Order) shall remain in

full force and effect until all obligations and liabilities secured thereby have been repaid in full, or unless otherwise agreed by the Applicants and the DIP Lender (as defined in the Initial CCAA Order).

35. **THIS COURT ORDERS AND DECLARES** that, notwithstanding any of the terms of the Plan or this Order, the Applicants shall not be released or discharged from their obligations in respect of Unaffected Claims, including, without limitation, to pay the fees and expenses of the Monitor and its respective counsel.

Stay of Proceedings

36. **THIS COURT ORDERS** that, subject to further order of this Court, the Stay Period established in the Initial CCAA Order, as extended, shall be and is hereby further extended until the earlier of the Plan Implementation Date and the date that is 60 Business Days after the date of this Order, or such later date as may be fixed by this Court.

37. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to apply to the U.S. District Court for a comparable extension of the Stay Period as set out in paragraph 36 hereof.

Initial CCAA Order and Other Orders

38. **THIS COURT ORDERS** that:

(a) except to the extent that the Initial CCAA Order has been varied by or is inconsistent with this Order or any further Order of this Court, the provisions of the Initial CCAA Order shall remain in full force and effect until the Plan Implementation Date; provided that the protections granted in favour of the Monitor shall continue in full force and effect after the Plan Implementation Date; and

(b) all other Orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or are inconsistent with, this Order or any further Order of this Court in the CCAA Proceedings; provided that the protections granted in favour of the Monitor shall continue in full force and effect after the Plan Implementation Date.

39. **THIS COURT ORDERS AND DECLARES** that, without limiting paragraph 0 above, the Call For Claims Order, including, without limitation, the Claims Bar Date, releases, injunctions and prohibitions provided for thereunder, be and is hereby confirmed, and shall operate in addition to the provisions of this Order and the Plan, including, without limitation, the releases, injunctions and prohibitions provided for hereunder and thereunder, respectively.

Approval of the Seventeenth Report

40. **THIS COURT ORDERS** that the Seventeenth Report of the Monitor and the activities of the Monitor referred to therein be and are hereby approved.

Fees

41. **THIS COURT ORDERS** that the fees, disbursements and expenses of the Monitor from November 1, 2006 to January 31, 2007, in the amount of \$123,819.56, plus a reserve for fees in the amount of \$100,000 to complete the administration of the Monitor's mandate, be and are hereby approved and fixed.

42. **THIS COURT ORDERS** that the fees, disbursements and expenses of Monitor's legal counsel in Canada, Davies Ward Phillips & Vineberg LLP, from October 1, 2006 to January 31, 2007, in the amount of \$134,109.56, plus a reserve for fees in the amount of \$75,000 to complete the administration of its mandate, be and are hereby approved and fixed.

43. **THIS COURT ORDERS** that the fees, disbursements and expenses of Monitor's legal counsel in the United States, Allen & Overy LLP, from September 1, 2006 to January 31, 2007, in the amount of USD\$98,219.87, plus a reserve for fees in the amount of USD\$50,000 to complete the administration of its mandate, be and are hereby approved and fixed.

General

44. **THIS COURT ORDERS** that the Applicants, the Monitor or any other interested parties may apply to this Court for any directions or determination required to resolve any matter or dispute relating to, or the subject matter of or rights and benefits under, the Plan or this Order.

Effect, Recognition, Assistance

45. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to apply to the U.S. District Court for the Sanction Recognition Order.

46. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada, outside Canada and against all Persons against whom it may otherwise be enforceable.

47. **THIS COURT REQUESTS** the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the CCAA and the Initial CCAA Order, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other subdivisions of the United States of America including, without limitation, the U.S. District Court, and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order and any other Order in this proceeding. Each of Applicants and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other court and judicial, regulatory and administrative bodies, and take such other steps, in Canada or the United States of America, as may be necessary or advisable to give effect to this Order.

Motion granted.

END OF DOCUMENT

TAB 17

2006 CarswellOnt 6230, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16

2006 CarswellOnt 6230, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16

Muscletech Research & Development Inc., Re
Muscletech Research and Development Inc. et al

Ontario Superior Court of Justice

Ground J.

Heard: September 29, 2006

Judgment: October 13, 2006

Docket: 06-CL-6241

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Counsel: Fred Myers, David Bish for Applicants, Muscletech Research and Development Inc. et al

Natasha MacParland, Jay Swartz for Monitor, RSM Richter Inc.

Justin Fogarty, Fraser Hughes, Chris Robertson for Ishman, McLaughlin, Jaramillo Claimants

Jeff Carhart for Ad Hoc Tort Claimants Committee

Sara J. Erskine for Ward et al

Alan Mark, Suzanne Wood for Iovate Companies, Paul Gardiner

A. Kauffman for GNC Oldco Inc.

Tony Kurian for HVL Incorporated

Steven Golick for Zurich Insurance Company

Subject: Insolvency; Corporate and Commercial

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

Applicant companies sought relief under Act as means of achieving global resolution of numerous actions brought against them and third parties in United States — Liability of third parties was linked to that of applicants — Certain of third parties agreed to provide funding of settlement of actions — Most of plaintiffs settled claims but claimants in three actions did not — Claimants brought motions for various interim orders — Motions dismissed — Claimants were not entitled to make collateral attack on claims resolution order — Court had

jurisdiction to make order affecting claims against third parties — Practicality of plan of compromise depended on resolution of all claims — Claimants filed proof of claims including their claims against third parties — Claims were not deemed to be accepted pursuant to claims resolution order — Request for better notices of objection could be dealt with by claims officer — There was no reason to appoint investigator given thorough and impartial report already prepared by monitor.

Cases considered by *Ground J.*:

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

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

Generally — referred to

MOTIONS by objecting claimants in proceedings under Companies' Creditors Arrangement Act for various interim orders.

***Ground J.*:**

1 This is a somewhat unique proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. (1985) Ch. c.36 as amended ("CCAA"). The Applicants have also commenced ancillary proceedings under Chapter 15 of the U.S. Bankruptcy Code and are now before the United States District Court for the Southern District of New York ("U.S. Court"). All of the assets of the Applicants have been disposed of and no proceeds of such disposition remain in the estate. The Applicants no longer carry on business and have no employees. The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants against the Applicants and others (the "Third Parties") in the United States. In addition to the Applicants, the Third Parties, which include affiliated and non-affiliated parties, were named as defendants or otherwise involved in some 33 Product Liability Actions. The liability of the Third Parties in the Product Liability Actions is linked to the liability of the Applicants, as the Product Liability Actions relate to products formerly sold by the Applicants.

2 Certain of the Third Parties have agreed to provide funding for settlement of the Product Liability Actions and an ad hoc committee of tort claimants (the "Committee") has been formed to represent the Plaintiffs in such Products Liability Actions (the "Claimants"). Through its participation in a court-ordered mediation (the "Mediation Process") that included the Applicants and the Third Parties, the Committee played a fundamental role in the settlement of 30 of the 33 Product Liability Actions being the Product Liability Claims of all of those Product Liability Claimants represented in the Mediation Process by the Committee.

3 The Moving Parties in the motions now before this court, being the Claimants in the three Product Liability Actions which have not been settled (the "Objecting Claimants"), elected not to be represented by the Committee in the Mediation Process and mediated their cases individually. Such mediations were not successful and

the Product Liability Actions of the Moving Parties remain unresolved.

4 Pursuant to a Call for a Claims Order issued by this court on March 3, 2006, and approved by the U.S. court on March 22, 2006, each of the Objecting Claimants filed Proofs of Claim providing details of their claims against the Applicants and Third Parties. The Call for Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, the Applicants engaged in a process of extensive discussions and negotiations. With the input of various key players, including the Committee, the Applicants established a claims resolution process (the "Claims Resolution Process"). The Committee negotiated numerous protections in the Claims Resolution Process for the benefit of its members and consented to the Claims Resolution Order issued by this court on August 1, 2006, and approved by the U.S. court on August 11, 2006.

5 The Claims Resolution Order appoints the Honourable Edward Saunders as Claims Officer. The Claims Resolution Order also sets out the Claims Resolution Process including the delivery of a Notice of Objection to Claimants for any claims not accepted by the Monitor, the provision for a Notice of Dispute to be delivered by the Claimants who do not accept the objection of the Monitor, the holding of a hearing by the Claims Officer to resolve Disputed Claims and an appeal therefrom to this court. The definition of "Product Liability Claims" in the Claims Resolution Order provides in part:

"Product Liability Claim" means any right or claim, including any action, proceeding or class action in respect of any such right or claim, other than a Claim, Related Claim or an Excluded Claim, of any Person which alleges, arises out of or is in any way related to wrongful death or personal injury (whether physical, economic, emotional or otherwise), whether or not asserted and however acquired, against any of the Subject Parties arising from, based on or in connection with the development, advertising and marketing, and sale of health supplements, weight-loss and sports nutrition or other products by the Applicants of any of them.

.....

Nature of the Motions

6 The motions now before this court emanate from Notices of Motion originally returnable August 22, 2006 seeking:

1. An Order providing for joint hearings before Canadian and U.S. Courts and the establishment of a cross-border insolvency protocol in this CCAA proceeding, to determine the application or conflict of Canadian and U.S. law in respect of the relief requested herein.
2. An Order amending the June 8, 2006 Claims Resolution Claim to remove any portions that purport to determine the liabilities of third party non-debtors who have not properly applied for CCAA relief.

.....

3. An Order requiring the Monitor and the Applicants herein,

(a) to provide an investigator, funded by the Claimants (the "Investigator"), with access to all books and records relied upon by the Monitor in preparing its Sixth Report, including all documents listed at Appendix "2" to that report;

(b) to provide the Investigator with copies of or access to documents relevant to the investigation of the impugned transactions as the Investigator may request, and

(c) providing that the Investigator shall report back to this Honourable Court as to its findings, and a Notice of Motion returnable September 29, 2006 seeking.

4. An Order finding that the Notices of Objection sent by the Monitor/Applicants do not properly object to the Claimants' claims against non-debtor third parties;

5. An Order that the Claimants' Product Liability Claims against non-debtor third parties are deemed to be accepted by the Applicants pursuant to paragraph 14 of the Claims Resolution Order;

6. In the alternative, an Order that the Monitor, on behalf of the Applicants, provide further and better Notices of Objection properly objecting to claims against non-debtor third parties so that the Claimants may know the case they are to meet and may respond appropriately.

Analysis

7 With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

8 Moreover, 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. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.

9 It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 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.

10 I do not regard the motions before this court with respect to claims against Third Parties as being made pursuant to paragraph 37 of the Claims Resolution Order which provides that a party may move before this court "to seek advice and directions or such other relief in respect of this Order and the Claims Resolution Process." The relief sought by the Objecting Creditors with respect to claims against Third Parties is an attack upon the substance of the Claims Resolution Order and of the whole structure of this CCAA proceeding which is to resolve claims against the Applicants and against Third Parties as part of a global settlement of the litigation in the United States arising out of the distribution and sale of the offending products by the Applicants. What the Objecting Claimants are, in essence, attempting to do is to vary or set aside the Claims Resolution Order. The courts have been loathe to vary or set aside an order unless it is established that there was:

- (a) fraud in obtaining the order in question;
- (b) a fundamental change in circumstances since the granting of the order making the order no longer appropriate;
- (c) an overriding lack of fairness; or
- (d) the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing and the time when a review is sought that was not known at the time of the original hearing and that could have led to a different result.

None of such circumstances can be established in the case at bar.

11 In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.

12 The Objecting Claimants also seek an order of this court that their claims against Third Parties are deemed to be accepted pursuant to paragraph 14 of the Claims Resolution Order. Section 14 of the Claims Resolution Order provides in part as follows:

This Court Orders that, subject to further order of this Court, in respect of any Claim or Product Liability Claim set out in a Proof of Claim for which a Notice of Objection has not been sent by the Monitor in accordance with paragraph 12(b) above on or before 5:00 p.m. (Eastern Standard Time) on August 11, 2006, such Claim or Product Liability Claim is and shall be deemed to be accepted by the Applicants.

13 The submission of the Objecting Claimants appears to be based on the fact that, at least in one case, the Notice of Objection appears to be an objection solely on behalf of the Applicants in that Exhibit 1 to the Notice states "the Applicants hereby object to each and all of the Ishman Plaintiffs' allegations and claims." The Objecting Claimants also point out that none of the Notices of Objection provide particulars of the objections to the Objecting Claimants' direct claims against third parties. I have some difficulty with this submission. The structure of the Claims Resolution Order is that a claimant files a single Proof of Claim setting out its Claims or Product Liability Claims and that if the Applicants dispute the validity or quantum of any Claim or Product Liability Claim, they shall instruct the Monitor to send a single Notice of Objection to the Claimant. Paragraph 12

of the Claims Resolution Order states that the Applicants, with the assistance of the Monitor, may "dispute the validity and/or quantum or in whole or in part of a Claims or a Product Liability Claim as set out in a Proof of Claim." The Notices of Objection filed with the court do, in my view, make reference to certain Product Liability Claims against Third Parties and, in some cases, in detail. More importantly, the Notices of Objection clearly state that the Applicants, with the assistance of the Monitor, have reviewed the Proof of Claim and have valued the amount claimed at zero dollars for voting purposes and zero dollars for distribution purposes. I fail to understand how anyone could read the Notices of Objection as not applying to Product Liability Claims against Third Parties as set out in the Proof of Claim. The Objecting Claimants must have read the Notices of Objection that way initially as their Dispute Notices all appear to refer to all claims contained in their Proofs of Claim. Accordingly, I find no basis on which to conclude that the Product Liability Claims against the Third Parties are deemed to have been accepted.

14 The Objecting Claimants seek, in the alternative, an order that the Monitor provide further and better Notices of Objection with respect to the claims against the Third Parties so that the Objecting Claimants may know the case they have to meet and may respond appropriately. I have some difficulty with this position. In the context of the Claims Resolution Process, I view the Objecting Claimants as analogous to plaintiffs and it is the Applicants who need to know the case they have to meet. The Proofs of Claim set out in detail the nature of the claims of the Objecting Claimants against the Applicants and Third Parties and, to the extent that the Notices of Objection do not fully set out in detail the basis of the objection with respect to each particular claim, it appears to me that this is a procedural matter, which should be dealt with by the Claims Officer and then, if the Objecting Claimants remain dissatisfied, be appealed to this court. Section 25 of the Claims Resolution Order provides:

This Court Orders that, subject to paragraph 29 hereof, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him by the parties, as well as any other procedural or evidentiary matters that may arise in respect of the hearing of a Disputed Claim, including, without limitation, the production of documentation by any of the parties involved in the hearing of a Disputed Claim.

15 In fact, with respect to the medical causation issue which is the first issue to be determined by the Claims Officer, the Claims Officer has already held a scheduling hearing and has directed that by no later than August 16, 2006, all parties will file and serve all experts reports and will-say statements for all non-expert witnesses as well as comprehensive memoranda of fact of law in respect of the medical causation issues. To the extent that the Objecting Claimants appear to have some concerns as to natural justice, due process and fairness, in spite of the earlier decision of Judge Rakoff with respect to the Claims Resolution Order and the consequent amendments made to such Order, in my view, any such concerns are adequately addressed by the rulings made by the Claims Officer with respect to the hearing of the medical causation issue. I would expect that the Claims Officer would make similar rulings with respect to the other issues to be determined by him.

16 In addition, as I understand it, all three actions commenced by the Objecting Claimants in the United States were ready for trial at the time that the CCAA proceedings commenced and I would have thought, as a result, that the Objecting Claimants are well aware of the defences being raised by the Applicants and the Third Parties to their claims and as to the positions they are taking with respect to all of the claims.

17 Accordingly, it appears to me to be premature and unproductive to order further and better Notices of Objection at this time.

18 The motion seeking an order requiring the Monitor and the Applicants to provide an Investigator selected

by the Objecting Claimants relates to transactions referred to by the Monitor in preparing its Sixth Report which dealt with certain transactions entered into by the Applicants with related parties prior to the institution of these CCAA proceedings. The Objecting Creditors also seek to have the Investigator provided with copies of, or access to, all documents relevant to an investigation of the impugned transactions as the Investigator may request. It appears from the evidence before this court that the Applicants prepared for the Monitor a two-volume report (the "Corporate Transactions Report") setting out in extensive detail the negotiation, documentation and implementation of the impugned transactions. Subsequently by order of this court dated February 6, 2006, the Monitor was directed to review the Corporate Transactions Report and prepare its own report to provide sufficient information to allow creditors to make an informed decision on any plan advanced by the Applicants. This review was incorporated in the Monitor's Sixth Report filed with this court and the U.S. court on March 31, 2006. In preparing its Sixth Report, the Monitor had the full cooperation of, and full access to the documents of, the Iovate Companies and Mr. Gardiner, the principal of the Iovate Companies. No stakeholder has made any formal allegation that the review conducted by the Monitor was flawed or incomplete in any way. The Monitor has also, pursuant to further requests, provided documentation and additional information to stakeholders on several occasions, subject in certain instances to the execution of confidentiality agreements particularly with respect to commercially sensitive information of the Applicants and the Iovate Companies which are Third Parties in this proceeding. There is no evidence before this court that the Monitor has, at any time, refused to provide information or to provide access to documents other than in response to a further request from the Objecting Claimants made shortly before the return date of these motions, which request is still under consideration by the Monitor. The Sixth Report is, in the opinion of the Respondents, including the Committee, a comprehensive, thorough, detailed and impartial report on the impugned transactions and I fail to see any utility in appointing another person to duplicate the work of the Monitor in reviewing the impugned transactions where there has been no allegation of any deficiency, incompleteness or error in the Sixth Report of the Monitor.

19 I also fail to see how a further report of an Investigator duplicating the Monitor's work would be of any assistance to the Objecting Claimants in making a decision as to whether to support any Plan that may be presented to this court. The alternative to acceptance of a Plan is, of course, the bankruptcy of the Applicants and I would have thought that, equipped with the Corporate Transactions Report and the Sixth Report of the Monitor, the Objecting Claimants would have more than enough information to consider whether they wish to attempt to defeat any Plan and take their chances on the availability of relief in bankruptcy.

20 In any event, it is my understanding that, at the request of the Committee, any oppression claims or claims as to reviewable transactions have been excluded from the Claims Resolution Process.

21 The final relief sought in the motions before this court is for an Order providing for joint hearings before this court and the U.S. court and the establishment of a cross-border protocol in this proceeding to determine the application of Canadian and U.S. law or evidentiary rulings in respect of the determination of the liability of Third Parties. During the currency of the hearing of these motions, I believe it was conceded by the Objecting Claimants that the question of the applicability of U.S. law or evidentiary rulings would be addressed by the Claims Officer. The Objecting Claimants did not, on the hearing of these motions, press the need for the establishment of a protocol at this time. An informal protocol has been established with the consent of all parties whereby Justice Farley and Judge Rakoff have communicated with each other with respect to all aspects of this proceeding and I intend to follow the same practice. Any party may, of course, at any time bring a motion before this court and the U.S. court for an order for a joint hearing on any matter to be considered by both courts.

22 The motions are dismissed. Any party wishing to make submissions as to the costs of this proceeding

2006 CarswellOnt 6230, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16

may do so by brief written submissions to me prior to October 31, 2006.

Motions dismissed.

END OF DOCUMENT

TAB 18

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

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

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)

Ontario Court of Appeal

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008

Judgment: August 18, 2008[FN*]

Docket: CA C48969

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2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

served.

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee

Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.

Peter F.C. Howard, Samaneh Hosseini for Bank of America N.A., Citibank N.A., Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank AG, HSBC Bank Canada, HSBC Bank USA, National Association, Merrill Lynch International, 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.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

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

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.

Cases considered by *R.A. Blair J.A.*:

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

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

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

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

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

Cineplex Odeon Corp., Re (2001), 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) — followed

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

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.*) 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

Fotinis Restaurant Corp. v. White Spot Ltd. (1998), 1998 CarswellBC 543, 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) — referred to

Guardian Assurance Co., Re (1917), [1917] 1 Ch. 431 (Eng. C.A.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

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

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

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

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

C.A.) — considered

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

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

Quebec (Attorney General) v. Bélanger (Trustee of) (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue*) 8 C.B.R. 579 (Canada P.C.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1933), [1934] 1 D.L.R. 43, 1933 CarswellNat 47, [1933] S.C.R. 616 (S.C.C.) — referred to

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — considered

Royal Penfield Inc., Re (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (Que. S.C.) — referred to

Skydome Corp., Re (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

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

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

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

Stelco Inc., Re (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — re-

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ferred to

T&N Ltd., Re (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

s. 182 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 192 — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Companies Act, 1985, c. 6

s. 425 — referred to

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

Generally — referred to

s. 4 — considered

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

s. 6 — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

R.A. Blair J.A.:

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the \$32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over \$1 billion — represent only a small fraction of the more than \$32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over \$116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately \$32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay

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off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the \$32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than \$1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the \$1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABCP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized

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the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

- a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
- b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
- c) The Canadian banks provide below-cost financing for the margin funding facility and,
- d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious

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consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

- 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
- 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[FN1] 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

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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,"^[FN2] 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 ap-

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plication 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,

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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".[FN3] 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.]

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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

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(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.[FN4]

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.[FN5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an

unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[FN6] *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

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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*,^[FN7] 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-

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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

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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. v. 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

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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:[FN8]

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.

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99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (Que. S.C.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy

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and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

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

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
- c) The Plan cannot succeed without the releases;
- d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
- f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action

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against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than \$32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in advert- ing to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Note- holders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between bene- fit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the cir- cumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dis- miss the appeal.

J.I. Laskin J.A.:

I agree.

E.A. Cronk J.A.:

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I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

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Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

- 1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee
- 2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
- 3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
- 4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
- 5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)
- 6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
- 7) Mario J. Forte for Caisse de Dépôt et Placement du Québec
- 8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

- 9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
- 10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
- 11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
- 12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
- 13) Usman Sheikh for Coventree Capital Inc.
- 14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
- 15) Neil C. Saxe for Dominion Bond Rating Service
- 16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
- 17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
- 18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

FN* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

FN1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

FN2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

FN3 Citing Gibbs J.A. in *Chef Ready Foods, supra*, at pp.319-320.

FN4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

House of Commons Debates (Hansard), supra.

FN5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

FN6 A majority in number representing two-thirds in value of the creditors (s. 6)

FN7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (Que. C.A.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (Que. C.A.)

FN8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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TAB 19

2010 CarswellOnt 5510, 2010 ONSC 4209, 70 C.B.R. (5th) 1

2010 CarswellOnt 5510, 2010 ONSC 4209, 70 C.B.R. (5th) 1

Canwest Global Communications Corp., Re

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

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

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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

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.

Cases considered by *Pepall J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to

A&M Cookie Co. Canada, Re (2009), 2009 CarswellOnt 3473 (Ont. S.C.J. [Commercial List]) — referred to

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bkcty.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 3702 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

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

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

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

2010 CarswellOnt 5510, 2010 ONSC 4209, 70 C.B.R. (5th) 1

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

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (Que. S.C.) — referred to

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

Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (Que. S.C.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 173 — considered

s. 173(1)(e) — considered

s. 173(1)(h) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — referred to

s. 36 — considered

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for

related relief.

Pepall J.:

1 This is the culmination of the *Companies' Creditors Arrangement Act*[FN1] 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[FN2]

(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 (1) 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 (1) 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[FN3].

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 Papperny 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.[FN4]

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*[FN5] 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."[FN6]

23 Similarly, in *Uniforêt inc., Re*[FN7] 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.*[FN8], 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. [FN9]

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*[FN10] and *Calpine Canada Energy Ltd., Re* [FN11] 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*[FN12] and *Laidlaw, Re*[FN13]. 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*[FN14] and *MEI Computer Technology Group Inc., Re*[FN15]

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.

FN1 R.S.C. 1985, c. C-36 as amended.

FN2 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.)].

FN3 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]).

FN4 Ibid, at para. 3.

FN5 (1993), 22 C.B.R. (3d) 80 (Ont. Bkcty.).

2010 CarswellOnt 5510, 2010 ONSC 4209, 70 C.B.R. (5th) 1

FN6 *Ibid*, at para. 6.

FN7 (2003), 43 C.B.R. (4th) 254 (Que. S.C.).

FN8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).

FN9 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.

FN10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

FN11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).

FN12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).

FN13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).

FN14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/

FN15 [2005] Q.J. No. 22993 (Que. S.C.) at para. 9.

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TAB 20

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4132, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4126, 76 C.B.R. (5th) 210

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4132, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4126, 76 C.B.R. (5th) 210

Angiotech Pharmaceuticals Inc., Re

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

And In the Matter of a Plan of Compromise or Arrangement of Angiotech Pharmaceuticals, Inc. and the other
Petitioners Listed on Schedule "A" (Petitioners)

British Columbia Supreme Court [In Chambers]

Paul Walker J.

Heard: April 6, 2011

Oral reasons: April 6, 2011

Docket: Vancouver S110587

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Counsel: J. Dacks, M. Wasserman, D. Gruber, R. Morse for Angiotech Pharmaceutics, Inc.

S. Jones for Angiotech Pharmaceutics

J. Grieve, K. Jackson for Alvarez & Marsal Canada Inc.

R. Chadwick, L. Willis for Consenting Noteholders

M. Buttery for U.S. Bank National Association

Subject: Corporate and Commercial; Insolvency

Business associations --- Specific matters of corporate organization — Shareholders — Meetings — General principles.

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

Debtor company sought protection of Companies' Creditors Arrangement Act — Petitioners proposed amended plan to effect settlement of claims; implement recapitalization of subordinated notes; and enable petitioners to sustain sufficient current and future liquidity — Plan was unanimously approved by creditors and monitor — Petitioners brought application for order to sanction amended plan — Application granted — Plan should be sanctioned because it met statutory criteria set out in s. 61 of Act; it was fair and reasonable; and it was in best

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4132, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4126, 76 C.B.R. (5th) 210

interests of creditors and public — Plan would enable petitioners to keep operating as going concerns; promote continued employment of many of petitioners' employees; allow creditors and others with economic interest in petitioners to derive far greater benefit than would result from bankruptcy or liquidation; and permit important medical products sold and distributed by petitioners to continue to be made available — Amendments to plan contemplating distribution of new common shares in aggregate amount of 3.5 per cent afforded greater benefit to all creditors who chose to and were qualified to take them — Amendments to plan calling for liquidity election provided greater benefits to creditors who were not able, or chose not, to participate in share offering — Proposed release contained in plan was rationally connected to purpose of plan, was necessary for implementation of plan, and met tests set out in jurisprudence.

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

Debtor company sought protection of Companies' Creditors Arrangement Act ("CCAA") — Petitioners proposed amended plan to effect settlement of claims; implement recapitalization of subordinated notes; and enable petitioners to sustain sufficient current and future liquidity — Plan was unanimously approved by creditors and monitor — Petitioners brought application for order to sanction amended plan — Application granted on other grounds — Court has jurisdiction pursuant to CCAA and Business Corporations Act to dispense with calling of meeting of existing shareholders in order to amend articles of Canadian petitioner — Section 6(8) of CCAA prohibits plan that calls for distribution to pay equity claim where non-equity claims cannot be paid in full — Evidence disclosed that this was not possible in present case — Even if it could be said that combined effect of ss. 6(8) and 6(2) of CCAA did not remove requirement for shareholders' meeting, requirement should be dispensed with in circumstances of case — To do otherwise, so that meeting was held, would cause persons who no longer had economic interest in company to acquire functional veto.

Cases considered by Paul Walker J.:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — followed

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

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

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — followed

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

Xillix Technologies Corp., Re (June 21, 2007), Doc. Vancouver S066835 (B.C. S.C.) — referred to

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4132, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4126, 76 C.B.R. (5th) 210

Statutes considered:

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

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

Generally — referred to

s. 6(2) — considered

s. 6(8) — considered

s. 61 — considered

APPLICATION for order to sanction plan proposed by petitioners in proceeding under *Companies' Creditors Arrangement Act*.

Paul Walker J.:

1 The application before me is for an order to sanction the plan (as amended) proposed by the petitioners and approved by the monitor in the Angiotech CCAA proceeding.

2 I find that the proposed plan has several purposes, which include:

(a) effecting a compromise, settlement, and payment of all affected claims;

(b) implementing a recapitalization of subordinated notes; and

(c) enabling the petitioners to sustain sufficient current and future liquidity in order to enhance their short and long term viability.

3 The plan was unanimously approved at a plan approval meeting of the creditors ("creditors' meeting") held and conducted by the monitor in Vancouver on April 4, 2011. I am satisfied that notice of the plan, the amended plan, and the creditors' meeting was widely disseminated in accordance with my previous orders.

4 The total value of the notes held by subordinated noteholders is approximately \$266 million. It is noteworthy that the noteholders which held subordinated notes having a value of approximately \$234 million voted in favour of the plan at the creditors' meeting.

5 No objection to the plan has been taken by any employee, past or present, or the existing common shareholders whose interests will be extinguished by the plan.

6 The plan as amended contains the following key elements, which are set out in the affidavit of K. Thomas Bailey sworn on March 31, 2011 at para. 31:

(a) New Common Shares will be issued to Affected Creditors with Distribution Claims who have not

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4132, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4126, 76 C.B.R. (5th) 210

made valid Cash Elections or Liquidity Elections (as defined below) and distributions of cash will be made to Convenience Class Creditors and Affected Creditors that have made valid Liquidity Elections;

(b) the Subordinated Notes, the Subordinated Note Indenture and all Subordinated Note Obligations will be irrevocably and finally cancelled and eliminated except for the limited purposes provided in section 4.5 of the Plan;

(c) all Affected Claims will be discharged and released;

(d) the Existing Shares and options and the Shareholder Rights Agreement will be cancelled without any liability, payment or other compensation to Existing Shareholders in respect thereof;

(e) Angiotech US will repay to Wells Fargo and the DIP Lender, as applicable, any and all outstanding Secured Lender Obligations;

(f) Angiotech will make payment to the KEIP Participants of amounts owing under the KEIP at the time specified and in accordance with the terms of the KEIP;

(g) Angiotech will make grants of New Common Shares and options to acquire New Common Shares pursuant to the terms of the MIP;

(h) Angiotech's Notice of Articles will be amended to, among other things, create an unlimited number of New Common Shares in order to provide flexibility for the recapitalized Angiotech on a going forward basis;

(i) Angiotech will transfer to the Monitor the aggregate of all Cash Elected Amounts and Liquidity Election Payments (as defined below) to be held in escrow in one or more separate interest-bearing accounts for distributions to Convenience Class Creditors and Affected Creditors that have made valid Liquidity Elections, as applicable;

(j) the Board of Directors of Angiotech will be replaced by a new Board of Directors; and

(k) the Petitioners, the Monitor, Blackstone, the Subordinated Note Indenture Trustee, the Advisors, Wells Fargo, the DIP Lender, the Subordinated Noteholders and, among others, present and former shareholders, affiliates, subsidiaries, directors, officers and employees of the foregoing will be granted a release and discharge from liability in connection with, among other things, the CCAA proceeding and the Plan.

7 I am satisfied from my review of the evidence that the plan, if implemented, would:

(a) enable the petitioners to continue to operate as going concerns;

(b) facilitate and promote continued employment of a substantial number of the petitioners' employees;

(c) allow creditors and other persons with an economic interest in the petitioners to derive a far greater benefit than would result from a bankruptcy or liquidation; and

(c) permit important medical products sold and distributed by the petitioners to continue to be made

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4132, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4126, 76 C.B.R. (5th) 210

available to the public worldwide.

8 The amendments to the plan that now contemplate distribution of newly issued common shares in an aggregate amount of 3.5% afford greater benefit to all affected creditors who choose to and are qualified to take them.

9 As well, the amendments to the plan calling for a liquidity election provide greater benefits to creditors who are not able, or choose not, to participate in the share offering.

10 I am also satisfied that the Court has jurisdiction to dispense with the calling of a meeting of existing shareholders in order to amend the articles of the Canadian petitioner. I am satisfied that I have that jurisdiction pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and the *Business Corporations Act*, S.B.C. 2002, c. 57. I say that because I am of the view that s. 6(8) of the *CCAA* prohibits a plan that calls for a distribution to pay an equity claim where non-equity claims cannot be paid in full: *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at paras. 143 and 145, aff'd at 2000 ABCA 238 (Alta. C.A. [In Chambers]). The evidence discloses that this is not possible in this case.

11 Even if it could be said that the combined effect of ss. 6(8) and 6(2) of the *CCAA* do not remove the requirement for a shareholders' meeting, I am satisfied that the requirement should be dispensed with in the circumstances of this case. To do otherwise, so that a meeting is held, would cause persons who no longer have an economic interest in the company to acquire a functional veto: *Xillix Technologies Corp., Re* (June 21, 2007), Doc. Vancouver S066835 (B.C. S.C.).

12 I am also satisfied that the proposed release contained in the plan is rationally connected to the purpose of the plan, it is necessary for the implementation of the plan, and it meets the tests set out in *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.); *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.); and *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]).

13 The creditors who are protected by the the release were instrumental in facilitating the reorganization of the petitioners' affairs as a going concern. Further, their efforts led to the development of a plan that meets the objectives set out in the *CCAA*.

14 The reorganization facilitated by those creditors provides greater benefits to all of the creditors than would otherwise be realized if the petitioners had been liquidated.

15 In conclusion, I am satisfied that the plan should be sanctioned because:

- (a) it meets the statutory criteria set out in s. 61 of the *CCAA*;
- (b) it is fair and reasonable; and
- (c) it is in the best interests of the creditors and the public.

Application granted.

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TAB 21

2010 CarswellQue 10118, 2010 QCCS 4450, EYB 2010-179705, 72 C.B.R. (5th) 80

2010 CarswellQue 10118, 2010 QCCS 4450, EYB 2010-179705, 72 C.B.R. (5th) 80

AbitibiBowater inc., Re

In The Matter of the Plan of Compromise or Arrangement of

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The Other Petitioners Listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor)

Quebec Superior Court

Clément Gascon, J.S.C.

Heard: September 20-21, 2010

Judgment: September 23, 2010

Docket: C.S. Montréal 500-11-036133-094

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Counsel: Mr. Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors

Me Gilles Paquin, Me Avram Fishman, for the Monitor

Mr. Robert Thornton, for the Monitor

Me Bernard Boucher, for BI Citibank (London Branch), as Agent for Citibank, N.A.

Me Jocelyn Perreault, for Bank of Nova Scotia (as Administrative and Collateral Agent)

Me Marc Duchesne, Me François Gagnon, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Mr. Frederick L. Myers, Mr. Robert J. Chadwick, for the Ad hoc Committee of Bondholders

Mr. Michael B. Rotsztein, for Fairfax Financial Holdings Ltd.

Me Louise Hélène Guimond, for Syndicat canadien des communications, de l'énergie et du papier (SCEP) et ses sections locales 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 et 1455 and for Syndicat des employés(es) et employés(es) professionnels(-les) et de bureau - Québec (SEPB) et les sections locales 110, 151 et 526

Me Neil Peden, Mr. Raj Sahni, for The Official Committee of Unsecured Creditors of AbitibiBowater Inc. & al.

Me Sébastien Guy, for Cater Pillar Financial Services and Desjardins Trust inc.

Mr. Richard Butler, for Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of British Columbia

Me Louis Dumont, Mr. Neil Rabinovitch, for Aurelius Capital Management LLC and Contrarian Capital Management LLC

Mr. Christopher Besant, for NPower Cogen Limited

Mr. Len Marsello, for the Attorney General for Ontario

Mr. Carl Holm, for Bowater Canada Finance Company

Mr. David Ward, for Wilmington Trust US Indenture Trustee of Unsecured Notes issued by BCFC

Subject: Insolvency

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

Pulp and paper company experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — In order to complete its restructuring process, company prepared plan of arrangement — Under plan, company's secured debt obligations would be paid in full while unsecured debt obligations would be converted to equity of reorganized entity — Monitor as well as overwhelming majority of stakeholders strongly supported plan while only handful of stakeholders raised limited objections — Company brought motion seeking approval of plan by Court — Motion granted — Sole issue to be determined was whether plan was fair and reasonable — Here, level of approval by creditors was significant factor to consider — Monitor's recommendation to approve plan was another significant factor, given his professionalism, objectivity and competence — As most of objecting parties had agreed upon "carve-out" wording to be included in Court's order, only two creditors actually objected to plan and it was Court's view that their objections were either ill-founded or moot — Should Court decide to go against vast majority of stakeholders' will and reject plan, not only would those stakeholders be adversely prejudiced but company would also go bankrupt — Court should not seek perfection as plan was result of many compromises and of favourable market window — Court was of view that it was important to allow company to move forthwith towards emergence from 18-month restructuring process — Therefore, Court considered it appropriate and justified to approve plan of arrangement.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et équitable »

Compagnie papetière a connu des problèmes financiers et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Afin de compléter son processus de restructuration, la compagnie a préparé un plan d'arrangement — Dans le cadre du plan, les dettes de la compagnie faisant l'objet d'une garantie seraient payées au complet tandis que les dettes de la compagnie ne faisant pas l'objet d'une garantie seraient converties en actions de l'entité restructurée — Contrôleur de même que la vaste majorité des parties intéressées étaient fortement en faveur du plan tandis qu'une poignée seulement des personnes intéressées soulevaient des objections limitées — Compagnie a déposé une requête visant l'approbation du plan par le Tribunal — Requête accueillie — Seule question à trancher était de savoir si le plan était juste et raisonnable — En l'espèce, la pro-

portion des créanciers s'étant prononcés en faveur du plan était un élément important à considérer — Recommandation du contrôleur d'approuver le plan était un autre élément important, compte tenu de son professionnalisme, de son objectivité et de sa compétence — Comme la majeure partie des parties s'étant prononcées contre le plan avaient donné leur accord à la rédaction d'une clause de « retranchement » destinée à faire partie de l'ordonnance du Tribunal, seuls deux créanciers s'objectaient au plan dans les faits et le Tribunal était d'avis que leurs objections étaient soit sans fondement ou sans objet — S'il fallait que le Tribunal décide d'aller à l'encontre de la volonté de la vaste majorité des personnes intéressées et de rejeter le plan, non seulement ces personnes subiraient-elles des impacts négatifs mais aussi la compagnie ferait-elle faillite — Tribunal ne devrait pas chercher la perfection puisque le plan était le fruit de plusieurs compromis et le résultat d'une fenêtre d'opportunité favorable en terme de marché — Tribunal était d'avis qu'il était important que la compagnie puisse dès à présent mener à son terme un processus de restructuration long de dix-huit mois — Par conséquent, de l'avis du Tribunal, il était approprié et justifié de sanctionner le plan d'arrangement.

Cases considered by *Clément Gascon, J.S.C.*:

AbitibiBowater Inc., Re (2009), 2009 QCCS 6459, 2009 CarswellQue 14194 (Que. S.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (Que. S.C.) — referred to

Charles-Auguste Fortier inc., Re (2008), 2008 CarswellQue 11376, 2008 QCCS 5388 (Que. S.C.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 375, 2003 CarswellBC 552, 41 C.B.R. (4th) 42 (B.C. S.C. [In Chambers]) — referred to

Hy Bloom inc. c. Banque Nationale du Canada (2010), 66 C.B.R. (5th) 294, 2010 QCCS 737, 2010 CarswellQue 1714, 2010 CarswellQue 11740, [2010] R.J.Q. 912 (Que. S.C.) — referred to

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (Que. S.C.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175, 1988 CarswellBC 558 (B.C. S.C.) — referred to

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

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York*

2010 CarswellQue 10118, 2010 QCCS 4450, EYB 2010-179705, 72 C.B.R. (5th) 80

Developments Ltd., Re 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

PSINET Ltd., Re (2002), 33 C.B.R. (4th) 284, 2002 CarswellOnt 1261 (Ont. S.C.J. [Commercial List]) — referred to

Raymor Industries inc., Re (2010), 66 C.B.R. (5th) 202, 2010 CarswellQue 9092, 2010 QCCS 376, 2010 CarswellQue 892, [2010] R.J.Q. 608 (Que. S.C.) — referred to

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to

T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — referred to

TQS inc., Re (2008), 2008 CarswellQue 5282, 2008 QCCS 2448 (Que. S.C.) — referred to

Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (Que. S.C.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 191 — considered

s. 241 — referred to

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

Generally — referred to

s. 6 — considered

s. 9 — referred to

s. 10 — referred to

Corporations Tax Act, R.S.O. 1990, c. C.40

s. 107 — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

s. 270 [en. 1990, c. 45, s. 12(1)] — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 159 — referred to

Ministère du Revenu, Loi sur le, L.R.Q., c. M-31

art. 14 — referred to

Retail Sales Tax Act, R.S.O. 1990, c. R.31

s. 22 — referred to

Taxation Act, 2007, S.O. 2007, c. 11, Sched. A

s. 117 — referred to

MOTION by debtor company seeking Court's approval of plan of arrangement.

Clément Gascon, J.S.C.:

Introduction

1 This judgment deals with the sanction and approval of a plan of arrangement under the *CCAA*[FN1]. The sole issue to resolve is the fair and reasonable character of the plan. While the debtor company, the monitor and an overwhelming majority of stakeholders strongly support this sanction and approval, three dissenting voices raise limited objections. The Court provides these reasons in support of the Sanction Order it considers appropriate and justified to issue under the circumstances.

The Relevant Background

2 On April 17, 2009 [2009 CarswellQue 14194 (Que. S.C.)], the Court issued an Initial Order pursuant to the *CCAA* with respect to the Abitibi Petitioners (listed in Schedule A), the Bowater Petitioners (listed in Schedule B) and the Partnerships (listed in Schedule C).

3 On the day before, April 16, 2009, AbitibiBowater Inc., Bowater Inc. and certain of their U.S. and Canadian Subsidiaries (the "*U.S. Debtors*") had, similarly, filed Voluntary Petitions for Relief under Chapter 11 of the U.S. Bankruptcy Code.

4 Since the Initial Order, the Abitibi Petitioners, the Bowater Petitioners and the Partnerships (collectively, "*Abitibi*") have, under the protection of the Court, undertaken a huge and complex restructuring of their insolvent business.

5 The restructuring of Abitibi's imposing debt of several billion dollars was a cross-border undertaking that affected tens of thousands of stakeholders, from employees, pensioners, suppliers, unions, creditors and lenders to government authorities.

6 The process has required huge efforts on the part of many, including important sacrifices from most of the stakeholders involved. To name just a few, these restructuring efforts have included the closure of certain facilities, the sale of assets, contracts repudiations, the renegotiation of collective agreements and several costs saving initiatives[FN2].

7 In a span of less than 18 months, more than 740 entries have been docketed in the Court record that now comprises in excess of 12 boxes of documents. The Court has, so far, rendered over 100 different judgments and

orders. The Stay Period has been extended seven times. It presently expires on September 30, 2010.

8 Abitibi is now nearing emergence from this *CCAA* restructuring process.

9 In May 2010, after an extensive review of the available alternatives, and pursuant to lengthy negotiations and consultations with creditors' groups, regulators and stakeholders, Abitibi filed its Plan of Reorganization and Compromise in the *CCAA* restructuring process (the "*CCAA Plan*[FN3]"). A joint Plan of Reorganization was also filed at the same time in the U.S. Bankruptcy Court process (the "*U.S. Plan*").

10 In essence, the Plans provided for the payment in full, on the Implementation Date and consummation of the U.S. Plan, of all of Abitibi's and U.S. Debtors' secured debt obligations.

11 As for their unsecured debt obligations, save for few exceptions, the Plans contemplated their conversion to equity of the post emergence reorganized Abitibi. If the Plans are implemented, the net value would likely translate into a recovery under the *CCAA* Plan corresponding to the following approximate rates for the various Affected Unsecured Creditors Classes:

- (a) 3.4% for the ACI Affected Unsecured Creditor Class;
- (b) 17.1% for the ACCC Affected Unsecured Creditor Class;
- (c) 4.2% for the Saguenay Forest Products Affected Unsecured Creditor Class;
- (d) 36.5% for the BCFPI Affected Unsecured Creditor Class;
- (e) 20.8% for the Bowater Maritimes Affected Unsecured Creditor Class; and
- (f) 43% for the ACNSI Affected Unsecured Creditor Class.

12 With respect to the remaining Petitioners, the illustrative recoveries under the *CCAA* Plan would be nil, as these entities have nominal assets.

13 As an alternative to this debt to equity swap, the basic structure of the *CCAA* Plan included as well the possibility of smaller unsecured creditors receiving a cash distribution of 50% of the face amount of their Proven Claim if such was less than \$6,073, or if they opted to reduce their claim to that amount.

14 In short, the purpose of the *CCAA* Plan was to provide for a coordinated restructuring and compromise of Abitibi's debt obligations, while at the same time reorganizing and simplifying its corporate and capital structure.

15 On September 14, 2010, Abitibi's Creditors' Meeting to vote on the *CCAA* Plan was convened, held and conducted. The resolution approving the *CCAA* Plan was overwhelmingly approved by the Affected Unsecured Creditors of Abitibi, save for the Creditors of one the twenty Classes involved, namely, the BCFC Affected Unsecured Creditors Class.

16 Majorities well in excess of the statutorily required simple majority in number and two-third majority in value of the Affected Unsecured Claims held by the Affected Unsecured Creditors were attained. On a combined basis, the percentages were 97.07% in number and 93.47% in value.

17 Of the 5,793 votes cast by creditors holding claims totalling some 8,9 billion dollars, over 8,3 billion dollars worth of claims voted in favour of approving the *CCAA* Plan.

The Motion[FN4] at Issue

18 Today, as required by Section 6 of the *CCAA*, the Court is asked to sanction and approve the *CCAA* Plan. The effect of the Court's approval is to bind Abitibi and its Affected Unsecured Creditors to the terms of the *CCAA* Plan.

19 The exercise of the Court's authority to sanction a compromise or arrangement under the *CCAA* is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that[FN5]:

- a) There has been strict compliance with all statutory requirements;
- b) Nothing has been done or purported to be done that was not authorized by the *CCAA*; and
- c) The Plan is fair and reasonable.

20 Only the third condition is truly at stake here. Despite Abitibi's creditors' huge support of the fairness and the reasonableness of the *CCAA* Plan, some dissenting voices have raised objections.

21 They include:

- a) The BCFC Noteholders' Objection;
- b) The Contestations of the Provinces of Ontario and British Columbia; and
- c) The Contestation of NPower Cogen Limited.

22 For the reasons that follow, the Court is satisfied that the *CCAA* Plan is fair and reasonable. The Contestations of the Provinces of Ontario and British Columbia and of NPower Cogen Limited have now been satisfactorily resolved by adding to the Sanction Order sought limited "carve-out" provisions in that regard. As for the only other objection that remains, namely that of some of the BCFC Noteholders, the Court considers that it should be discarded.

23 It is thus appropriate to immediately approve the *CCAA* Plan and issue the Sanction Order sought, albeit with some minor modifications to the wording of specific conclusions that the Court deems necessary.

24 In the Court's view, it is important to allow Abitibi to move forthwith towards emergence from the *CCAA* restructuring process it undertook eighteen month ago.

25 No one seriously disputes that there is risk associated with delaying the sanction of the *CCAA* Plan. This risk includes the fact that part of the exit financing sought by Abitibi is dependent upon the capital markets being receptive to the high yield notes or term debt being offered, in a context where such markets are volatile. There is, undoubtedly, continuing uncertainty with respect to the strength of the economic recovery and the effect this could have on the financial markets.

26 Moreover, there are numerous arrangements that Abitibi and their key stakeholders have agreed to or are in the process of settling that are key to the successful implementation of the *CCAA* Plan, including collective bargaining agreements with employees and pension funding arrangements with regulators. Any undue delay with implementation of the *CCAA* Plan increases the risk that these arrangements may require alterations or amendments.

27 Finally, at hearing, Mr. Robertson, the Chief Restructuring Officer, testified that the monthly cost of any delay in Abitibi's emergence from this *CCAA* process is the neighbourhood of 30 million dollars. That includes the direct professional costs and financing costs of the restructuring itself, as well as the savings that the labour cost reductions and the exit financing negotiated by Abitibi will generate as of the Implementation Date.

28 The Court cannot ignore this reality in dealing rapidly with the objections raised to the sanction and approval of the *CCAA* Plan.

Analysis

1. The Court's approval of the CCAA Plan

29 As already indicated, the first and second general requirements set out previously dealing with the statutory requirements and the absence of unauthorized conduct are not at issue.

30 On the one hand, the Monitor has reached the conclusion that Abitibi is and has been in strict compliance with all statutory requirements. Nobody suggests that this is not the case.

31 On the other hand, all materials filed and procedures taken by Abitibi were authorized by the *CCAA* and the orders of this Court. The numerous reports of the Monitor (well over sixty to date) make no reference to any act or conduct by Abitibi that was not authorized by the *CCAA*; rather, the Monitor is of the view that Abitibi has not done or purported to do anything that was not authorized by the *CCAA*[FN6].

32 In fact, in connection with each request for an extension of the stay of proceedings, the Monitor has reported that Abitibi was acting in good faith and with due diligence. The Court has not made any contrary finding during the course of these proceedings.

33 Turning to the fairness and reasonableness of a *CCAA* Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection[FN7].

34 Considering that a plan is, first and foremost, a compromise and arrangement reached, between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body[FN8].

35 In that regard, courts in this country have held that the level of approval by the creditors is a significant factor in determining whether a *CCAA* Plan is fair and reasonable[FN9]. Here, the majorities in favour of the *CCAA* Plan, both in number and in value, are very high. This indicates a significant and very strong support of the *CCAA* Plan by the Affected Unsecured Creditors of Abitibi.

36 Likewise, in its Fifty-Seventh Report, the Monitor advised the creditors that their approval of the *CCAA* Plan would be a reasonable decision. He recommended that they approve the *CCAA* Plan then. In its Fifty-Eighth Report, the Monitor reaffirmed its view that the *CCAA* Plan was fair and reasonable. The recommendation was for the Court to sanction and approve the *CCAA* Plan.

37 In a matter such as this one, where the Monitor has worked through out the restructuring with professionalism, objectivity and competence, such a recommendation carries a lot of weight.

38 The Court considers that the *CCAA* Plan represents a truly successful compromise and restructuring, fully in line with the objectives of the *CCAA*. Despite its weaknesses and imperfections, and notwithstanding the huge sacrifices and losses it imposes upon numerous stakeholders, the *CCAA* Plan remains a practical, reasonable and responsible solution to Abitibi's insolvency.

39 Its implementation will preserve significant social and economic benefits to the Canadian economy, including enabling about 11,900 employees (as of March 31, 2010) to retain their employment, and allowing hundreds of municipalities, suppliers and contractors in several regions of Ontario and Quebec to continue deriving benefits from a stronger and more competitive important player in the forest products industry.

40 In addition, the business of Abitibi will continue to operate, pension plans will not be terminated, and the Affected Unsecured Creditors will receive distributions (including payment in full to small creditors).

41 Moreover, simply no alternative to the *CCAA* Plan has been offered to the creditors of Abitibi. To the contrary, it appears obvious that in the event the Court does not sanction the *CCAA* Plan, the considerable advantages that it creates will be most likely lost, such that Abitibi may well be placed into bankruptcy.

42 If that were to be the case, no one seriously disputes that most of the creditors would end up being in a more disadvantageous position than with the approval of the *CCAA* Plan. As outlined in the Monitor's 57th Report, the alternative scenario, a liquidation of Abitibi's business, will not prove to be as advantageous for its creditors, let alone its stakeholders as a whole.

43 All in all, the economic and business interests of those directly concerned with the end result have spoken vigorously pursuant to a well-conducted democratic process. This is certainly not a case where the Court should override the express and strong wishes of the debtor company and its creditors and the Monitor's objective analysis that supports it.

44 Bearing these comments in mind, the Court notes as well that none of the objections raised support the conclusion that the *CCAA* Plan is unfair or unreasonable.

2. The BCFC Noteholders' objections

45 In the end, only Aurelius Capital Management LP and Contrarian Capital Management LLC (the "Noteholders") oppose the sanction of the *CCAA* Plan[FN10].

46 These Noteholders, through their managed funds entities, hold about one-third of some six hundred million US dollars of Unsecured Notes issued by Bowater Canada Finance Company ("*BCFC*") and which are guaranteed by Bowater Incorporated. These notes are *BCFC*'s only material liabilities.

47 *BCFC* was a Petitioner under the *CCAA* proceedings and a Debtor in the parallel proceedings under

Chapter 11 of the U.S. Bankruptcy Code. However, its creditors voted to reject the *CCAA* Plan: while 76.8% of the Class of Affected Unsecured Creditors of BCFC approved the *CCAA* Plan in number, only 48% thereof voted in favour in dollar value. The required majorities of the *CCAA* were therefore not met.

48 As a result of this no vote occurrence, the Affected Unsecured Creditors of BCFC, including the Noteholders, are Unaffected Creditors under the *CCAA* Plan: they will not receive the distribution contemplated by the plan. As for BCFC itself, this outcome entails that it is not an "Applicant" for the purpose of this Sanction Order.

49 Still, the terms of the *CCAA* Plan specifically provide for the compromise and release of any claims BCFC may have against the other Petitioners pursuant, for instance, to any inter company transactions. Similarly, the *CCAA* Plan specifies that BCFC's equity interests in any other Petitioner can be exchanged, cancelled, redeemed or otherwise dealt with for nil consideration.

50 In their objections to the sanction of the *CCAA* Plan, the Noteholders raise, in essence, three arguments:

- (a) They maintain that BCFC did not have an opportunity to vote on the *CCAA* Plan and that no process has been established to provide for BCFC to receive distribution as a creditor of the other Petitioners;
- (b) They criticize the overly broad and inappropriate character of the release provisions of the *CCAA* Plan;
- (c) They contend that the NAFTA Settlement Funds have not been appropriately allocated.

51 With respect, the Court considers that these objections are ill founded.

52 First, given the vote by the creditors of BCFC that rejected the *CCAA* Plan and its specific terms in the event of such a situation, the initial ground of contestation is moot for all intents and purposes.

53 In addition, pursuant to a hearing held on September 16 and 17, 2010, on an Abitibi's *Motion for Advice and Directions*, Mayrand J. already concluded that BCFC had simply no claims against the other Petitioners, save with respect to the Contribution Claim referred to in that motion and that is not affected by the *CCAA* Plan in any event.

54 There is no need to now review or reconsider this issue that has been heard, argued and decided, mostly in a context where the Noteholders had ample opportunity to then present fully their arguments.

55 In her reasons for judgment filed earlier today in the Court record, Mayrand J. notably ruled that the alleged Inter Company Claims of BCFC had no merit pursuant to a detailed analysis of what took place.

56 For one, the Monitor, in its Amended 49th Report, had made a thorough review of the transactions at issue and concluded that they did not appear to give rise to any inter company debt owing to BCFC.

57 On top of that, Mayrand J. noted as well that the Independent Advisors, who were appointed in the Chapter 11 U.S. Proceedings to investigate the Inter Company Transactions that were the subject of the Inter Company Claims, had completed their report in this regard. As explained in its 58th Report, the Monitor understands that they were of the view that BCFC had no other claims to file against any other Petitioner. In her reas-

ons, Mayrand J. concluded that this was the only reasonable inference to draw from the evidence she heard.

58 As highlighted by Mayrand J. in these reasons, despite having received this report of the Independent Advisors, the Noteholders have not agreed to release its content. Conversely, they have not invoked any of its findings in support of their position either.

59 That is not all. In her reasons for judgment, Mayrand J. indicated that a detailed presentation of the Independent Advisors report was made to BCFC's Board of Directors on September 7, 2010. This notwithstanding, BCFC elected not to do anything in that regard since then.

60 As a matter of fact, at no point in time did BCFC ever file, in the context of the current *CCAA* Proceedings, any claim against any other Petitioner. None of its creditors, including the Noteholders, have either purported to do so for and/or on behalf of BCFC. This is quite telling. After all, the transactions at issue date back many years and this restructuring process has been going on for close to eighteen months.

61 To sum up, short of making allegations that no facts or analysis appear to support or claiming an insufficiency of process because the independent and objective ones followed so far did not lead to the result they wanted, the Noteholders simply have nothing of substance to put forward.

62 Contrary to what they contend, there is no need for yet again another additional process to deal with this question. To so conclude would be tantamount to allowing the Noteholders to take hostage the *CCAA* restructuring process and derail Abitibi's emergence for no valid reason.

63 The other argument of the Noteholders to the effect that BCFC would have had a claim as the holder of preferred shares of BCHI leads to similar comments. It is, again, hardly supported by anything. In any event, assuming the restructuring transactions contemplated under the *CCAA* Plan entail their cancellation for nil consideration, which is apparently not necessarily the case for the time being, there would be nothing unusual in having the equity holders of insolvent companies not receive anything in a compromise and plan of arrangement approved in a *CCAA* restructuring process.

64 In such a context, the Court disagrees with the Noteholders' assertion that BCFC did not have an opportunity to vote on the *CCAA* Plan or that no process was established to provide the latter to receive distribution as a potential creditor of the other Petitioners.

65 To argue that the *CCAA* Plan is not fair and reasonable on the basis of these alleged claims of BCFC against the other Petitioners has no support based on the relevant facts and Mayrand J.'s analysis of that specific point.

66 Second, given these findings, the issue of the breadth and appropriateness of the releases provided under the *CCAA* Plan simply does not concern the Noteholders.

67 As stated by Abitibi's Counsel at hearing, BCFC is neither an "Applicant" under the terms of the releases of the *CCAA* Plan nor pursuant to the Sanction Order. As such, BCFC does not give or get releases as a result of the Sanction Order. The *CCAA* Plan does not release BCFC nor its directors or officers acting as such.

68 As it is not included as an "Applicant", there is no need to provide any type of convoluted "carve-out" provision as the Noteholders requested. As properly suggested by Abitibi, it will rather suffice to include a mere clarification at paragraph 15 of the Sanction Order to reaffirm that in the context of the releases and the Sanction

Order, "Applicant" does not include BCFC.

69 As for the Noteholders themselves, they are Unaffected Creditors under the *CCAA* Plan as a result of the no vote of their Class.

70 In essence, the main concern of the Noteholders as to the scope of the releases contemplated by the *CCAA* Plan and the Sanction Order is a mere issue of clarity. In the Court's opinion, this is sufficiently dealt with by the addition made to the wording of paragraph 15 of the Sanction Order.

71 Besides that, as explained earlier, any complaint by the Noteholders that the alleged inter company claims of BCFC are improperly compromised by the *CCAA* Plan has no merit. If their true objective is to indirectly protect their contentions to that end by challenging the wording of the releases, it is unjustified and without basis. The Court already said so.

72 Save for these arguments raised by the Noteholders that the Court rejects, it is worth noting that none of the stakeholders of Abitibi object to the scope of the releases of the *CCAA* Plan or their appropriateness given the global compromise reached through the debt to equity swap and the reorganization contemplated by the plan.

73 The *CCAA* permits the inclusion of releases (even ones involving third parties) in a plan of compromise or arrangement when there is a reasonable connection between the claims being released and compromised and the restructuring achieved by the plan. Amongst others, the broad nature of the terms "compromise or arrangement", the binding nature of a plan that has received creditors' approval, and the principles that parties should be able to put in a plan what could lawfully be incorporated into any other contract support the authority of the Court to approve these kind of releases[FN11]. In accordance with these principles, the Quebec Superior Court has, in the past, sanctioned plans that included releases of parties making significant contribution to a restructuring[FN12].

74 The additional argument raised by the Noteholders with respect to the difference between the releases that could be approved by this Court as compared to those that the U.S. Bankruptcy Court may issue in respect of the Chapter 11 Plan is not convincing.

75 The fact that under the Chapter 11 Plan, creditors may elect not to provide releases to directors and officers of applicable entities does not render similar kind of releases granted under the *CCAA* Plan invalid or improper. That the result may be different in a jurisdiction as opposed to the other does not make the *CCAA* Plan unfair and unreasonable simply for that reason.

76 Third, the last objection of the Noteholders to the effect that the NAFTA Settlement Funds have not been properly allocated is simply a red herring. It is aimed at provoking a useless debate with respect to which the Noteholders have, in essence, no standing.

77 The Monitor testified that the NAFTA Settlement has no impact whatsoever upon BCFC. If it is at all relevant, all the assets involved in this settlement belonged to another of the Petitioners, ACCC, with respect to whom the Noteholders are not a creditor.

78 In addition, this apparent contestation of the allocation of the NAFTA Settlement Funds is a collateral attack on the Order granted by this Court on September 1, 2010, which approved the settlement of Abitibi's NAFTA claims against the Government of Canada, as well as the related payment to be made to the reorganised suc-

cessor Canadian operating entity upon emergence. No one has appealed this NAFTA Settlement Order.

79 That said, in their oral argument, the Noteholders have finally argued that the Court should lift the Stay of Proceedings Order inasmuch as BCFC was concerned. The last extension of the Stay was granted on September 1, 2010, without objection; it expires on September 30, 2010. It is clear from the wording of this Sanction Order that any extension beyond September 30, 2010 will not apply to BCFC.

80 The Court considers this request made verbally by the Noteholders as unfounded.

81 No written motion was ever served in that regard to start with. In addition, the Stay remains in effect against BCFC up until September 30, 2010, that is, for about a week or so. The explanations offered by Abitibi's Counsel to leave it as such for the time being are reasonable under the circumstances. It appears proper to allow a few days to the interested parties to ascertain the impact, if any, of the Stay not being applicable anymore to BCFC, if alone to ascertain how this impacts upon the various charges created by the Initial Order and subsequent Orders issued by the Court during the course of these proceedings.

82 There is no support for the concern of the Noteholders as to an ulterior motive of Abitibi for maintaining in place this Stay of Proceedings against BCFC up until September 30, 2010.

83 All things considered, in the Court's opinion, it would be quite unfair and unreasonable to deny the sanction of the *CCAA* Plan for the benefit of all the stakeholders involved on the basis of the arguments raised by the Noteholders.

84 Their objections either reargue issues that have been heard, considered and decided, complain of a lack of clarity of the scope of releases that the addition of a few words to the Sanction Order properly addresses, or voice queries about the allocation of important funds to the Abitibi's emergence from the *CCAA* that simply do not concern the entities of which the Noteholders are allegedly creditors, be it in Canada or in the U.S.

85 When one remains mindful of the relative degrees of prejudice that would flow from granting or refusing the relief sought, it is obvious that the scales heavily tilt in favour of granting the Sanction Order sought.

3. The Contestations of the Provinces of Ontario and British Columbia

86 Following negotiations that the Provinces involved and Abitibi pursued, with the assistance of the Monitor, up to the very last minute, the interested parties have agreed upon a "carve-out" wording that is satisfactory to every one with respect to some potential environmental liabilities of Abitibi in the event future circumstances trigger a concrete dispute in that regard.

87 In the Court's view, this is, by far, the most preferred solution to adopt with respect to the disagreement that exists on their respective position as to potential proceedings that may arise in the future under environmental legislation. This approach facilitates the approval of the *CCAA* Plan and the successful restructuring of Abitibi, without affecting the right of any affected party in this respect.

88 The "carve-out" provisions agreed upon will be included in the Sanction Order.

4. The Contestation of NPower Cogen Limited

89 By its Contestation, NPower Cogen Limited sought to preserve its rights with respect to what it called

the "Cogen Motion", namely a "*motion to be brought by Cogen before this Honourable Court to have various claims heard*" (para. 24(b) and 43 of NPower Cogen Limited Contestation).

90 Here again, Abitibi and NPower Cogen Limited have agreed on an acceptable "carve-out" wording to be included in the Sanction Order in that regard. As a result, there is no need to discuss the impact of this Contestation any further.

5. Abitibi's Reorganization

91 The Motion finally deals with the corporate reorganization of Abitibi and the Sanction Order includes declarations and orders dealing with it.

92 The test to be applied by the Court in determining whether to approve a reorganization under Section 191 of the *CBCA* is similar to the test applied in deciding whether to sanction a plan of arrangement under the *CCAA*, namely: (a) there must be compliance with all statutory requirements; (b) the debtor company must be acting in good faith; and (c) the capital restructuring must be fair and reasonable[FN13].

93 It is not disputed by anyone that these requirements have been fulfilled here.

6. The wording of the Sanction Order

94 In closing, the Court made numerous comments to Abitibi's Counsel on the wording of the Sanction Order initially sought in the Motion. These comments have been taken into account in the subsequent in depth revisions of the Sanction Order that the Court is now issuing. The Court is satisfied with the corrections, adjustments and deletions made to what was originally requested.

For these Reasons, The Court:

1 *GRANTS* the Motion.

Definitions

2 *DECLARES* that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the *CCAA* Plan[FN14] and the Creditors' Meeting Order, as the case may be.

Service and Meeting

3 *DECLARES* that the notices given of the presentation of the Motion and related Sanction Hearing are proper and sufficient, and in accordance with the Creditors' Meeting Order.

4 *DECLARES* that there has been proper and sufficient service and notice of the Meeting Materials, including the *CCAA* Plan, the Circular and the Notice to Creditors in connection with the Creditors' Meeting, to all Affected Unsecured Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the *CCAA*, the Creditors' Meeting Order and all other applicable orders of the Court.

5 *DECLARES* that no meetings or votes of (i) holders of Equity Securities and/or (ii) holders of equity securities of ABH are required in connection with the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions as set out in the Restructuring Transactions Notice dated September 1, 2010, as amended on September 13, 2010.

CCAA Plan Sanction

6 *DECLARES* that:

a) the *CCAA* Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of Affected Unsecured Creditors in each of the following classes in conformity with the *CCAA*: ACI Affected Unsecured Creditor Class, the ACCC Affected Unsecured Creditor Class, the 15.5% Guarantor Applicant Affected Unsecured Creditor Classes, the Saguenay Forest Products Affected Unsecured Creditor Class, the BCFPI Affected Unsecured Creditor Class, the AbitibiBowater Canada Affected Unsecured Creditor Class, the Bowater Maritimes Affected Unsecured Creditor Class, the ACNSI Affected Unsecured Creditor Class, the Office Products Affected Unsecured Creditor Class and the Recycling Affected Unsecured Creditor Class;

b) the *CCAA* Plan was not approved by the Required Majority of Affected Unsecured Creditors in the BCFC Affected Unsecured Creditors Class and that the Holders of BCFC Affected Unsecured Claims are therefore deemed to be Unaffected Creditors holding Excluded Claims against BCFC for the purpose of the *CCAA* Plan and this Order, and that BCFC is therefore deemed not to be an Applicant for the purpose of this Order;

c) the Court is satisfied that the Petitioners and the Partnerships have complied with the provisions of the *CCAA* and all the orders made by this Court in the context of these *CCAA* Proceedings in all respects;

d) the Court is satisfied that no Petitioner or Partnership has either done or purported to do anything that is not authorized by the *CCAA*; and

e) the *CCAA* Plan (and its implementation, including the implementation of the Restructuring Transactions), is fair and reasonable, and in the best interests of the Applicants and the Partnerships, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

7 *ORDERS* that the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the *CCAA* and Section 191 of the *CBCA*, and, as at the Implementation Date, will be effective and will enure to the benefit of and be binding upon the Applicants, the Partnerships, the Reorganized Debtors, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

CCAA Plan Implementation

8 *DECLARES* that the Applicants, the Partnerships, the Reorganized Debtors and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Applicants, the Partnerships and the Reorganized Debtors in accordance with and subject to the terms of the *CCAA* Plan, to implement and effect the *CCAA* Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the *CCAA* Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

9 *AUTHORIZES* the Applicants, the Partnerships and the Reorganized Debtors to request, if need be, one or more order(s) from this Court, including *CCAA* Vesting Order(s), for the transfer and assignment of assets to the Applicants, the Partnerships, the Reorganized Debtors or other entities referred to in the Restructuring Transactions Notice, free and clear of any financial charges, as necessary or desirable to implement and effect the Re-

structuring Transactions as set forth in the Restructuring Transactions Notice.

10 *DECLARES* that, pursuant to Section 191 of the *CBCA*, the articles of AbitibiBowater Canada will be amended by new articles of reorganization in the manner and at the time set forth in the Restructuring Transactions Notice.

11 *DECLARES* that all Applicants and Partnerships to be dissolved pursuant to the Restructuring Transactions shall be deemed dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Applicants or the Partnerships or their respective securityholders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Applicants, the Partnerships and the Reorganized Debtors shall cause to be filed with the appropriate Governmental Entities articles, agreements or other documents of dissolution for the dissolved Applicants or Partnerships to the extent required by applicable Law.

12 *DECLARES* that, subject to the performance by the Applicants and the Partnerships of their obligations under the *CCAA* Plan, and in accordance with Section 8.1 of the *CCAA* Plan, all contracts, leases, Timber Supply and Forest Management Agreements ("TSFMA") and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements and other arrangements to which the Applicants or the Partnerships are a party and that have not been terminated including as part of the Restructuring Transactions or repudiated in accordance with the terms of the Initial Order will be and remain in full force and effect, unamended, as at the Implementation Date, and no Person who is a party to any such contract, lease, agreement or other arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such contract, lease, agreement or other arrangement and no automatic termination will have any validity or effect by reason of:

- a) any event that occurred on or prior to the Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Applicants and the Partnerships);
- b) the insolvency of the Applicants, the Partnerships or any affiliate thereof or the fact that the Applicants, the Partnerships or any affiliate thereof sought or obtained relief under the *CCAA*, the *CBCA* or the Bankruptcy Code or any other applicable legislation;
- c) any of the terms of the *CCAA* Plan, the U.S. Plan or any action contemplated therein, including the Restructuring Transactions Notice;
- d) any settlements, compromises or arrangements effected pursuant to the *CCAA* Plan or the U.S. Plan or any action taken or transaction effected pursuant to the *CCAA* Plan or the U.S. Plan; or
- e) any change in the control, transfer of equity interest or transfer of assets of the Applicants, the Partnerships, the joint ventures, or any affiliate thereof, or of any entity in which any of the Applicants or the Partnerships held an equity interest arising from the implementation of the *CCAA* Plan (including the Restructuring Transactions Notice) or the U.S. Plan, or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

13 *DECLARES* that any consent or authorization required from a third party, including any Governmental

Entity, under any such contracts, leases, TSFMAs and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements or other arrangements in respect of any change of control, transfer of equity interest, transfer of assets or transfer of any asset as part of or in connection with the Restructuring Transactions Notice be deemed satisfied or obtained, as applicable.

14 *DECLARES* that the determination of Proven Claims in accordance with the Claims Procedure Orders, the Cross-border Claims Protocol, the Cross-border Voting Protocol and the Creditors' Meeting Order shall be final and binding on the Applicants, the Partnerships, the Reorganized Debtors and all Affected Unsecured Creditors.

Releases and Discharges

15 *CONFIRMS* the releases contemplated by Section 6.10 of the *CCAA* Plan and *DECLARES* that the said releases constitute good faith compromises and settlements of the matters covered thereby, and that such compromises and settlements are in the best interests of the Applicants and its stakeholders, are fair, equitable, and are integral elements of the restructuring and resolution of these proceedings in accordance with the *CCAA* Plan, it being understood that for the purpose of these releases and/or this Order, the terms "Applicants" or "Applicant" are not meant to include Bowater Canada Finance Corporation ("*BCFC*").

16 *ORDERS* that, upon payment in full in cash of all BI DIP Claims and ULC DIP Claim in accordance with the *CCAA* Plan, the BI DIP Lenders and the BI DIP Agent or ULC, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the BI DIP Claims or the ULC DIP Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

17 *ORDERS* that, upon payment in full in cash of their Secured Claims in accordance with the *CCAA* Plan, the ACCC Administrative Agent, the ACCC Term Lenders, the BCFPI Administrative Agent, the BCFPI Lenders, the Canadian Secured Notes Indenture Trustee and any Holders of a Secured Claim, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the ACCC Term Loan Claim, BCFPI Secured Bank Claim, Canadian Secured Notes Claim or any other Secured Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

For the purposes of the present paragraph [17], in the event of any dispute as to the amount of any Secured Claim, the Applicants, Partnerships or Reorganized Debtors, as the case may be, shall be permitted to pay to the Monitor the full amount in dispute (as specified by the affected Secured Creditor or by this Court upon summary application) and, upon payment of the amount not in dispute, receive the releases, discharges, authorizations, directions, instruments notices or other documents as provided for therein. Any amount paid to the Monitor in accordance with this paragraph shall be held in trust by the Monitor for the holder of the Secured Claim and the payer as their interests shall be determined by agreement between the parties or, failing agreement, as directed

by this Court after summary application.

18 *PRECLUDES* the prosecution against the Applicants, the Partnerships or the Reorganized Debtors, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged or terminated pursuant to the *CCAA* Plan.

Accounts with Financial Institutions

19 *ORDERS* that any and all financial institutions (the "Financial Institutions") with which the Applicants, the Partnerships and the Reorganized Debtors have or will have accounts (the "Accounts") shall process and/or facilitate the transfer of, or changes to, such Accounts in order to implement the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

20 *ORDERS* that Mr. Allen Dea, Vice-President and Treasurer of ABH, or any other officer or director of the Reorganized Debtors, is empowered to take all required acts with any of the Financial Institutions to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement CCAA Plan

21 *ORDERS* that, in the event that the Implementation Date does not occur, Affected Unsecured Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the *CCAA* Plan, the Claims Procedure Orders or the Creditors' Meeting Order. For greater certainty, nothing in the *CCAA* Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Applicants or the Partnerships, including in the *CCAA* Proceedings or any other proceeding or process, in the event that the Implementation Date does not occur.

Charges created in the CCAA Proceedings

22 *ORDERS* that, upon the Implementation Date, all *CCAA* Charges against the Applicants and the Partnerships or their property created by the *CCAA* Initial Order or any subsequent orders shall be determined, discharged and released, provided that the BI DIP Lenders Charge shall be cancelled on the condition that the BI DIP Claims are paid in full on the Implementation Date.

Fees and Disbursements

23 *ORDERS* and *DECLARES* that, on and after the Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants and the Partnerships, in each case at their standard rates and charges and including any amounts outstanding as of the Implementation Date, in respect of the *CCAA* Plan, including the implementation of the Restructuring Transactions, shall become obligations of Reorganized ABH.

Exit Financing

24 *ORDERS* that the Applicants are authorized and empowered to execute, deliver and perform any credit

agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents, as may be required in connection with the Exit Facilities.

Stay Extension

25 *EXTENDS* the Stay Period in respect of the Applicants until the Implementation Date.

26 *DECLARES* that all orders made in the *CCAA* Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor and Chief Restructuring Officer

27 *DECLARES* that the protections afforded to Ernst & Young Inc., as Monitor and as officer of this Court, and to the Chief Restructuring Officer pursuant to the terms of the Initial Order and the other Orders made in the *CCAA* Proceedings, shall not expire or terminate on the Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

28 *ORDERS* and *DECLARES* that any distributions under the *CCAA* Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants for the purposes of section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 14 of the Act Respecting the Ministère du Revenu (Québec), section 107 of the Corporations Tax Act (Ontario), section 22 of the Retail Sales Tax Act (Ontario), section 117 of the Taxation Act, 2007 (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a Disbursing Agent under the *CCAA* Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the *CCAA* Plan and this Order and any claims of this nature are hereby forever barred.

29 *ORDERS* and *DECLARES* that the Disbursing Agent, the Applicants and the Reorganized Debtors, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements, including withholding a number of shares of New ABH Common Stock equal in value to the amount required to comply with such withholding requirements from the shares of New ABH Common Stock to be distributed to current or former employees and making the necessary arrangements for the sale of such shares on the TSX or the New York Stock Exchange on behalf of the current or former employees to satisfy such withholding requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Unsecured Creditor in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Entity.

Claims Officers

30 *DECLARES* that, in accordance with paragraph [25] hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the *CCAA* Proceedings.

General

31 *ORDERS* that, notwithstanding any other provision in this Order, the *CCAA* Plan or these *CCAA* Proceedings, the rights of the public authorities of British Columbia, Ontario or New Brunswick to take the position in or with respect to any future proceedings under environmental legislation that this or any other Order does not affect such proceedings by reason that such proceedings are not in relation to a claim within the meaning of the *CCAA* or are otherwise beyond the jurisdiction of Parliament or a court under the *CCAA* to affect in any way is fully reserved; as is reserved the right of any affected party to take any position to the contrary.

32 *DECLARES* that nothing in this Order or the *CCAA* Plan shall preclude NPower Cogen Limited ("Cogen") from bringing a motion for, or this Court from granting, the relief sought in respect of the facts and issues set out in the Claims Submission of Cogen dated August 10, 2010 (the "Claim Submission"), and the Reply Submission of Cogen dated August 24, 2010, provided that such relief shall be limited to the following:

a) a declaration that Cogen's claim against Abitibi Consolidated Inc. ("Abitibi") and its officers and directors, arising from the supply of electricity and steam to Bridgewater Paper Company Limited between November 1, 2009 and February 2, 2010 in the amount of £9,447,548 plus interest accruing at the rate of 3% *per annum* from February 2, 2010 onwards (the "Claim Amount") is (i) unaffected by the *CCAA* Plan or Sanction Order; (ii) is an Excluded Claim; or (iii) is a Secured Claim; (iv) is a D&O Claim; or (v) is a liability of Abitibi under its Guarantee;

b) an Order directing Abitibi and its Directors and Officers to pay the Claim Amount to Cogen forthwith; or

c) in the alternative to (b), an order granting leave, if leave be required, to commence proceedings for the payment of the Claim Amount under s. 241 of the *CBCA* and otherwise against Abitibi and its directors and officers in respect of same.

33 *DECLARES* that any of the Applicants, the Partnerships, the Reorganized Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice to the Service List.

34 *DECLARES* that this Order shall have full force and effect in all provinces and territories in Canada.

35 *REQUESTS* the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

36 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

37 *WITHOUT COSTS*.

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*
2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*
3. *3224112 NOVA SCOTIA LIMITED*
4. *MARKETING DONOHUE INC.*
5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*
6. *3834328 CANADA INC.*
7. *6169678 CANADA INC.*
8. *4042140 CANADA INC.*
9. *DONOHUE RECYCLING INC.*
10. *1508756 ONTARIO INC.*
11. *3217925 NOVA SCOTIA COMPANY*
12. *LA TUQUE FOREST PRODUCTS INC.*
13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*
14. *SAGUENAY FOREST PRODUCTS INC.*
15. *TERRA NOVA EXPLORATIONS LTD.*
16. *THE JONQUIERE PULP COMPANY*
17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*
18. *SCRAMBLE MINING LTD.*
19. *9150-3383 QUÉBEC INC.*
20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*
2. *BOWATER CANADA FINANCE CORPORATION*
3. *BOWATER CANADIAN LIMITED*
4. *3231378 NOVA SCOTIA COMPANY*
5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*
7. *BOWATER CANADIAN FOREST PRODUCTS INC.*
8. *BOWATER SHELBURNE CORPORATION*
9. *BOWATER LAHAVE CORPORATION*
10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*
11. *BOWATER TREATED WOOD INC.*
12. *CANEXEL HARDBOARD INC.*
13. *9068-9050 QUÉBEC INC.*
14. *ALLIANCE FOREST PRODUCTS (2001) INC.*
15. *BOWATER BELLEDUNE SAWMILL INC.*
16. *BOWATER MARITIMES INC.*
17. *BOWATER MITIS INC.*
18. *BOWATER GUÉRETTE INC.*
19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*
2. *ABITIBIBOWATER US HOLDING 1 CORP.*
3. *BOWATER VENTURES INC.*
4. *BOWATER INCORPORATED*
5. *BOWATER NUWAY INC.*
6. *BOWATER NUWAY MID-STATES INC.*
7. *CATAWBA PROPERTY HOLDINGS LLC*
8. *BOWATER FINANCE COMPANY INC.*
9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*
10. *BOWATER AMERICA INC.*
11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Motion granted.

FN1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

FN2 See Monitor's Fifty-Seventh Report dated September 7, 2010, and Monitor's Fifty-Ninth Report dated September 17, 2010.

FN3 This Plan of Reorganisation and Compromise (as modified, amended or supplemented by CCAA Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, CCAA Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) (collectively, the "*CCAA Plan*") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

FN4 Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief (the "Motion"), pursuant to Sections 6, 9 and 10 of the CCAA and Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (the "CBCA").

FN5 *Boutiques San Francisco Inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775 (S.C.); *Cable Satisfaction International Inc. v. Richter & Associés inc.*, J.E. 2004-907 (Que. S.C.) [2004 CarswellQue 810 (Que. S.C.)].

FN6 See Monitor's Fifty-Eight Report dated September 16, 2010.

FN7 *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]); *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]).

FN8 *Uniforêt inc., Re* (Que. S.C.) [2003 CarswellQue 3404 (Que. S.C.)], *TQS inc., Re*, 2008 QCCS 2448 (Que. S.C.), B.E. 2008BE-834; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.).

FN9 *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Boutiques San Francisco inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed 73 C.B.R. (N.S.) 195 (B.C. C.A.).

FN10 The Indenture Trustee acting under the Unsecured Notes supports the Noteholders in their objections.

FN11 See, in this respect, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Charles-Auguste Fortier inc., Re* (2008), J.E. 2009-9, 2008 QCCS 5388 (Que. S.C.); *Hy Bloom inc. c. Banque Nationale du Canada*, [2010] R.J.Q. 912 (Que. S.C.).

FN12 *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, N° 500-11-032338-085, 2009-06-30, Mongeon J.

FN13 *Raymor Industries inc. (Proposition de)*, [2010] R.J.Q. 608, 2010 QCCS 376 (Que. S.C.); *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, N° 500-11-032338-085, 2009-06-30, Mongeon J., at para. 7-8; *MEI Computer Technology Group Inc., Re* [2005 CarswellQue 13408 (Que. S.C.)], (S.C., 2005-11-14), SOQUIJ AZ-50380254, 2005 CanLII 54083; *Doman Industries Ltd., Re*, 2003 BCSC 375 (B.C. S.C. [In Chambers]); *Laidlaw, Re* (Ont. S.C.J.).

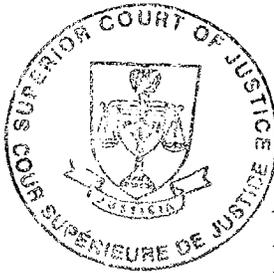
FN14 It is understood that for the purposes of this Sanction Order, the CCAA Plan is the Plan of Reorganisation and Compromise (as modified, amended or supplemented by CCAA Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, CCAA Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

END OF DOCUMENT

TAB 22

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.) WEDNESDAY, THE 16TH DAY
JUSTICE CAMPBELL) OF DECEMBER, 2009



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 ARRANGEMENT
AND REORGANIZATION OF ALLEN-VANGUARD
CORPORATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND SECTION 186 OF THE ONTARIO *BUSINESS*
CORPORATIONS ACT, R.S.O. 1990, c. B.16, AS AMENDED

SANCTION ORDER

THIS MOTION made by Allen-Vanguard Corporation (the "**Applicant**") for an Order pursuant to section 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") sanctioning the Applicant's Plan of Arrangement and Reorganization dated December 9, 2009, as amended, and as it may be further amended from time-to-time in accordance with its terms (the "**Plan**") and for ancillary relief associated with the implementation of the Plan, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion dated December 10, 2009, the affidavit of David E. Luxton sworn December 8, 2009 and the Exhibits thereto, the affidavit of Barry Goldberg, Genuity Capital Markets, sworn December 8, 2009, the affidavit of Glenn Sauntry, BMO Capital Markets, sworn December 8, 2009 and the Exhibit thereto, all filed, and the First and Second Reports of Deloitte & Touche Inc. (the "**Monitor**") in its capacity as Monitor dated December 8, 2009, and December 10, 2009 and the Appendices thereto (the "**Reports**"), all filed, and on being advised by counsel present that the Monitor, the Affected Creditors and the Sponsor (as

defined in the Plan) consent to the relief sought on this motion, and on hearing the submissions of counsel for the Applicant, the Monitor, the Affected Creditors, the Sponsor, Export Development Canada, the directors of the Applicant and for the Plaintiff in the Action (as defined below), no one else appearing although notice and service of this motion was duly and properly given in accordance with the requirements of this Honourable Court's Plan Filing and Meeting Order dated December 9, 2009 (the "**Meeting Order**"), as appears from the Affidavit of Service of David E. Luxton sworn December 14, 2009 (the "**Luxton Affidavit of Service**");

SERVICE

1. **THIS COURT ORDERS AND DECLARES** that in accordance with the Meeting Order this Motion is properly returnable today and hereby dispenses with further service hereof.

DEFINITIONS

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan.

SERVICE AND MEETING OF CREDITORS

3. **THIS COURT ORDERS AND DECLARES THAT** the Meeting Order remains in full force and effect, unvaried and unamended.

4. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice of the Meeting (as defined in the Meeting Order) and that the Meeting called pursuant to paragraph 6 of the Meeting Order was duly convened, held and conducted, in conformity with the CCAA and the Meeting Order.

AMENDMENT OF PLAN

5. **THIS COURT ORDERS AND DECLARES** that the amendments to the Plan described in Schedule "B" to this Order (the "**Amendments**") are hereby approved and the Applicant is hereby (a) authorized and directed to forthwith deliver to the Monitor, for posting on the website, an amended version of the Plan adopting and reflecting the Amendments and dated as of the date hereof and (b) deemed to have complied with the requirements of section 9.1 of the Plan and

paragraph 4 of the Plan Filing and Meeting Order concerning amendments to the Plan. (A blackline reflecting the Amendments made to the Plan is enclosed as Schedule "C" to this Order.)

SANCTION OF PLAN

6. **THIS COURT ORDERS AND DECLARES** that:

- (a) the Plan has been approved by the requisite majorities of the Affected Creditors present and voting, either in person or by proxy, at the Meeting, all in conformity with the CCAA and the terms of the Initial Order and the Meeting Order;
- (b) the Applicant has acted in good faith and with due diligence, has complied with the provisions of the CCAA, and has not done or purported to do (nor does the Plan do or purport to do) anything that is not authorized by the CCAA;
- (c) the Applicant has adhered to, and acted in accordance with, all Orders of this Court in the CCAA Proceedings; and
- (d) the Plan, together with all of the compromises, arrangements, reorganization, recapitalization, transfers, transactions, corporate transactions, releases and results provided for therein and effected or contemplated thereby are fair, reasonable and in the best interests of the Applicant, the Affected Creditors and the other stakeholders of the Applicant, and does not unfairly disregard the interests of any Person (whether an Affected Creditor or otherwise).

7. **THIS COURT ORDERS** that the Plan, including the compromises, arrangements, reorganization, recapitalization, transfers, transactions, corporate transactions, releases and results provided for therein and effected or contemplated thereby, including the Articles of Reorganization and the Restructuring Documents and the transactions contemplated thereby, be and are hereby sanctioned and approved pursuant to section 6 of the CCAA and, at the Effective Time, will enure to the benefit of, become effective and be binding upon the Applicant, the Affected Creditors, the Sponsor and all other Persons affected thereby, and on their respective heirs, administrators, executors, legal personal representatives, successors and assigns, in the order stipulated in the Plan.

PLAN IMPLEMENTATION

8. **THIS COURT ORDERS** that the Applicant, the Monitor and the Transfer Agent, as the case may be, are authorized and directed to take all steps and actions, and to do all things, necessary or appropriate to enter into or implement the Plan in accordance with its terms, including making the distributions and implementing the transactions contemplated by the Plan, and to enter into, execute, deliver, implement and consummate all of the steps, transactions and agreements contemplated under and pursuant to the Plan, including the Articles of Reorganization and the Restructuring Documents and the transactions contemplated thereby, in accordance with their respective terms.

9. **THIS COURT ORDERS** that in completing the Plan, the Applicant, the Monitor and the Transfer Agent, as the case may be, be and are hereby authorized and directed:

(a) to execute and deliver such additional, related and ancillary documents and assurances governing or giving effect to the Plan, including as set out in or contemplated by the Transaction Agreement, the Restructuring Documents and the Articles of Reorganization, which are reasonably necessary or advisable to conclude the Plan and the transactions contemplated thereby, including the execution of such powers of attorney, conveyances, deeds, releases, bills of sale, transfers, instruments and such other documents, in the name and on behalf of the Applicant or otherwise, as may be reasonably necessary or advisable to effect the Plan and transactions contemplated thereby; and

(b) to take any such steps, actions and proceedings that are reasonably necessary or incidental to conclude the Plan and the transactions contemplated thereby.

10. **THIS COURT ORDERS** that the *Bulk Sales Act*, R.S.O. 1990, c. B-14, as amended, and any other legislation affecting sales in bulk in all jurisdictions in which the Applicant's assets are located do not apply to the Plan, and the Plan may be completed without compliance with any notice, statutory or otherwise, which a creditor or other party may be required to issue in any jurisdiction within which any of the Applicant's assets are located.

11. **THIS COURT ORDERS AND DECLARES** that the reorganization of the capital of the Applicant under section 186 of the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16, as amended (the “**OBCA**”), by the (i) cancellation and extinguishment, without a return of capital or any other consideration, of all issued and outstanding Securities; (ii) amendment of the Applicant’s Articles of Amalgamation by way of the Articles of Reorganization; and (iii) the issuance of the New Shares to the Sponsor Subsidiary, in the manner set forth in section 8.2(2) of the Plan and the Articles of Reorganization, be and is hereby approved, authorized and directed.

12. **THIS COURT ORDERS** that the Applicant is hereby authorized and directed to file the Articles of Reorganization in the form attached hereto as Schedule “A” with the Director appointed under the OBCA pursuant to section 186(4) of the OBCA prior to closing to reflect the reorganization approved in paragraph 11 above.

13. **THIS COURT ORDERS AND DECLARES** that at the Effective Time, all Securities shall and are hereby cancelled and extinguished without a return of capital or other consideration, compensation or relief of any kind to the holders thereof.

14. **THIS COURT ORDERS AND DECLARES** that at the Effective Time, all Claims against the Applicant (and any successor thereto or the Sponsor Subsidiary) in respect of the Securities (including, without limitation, any Claims against the Applicant resulting from the ownership, purchase or sale of the Securities by any current or former holder thereof, and any Claims for contribution or indemnity against the Applicant in respect of any such Claims) shall be and are hereby discharged and extinguished without a return of capital or other consideration, compensation or relief of any kind to the current or former holders thereof.

15. **THIS COURT ORDERS AND DIRECTS** the Applicant and the Transfer Agent to transfer the Common Shares and to issue the New Shares to the Sponsor Subsidiary pursuant to section 8.2(2) of the Plan and the Articles of Reorganization.

16. **THIS COURTS ORDERS AND DECLARES** that no meetings or votes of any holders of Securities or of Common Shares are required in connection with the Plan or the Reorganization.

17. **THIS COURT ORDERS AND DECLARES** that all New Shares issued to the Sponsor Subsidiary in connection with the Plan are validly issued and outstanding on and as of the Effective Time as fully-paid and non-assessable.

18. **THIS COURT ORDERS AND DECLARES** that at the Effective Time, all Claims against the Applicant (and any successor thereto or the Sponsor Subsidiary) in respect of the Common Shares (including, without limitation, any Claims against the Applicant resulting from the ownership, purchase or sale of the Common Shares by any current or former holder thereof, and any Claims for contribution or indemnity against the Applicant in respect of any such Claims) shall be and are hereby discharged and extinguished without a return of capital or other consideration, compensation or relief of any kind to the current or former holders thereof, and the Transfer Agent shall not be required to distribute the Transfer Price (CDN\$ 1.00) to the holders of the Common Shares.

19. **THIS COURT ORDERS AND DECLARES** that, in accordance with the terms of the Plan, and the Articles of Reorganization, the legal and beneficial right, title and interest of the Sponsor Subsidiary in and to the Common Shares shall vest and hereby are vested as of the Effective Time in the Sponsor Subsidiary absolutely and forever, free and clear of and from any and all Claims.

20. **THIS COURT ORDERS** that upon implementation of the Plan in accordance with Section 8.2(2) thereof, the Applicant shall deliver to the Monitor and file with the Court a copy of a certificate stating that all conditions precedent set out in the Plan have been satisfied or waived, the Articles of Reorganization have been filed and have become effective as of the date set out in the Certificate of Amendment, the transactions set out in Section 8.2(2) of the Plan have occurred and become effective, and that the implementation of the Plan shall have occurred in accordance with the Plan at the Effective Time.

21. **THIS COURT ORDERS** that each Contract shall remain in full force and effect and no Person who is a party to any Contract shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand or declare any default, violation or breach under or in respect of any such Contract and no

automatic termination under or in respect of any such Contract will have any validity or effect, by reason:

- (a) of the insolvency of the Applicant (or any of its subsidiaries on account of the insolvency of the Applicant) or the fact that the Applicant sought or obtained relief under the CCAA, that the CCAA Proceedings have been commenced or completed, or that the within restructuring or recapitalization has been implemented in respect of the Applicant; or
- (b) of any compromises or arrangements effected pursuant to, or in connection with, the Plan or any action taken or transaction effected pursuant to the Plan, the Articles of Reorganization, any of the Restructuring Documents or this Sanction Order, including the change in control of the Applicant or any of its subsidiaries; provided, however, that nothing in this paragraph shall affect or otherwise limit any contractual right that an employee of the Applicant may have with respect to a change in control of the Applicant.

RELEASES, DISCHARGES AND INJUNCTIONS

22. **THIS COURT ORDERS AND DECLARES** that the compromises, arrangements, reorganizations, releases, discharges and other transactions contemplated in and by the Plan, including the Articles of Reorganization and the Restructuring Documents, including those granted by and for the benefit of the Released Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan and that, effective on the Plan Implementation Date, all such releases, discharges and injunctions are hereby sanctioned, approved and given full force and effect in accordance with and subject to their respective terms.

23. **THIS COURT ORDERS** that, without limiting the generality of any provision of this Order or the Plan, immediately upon the Plan Implementation Date having occurred, every Person (regardless of whether or not such Persons are Affected Creditors) hereby fully, finally, irrevocably and unconditionally releases and discharges each of the Released Parties of and from any and all demands, claims, actions (including any class actions or proceedings before an administrative tribunal), causes of action, grievances, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on

account of any liability, obligation, demand or cause of action of whatever nature that any such Person may be entitled to assert, including, without limitation, any and all claims for accounting, reconciliation, contribution or indemnity, restitution or otherwise, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing, termination, disclaimer or repudiation of any contract, lease or other agreement, whether written or oral or other occurrence existing or taking place on or prior to the Effective Time relating to, arising out of or in connection with any Affected Claims, the Plan, the Articles of Reorganization, the cancellation of the Securities and the transfer of the Common Shares without consideration, compensation or relief of any kind, the Restructuring Documents, the CCAA Proceedings, the Reorganization or any of the transactions implemented in connection with any of the foregoing (collectively, the “**Released Claims**”); provided, however, that nothing herein shall release or discharge a Released Party: (i) from any of its obligations under the Plan, the Restructuring Documents, the Articles of Reorganization, the Transaction Agreement or any other agreement which the Plan Participants or some of them may have entered into in connection with any of the foregoing; (ii) if such Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed gross negligence, fraud or willful misconduct; or (iii) in the case of directors in respect of any claim of the kind referred to in subsection 5.1(2) of the CCAA or (iv) the EDC Claims.

24. **THIS COURT ORDERS** that, without limiting the generality of any provision of this Order or the Plan, immediately upon the Plan Implementation Date having occurred, every Person (regardless of whether or not such Persons are Affected Creditors) hereby fully, finally, irrevocably and unconditionally releases and discharges the Applicant (and any successor thereto or the Sponsor Subsidiary) and the current and former officers and directors thereof of and from any and all demands, claims, actions (including any class actions or proceedings before an administrative tribunal), causes of action, grievances, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature that any such Person may be entitled to assert, including, without limitation, any and all claims for accounting, reconciliation, contribution or indemnity, restitution or otherwise, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter

arising, based in whole or in part on any act or omission, transaction, dealing, termination, disclaimer or repudiation of any contract or other agreement, whether written or oral or other occurrence existing or taking place on or prior to the Effective Time relating to, arising out of or in connection with any Equity Claims; provided, however, that nothing herein shall release or discharge a director or current or former officer in respect of any claim of the kind referred to in subsection 5.1(2) of the CCAA.

25. **THIS COURT ORDERS** that, without limiting the generality of any provision of this Order or the Plan, immediately upon the Plan Implementation Date having occurred, all Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under Plan, the Restructuring Documents or the Transaction Agreement or any other agreement which the Plan Participants or some of them may have entered into in connection with any of the foregoing or in respect of any claim against a director of the kind referred to in subsection 5.1(2) of the CCAA.

26. **THIS COURT ORDERS** that, without limiting the generality of any provision of this Order or the Plan, immediately upon the Plan Implementation Date having occurred, all Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Equity Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Applicant (or any successor thereto or the Sponsor Subsidiary) or any current or former officer or director thereof; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Applicant (or any successor thereto or the Sponsor Subsidiary), any current or former officer or director thereof, or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against the Applicant (or any successor thereto or the Sponsor Subsidiary) or any current or former officer or director thereof; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Applicant (or any successor thereto or the Sponsor Subsidiary), any current or former officer or director thereof, or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply in respect of any claim against a director or current or former officer of the kind referred to in subsection 5.1(2) of the CCAA.

27. **THIS COURT ORDERS** that, without limiting the generality of any provision of this Order or the Plan, immediately upon the Plan Implementation Date having occurred, all Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any claim of the kind referred to in subsection 5.1(2) of the CCAA, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings

of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Applicant (or any successor thereto or the Sponsor Subsidiary), or its property; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Applicant (or any successor thereto or the Sponsor Subsidiary), or its property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against the Applicant (or any successor thereto or the Sponsor Subsidiary) or its property; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Applicant (or any successor thereto or the Sponsor Subsidiary), or its property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; and that the sole recourse for any such claims against a current or former director or officer of the Applicant as of the date hereof shall be, and is hereby, limited to any recoveries available from the Applicant's insurance policies in respect of its current or former directors or officers, and that the holder of any such valid and proven claim shall be subrogated to the rights of any such director or officer to any insurance coverage available in respect of such a claim.

28. **THIS COURT ORDERS** that, pursuant to paragraphs 14 and 24 of this Order, the action styled as *Laneville v. Allen-Vanguard Corporation*, et al., Court File No. 64170, commenced at London (the "Action") is hereby dismissed without costs as against the Applicant. Notwithstanding the dismissal of the Action as against the Applicant and the full release of the Applicant from the claims in the Action pursuant to the Plan and this Order, the Applicant shall preserve all documentation within its possession, power and control relevant to the Action, pending further Order of the Court. This Order is without prejudice to: (a) the Plaintiff in the Action requesting documentary discovery and oral discovery of a representative of the Applicant under the provisions of R. 30.10 and R. 31.10 of the *Rules of Civil Procedure*; (b) the Plaintiff in the Action serving a summons to witness on an employee of the Applicant under the provisions

of R. 39.03 of the *Rules of Civil Procedure*; and (c) the Applicant's rights in responding to any such actions.

DISCHARGE OF MONITOR

29. **THIS COURT ORDERS** that as of the Effective Time, the Monitor shall be discharged and released and shall have no further obligations and responsibilities, save and except with respect to any remaining duties and responsibilities required to give effect to the terms of the Plan and this Order.

30. **THIS COURT ORDERS** that the completion of the Monitor's duties shall be evidenced, and its final discharge shall be effected by the Monitor filing a certificate of discharge with this Court.

31. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Monitor in the CCAA Proceedings are hereby approved and that the Monitor has satisfied all of its obligations up to and including the date of this Sanction Order, and that in addition to the protections in favour of the Monitor as set out in the Initial Order, the Monitor shall not be liable for any act or omission on the part of the Monitor, including with respect to any reliance thereof, including without limitation, with respect to any information disclosed, any act or omission pertaining to the discharge of duties under the Plan or as requested by the Applicant or with respect to any other duties or obligations in respect of the implementation of the Plan, save and except for any claim or liability arising out of any gross negligence or willful misconduct on the part of the Monitor. Subject to the foregoing, and in addition to the protections in favour of the Monitor as set out in the Orders of this Court, any Claims against the Monitor in connection with the performance of its duties as Monitor are hereby released, stayed, extinguished and forever barred and the Monitor shall have no liability in respect thereof.

32. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court and on prior written notice to the Monitor and such further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

33. **THIS COURT ORDERS** that the Reports of the Monitor and the activities of the Monitor referred to therein be and are hereby approved.

CCAA CHARGES

34. **THIS COURT ORDERS** that the Director's Charge (as such term is defined in the Initial Order) is hereby discharged and released and of no further force or effect as of the Effective Time.

35. **THIS COURT ORDERS** that on the Plan Implementation Date, or as soon as reasonably practicable thereafter, the Applicant shall pay all professional fees and disbursements incurred at their standard rates due to the Monitor, counsel for the Monitor and counsel for the Applicant in respect of these proceedings for the period up to and including the Plan Implementation Date, to the extent not already paid in accordance with the terms of the Initial Order, and upon such payments having been made by the Applicant, the Monitor shall file an acknowledgment confirming same with the Court (with a copy to the Sponsor) at which time the Administration Charge (as such term is defined in the Initial Order) shall hereby be discharged and released and of no further force or effect or, failing the filing of such acknowledgement by the Monitor, at such time as determined by this Honourable Court.

INITIAL ORDER AND OTHER ORDERS

36. **THIS COURT ORDERS** that:

- (a) except to the extent that the Initial Order has been varied by or is inconsistent with this Order or any further Order, the provisions of the Initial Order shall remain in full force and effect until the Effective Time; provided that the protection granted in favour of the Monitor in the Initial Order shall continue in full force and effect after the Effective Time;
- (b) the stay of proceedings set out in the Initial Order is hereby extended until the Effective Time without further order of this Court.

EFFECT, RECOGNITION, ASSISTANCE

37. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada, outside Canada and against all Persons against whom it may otherwise be enforceable.

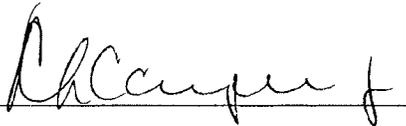
38. **THIS COURT REQUESTS** the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the CCAA and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other subdivisions of the United States of America including, without limitation, the U.S. District Court, the United Kingdom, Ireland, India and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order and any other Order in this proceeding. Each of the Applicant, the Monitor and the Sponsor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other court and judicial, regulatory and administrative bodies, and take such other steps, in Canada, the United States of America, the United Kingdom, Ireland, India, and other nations as may be necessary or advisable to give effect to this Order.

39. **THIS COURT ORDERS** that, in the event that the Affected Creditors and the Sponsor cannot resolve the quantum of the equity injection to be made by the Sponsor pursuant to the Transaction Agreement prior to the Effective Time, such quantum shall be determined by this Honourable Court on an expedited basis (within thirty days or less, subject to Court availability) on a mutually agreed timetable and process between the Affected Creditors and the Sponsor. Prior to the Effective Time, the Affected Creditors, the Sponsor and the Allen-Vanguard Parties shall agree on amended terms to the Credit Agreement and any other agreements among them required to outline the mechanism to resolve the quantum of the equity injection and related matters.

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

DEC 16 2009

PER / PAR:  **Joanne Nicoara**
Registrar, Superior Court of Justice



Schedule "A"

Articles of Reorganization

SCHEDULE 1
TO THE ARTICLES OF REORGANIZATION OF
ALLEN-VANGUARD CORPORATION

The additional rights, privileges, restrictions and conditions attaching to the common shares as a class shall be as follows:

1. Defined Terms

For the purposes of paragraphs 2 and 3 hereof:

- (a) **“Corporation”** means Allen-Vanguard Corporation;
- (b) **“Contego AV”** means Contego AV Luxembourg S.à r.l., a Luxembourg S.à r.l.;
- (c) **“Transfer”** has the meaning ascribed to such term in paragraph 2(b) hereof;
- (d) **“Transfer Agent”** means CIBC Mellon Trust Company;
- (e) **“Transfer Date”** means the date upon which the Transfer Notice is delivered to the Transfer Agent in accordance with paragraph 2(a) hereof;
- (f) **“Transfer Price”** means \$1.00;
- (g) **“Transfer Notice”** means the notice advising of the Transfer, substantially in the form attached hereto as Schedule 2; and
- (h) **“Transfer Time”** means the time the Transfer Notice is delivered to the Transfer Agent on the Transfer Date in accordance with paragraph 2(a) hereof.

2. Transfer

- (a) At any time, the Corporation may cause the Transfer through the delivery by the Corporation of the Transfer Notice to the Transfer Agent by hand delivery to an authorized signing officer of the Transfer Agent, which delivery shall be deemed to be delivery of the Transfer Notice to each holder of common shares of the Corporation, with a copy to Contego AV by delivery to an authorized signing officer of Contego AV.
- (b) In the event the Transfer Notice is delivered by the Corporation in accordance with paragraph 2(a) hereof, at the Transfer Time, each holder of common shares shall be deemed to have transferred, to Contego AV all of such person's right, title and interest in and to its common shares and Contego AV shall acquire, and shall be deemed to have acquired, from each such holder of common shares all, but not less than all, of the common shares held by each such holder (which transfer and acquisitions are referred to herein as the **“Transfer”**) and, at the Transfer Time, each holder of common shares shall not be entitled to exercise any of the rights of a holder of common shares in respect thereof other than the right to receive its pro rata share of the Transfer Price for the common shares.

- (c) Contego AV shall, on the Transfer Date, deposit with, or otherwise cause to be deposited with, the Transfer Agent sufficient funds to pay the Transfer Price to the holders of the common shares and, in the event that the Transfer Notice is delivered by the Corporation in accordance with paragraph 2(a) hereof, such deposit shall constitute a full and complete discharge of Contego AV's obligation to pay the Transfer Price to the holders of the common shares. On and after the Transfer Time, any such money deposited with the Transfer Agent shall be held by the Transfer Agent as agent for the holders of the common shares, and receipt of payment by the Transfer Agent shall be deemed to constitute payment of the Transfer Price to the holders of the common shares for all of the common shares transferred pursuant to the Transfer. The holders of the common shares transferred pursuant to the Transfer shall be entitled to receive their pro rata share of the Transfer Price (rounded down to the nearest \$0.01), without interest, for the common shares so transferred, (i) on presentation and surrender of the certificate or certificates representing all common shares held by such holder (or, in respect of any such certificate or certificates which have been lost, destroyed or wrongfully taken, an indemnity bond together with an affidavit confirming ownership, each in a form satisfactory to Contego AV, acting reasonably) or any other evidence of ownership with respect to the common shares which is satisfactory to Contego AV, acting reasonably, and (ii) on presentation of a fully completed and duly executed letter of transmittal in a form acceptable to Contego AV and the Transfer Agent, acting reasonably, provided that no holder shall be entitled to receive an amount less than \$0.01. Should any holder of any common shares transferred pursuant to the Transfer fail to present and surrender the above mentioned documentation, Contego AV shall have the right, after four (4) years from the Transfer Date, to have all remaining funds deposited with the Transfer Agent returned to Contego AV and Contego AV shall thereafter be responsible for payment of the Transfer Price to any former holder of a common share upon presentation and surrender of such documentation as Contego AV may require.
3. If the Transfer Notice has not been delivered to the Transfer Agent in accordance with paragraph 2(a) hereof on or prior to 11:59 p.m. on the date that is two (2) business days after the date on which the certificate of amendment is received by the Corporation from the Ministry of Government Services, the provisions of paragraphs 1 and 2 hereof shall be of no force or effect.

**SCHEDULE 2
TO THE ARTICLES OF REORGANIZATION OF
ALLEN-VANGUARD CORPORATION**

TRANSFER NOTICE

TO: CIBC Mellon Trust Company
COPY TO: Contego AV Luxembourg S.à r.l.
FROM: Allen-Vanguard Corporation
DATE: [insert date]

All capitalized terms in this Transfer Notice that are not defined herein have the meaning ascribed to such terms in the share provisions attaching to the common shares of Allen-Vanguard Corporation.

In accordance with the share provisions attaching to the common shares, Allen-Vanguard Corporation hereby gives notice to the Transfer Agent and Contego AV Luxembourg S.à r.l. of the Transfer.

ALLEN-VANGUARD CORPORATION

Per: _____
Name:
Title:

Date on which this Transfer Notice is delivered to the Transfer Agent: _____

Time on the Transfer Date this Transfer Notice is delivered to the Transfer Agent: _____

6. The terms and conditions to which the reorganization is made subject by the Order have been complied with.
Les conditions que l'ordonnance impose à la réorganisation ont été respectées.

These articles are submitted under section 186 of the *Business Corporations Act* and are signed in duplicate.
Les présents statuts sont déposés en vertu de l'article 186 de la Loi sur les sociétés par actions. Ils sont signés en double exemplaire.

ALLEN-VANGUARD CORPORATION

Name of Corporation / *Dénomination sociale de la société*

By/
Par :

[TO BE COMPLETED]

~~Signature / Signature~~

Description of Office / *Fonction*

EXHIBIT A
TO THE ARTICLES OF REORGANIZATION OF
ALLEN-VANGUARD CORPORATION
CERTIFIED COPY OF THE ORDER OF THE COURT

Schedule "B"

Amendments

Section 8.6(i)

- **Delete current section 8.6(i) and replace with:**

(i) At the Effective Time, the Released Parties will be released and discharged or deemed to be released and discharged by each of the other Released Parties and all Affected Creditors and all other Persons from any and all demands, claims, actions (including any class actions or proceedings before an administrative tribunal), causes of action, grievances, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature that any such Person may be entitled to assert, including, without limitation, any and all claims for accounting, reconciliation, contribution or indemnity, restitution or otherwise, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing, termination, disclaimer or repudiation of any contract, lease or other agreement, whether written or oral or other occurrence existing or taking place on or prior to the Effective Time relating to, arising out of or in connection with any Affected Claims, this Plan, the Articles of Reorganization, the cancellation of the Securities and the transfer of the Common Shares without consideration, compensation or relief of any kind, the Restructuring Documents, the CCAA Proceedings, the Reorganization or any of the transactions implemented in connection with any of the foregoing (collectively, the "**Released Claims**"); provided, however, that nothing herein shall release or discharge a Released Party: (i) from any of its obligations under the Plan, the Restructuring Documents, the Articles of Reorganization, the Transaction Agreement or any other agreement which the Plan Participants or some of them may have entered into in connection with any of the foregoing; (ii) if such Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed gross negligence, fraud or willful misconduct; or (iii) in the case of directors in respect of any claim of the kind referred to in subsection 5.1(2) of the CCAA or (iv) the EDC Claims.

Section 8.6(ii)

- **Delete current section 8.6(ii) and replace with:**

(ii) At the Effective Time, the Company and the current and former officers and directors thereof will be released and discharged or deemed to be released and discharged by each other and all Affected Creditors and all other Persons from any and all demands, claims, actions (including any class actions or proceedings before an administrative tribunal), causes of action, grievances, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other

recoveries on account of any liability, obligation, demand or cause of action of whatever nature that any such Person may be entitled to assert, including, without limitation, any and all claims for accounting, reconciliation, contribution or indemnity, restitution or otherwise, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing, termination, disclaimer or repudiation of any contract, lease or other agreement, whether written or oral or other occurrence existing or taking place on or prior to the Effective Time relating to, arising out of or in connection with any Equity Claims; provided, however, that nothing herein shall release a director or current or former officer in respect of any claim of the kind referred to in subsection 5.1(2) of the CCAA.

Section 8.7(ii)

- **Delete current section 8.7(ii) and replace with:**

(ii) All Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Equity Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Company (or any successor thereto or the Sponsor Subsidiary) or any current or former officer or director thereof; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Company (or any successor thereto or the Sponsor Subsidiary), any current or former officer or director thereof, or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against the Company (or any successor thereto or the Sponsor Subsidiary) or any current or former officer or director thereof; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Company (or any successor thereto or the Sponsor Subsidiary), any current or former officer or director thereof, or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply in respect of any claim against a director or current or former officer of the kind referred to in subsection 5.1(2) of the CCAA.

Section 8.7(iii)

- **Delete current section 8.7(iii) and replace with:**

(iii) All Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any claim of the kind referred to in subsection 5.1(2) of the CCAA, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Company (or any successor thereto or the Sponsor Subsidiary) or its property; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Company (or any successor thereto or the Sponsor Subsidiary) or its property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against the Company (or any successor thereto or the Sponsor Subsidiary) or its property; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Company (or any successor thereto or the Sponsor Subsidiary) or its property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; and the sole recourse for any such claims against a current or former director or officer of the Company as of the date hereof shall be, and is hereby, limited to any recoveries available from the Company's insurance policies in respect of its current or former directors or officers, and that the holder of any such valid and proven claim shall be subrogated to the rights of any such director or officer to any insurance coverage available in respect of such a claim.

Schedule "C"

Blackline of Amendments

Section 8.6(i):

(i) At the Effective Time, the Released Parties will be released and discharged or deemed to be released and discharged by each of the other Released Parties and all Affected Creditors and all other Persons from any and all demands, claims, actions (including any class actions or proceedings before an administrative tribunal), causes of action, grievances, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature that any such Person may be entitled to assert, including, without limitation, any and all claims for accounting, reconciliation, contribution or indemnity, restitution or otherwise, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing, termination, disclaimer or repudiation of any contract, lease or other agreement, whether written or oral or other occurrence existing or taking place on or prior to the Effective Time relating to, arising out of or in connection with any Affected Claims, this Plan, the Articles of Reorganization, the cancellation of the Securities and the transfer of the Common Shares without consideration, compensation or relief of any kind, the Restructuring Documents, the CCAA Proceedings, the Reorganization or any of the transactions implemented in connection with any of the foregoing (collectively, the "**Released Claims**"); provided, however, that nothing herein shall release or discharge a Released Party: (i) from any of its obligations under the Plan, the Restructuring Documents, the Articles of Reorganization, the Transaction Agreement or any other agreement which the Plan Participants or some of them may have entered into in connection with any of the foregoing; (ii) if such Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed gross negligence, fraud or willful misconduct; or (iii) in the case of directors in respect of any claim of the kind referred to in subsection 5.1(2) of the CCAA or (iv) the EDC Claims.

Section 8.6(ii):

(ii) At the Effective Time, the Company and the current and former officers and directors thereof will be released and discharged or deemed to be released and discharged by each other and all Affected Creditors and all other Persons from any and all demands, claims, actions (including any class actions or proceedings before an administrative tribunal), causes of action, grievances, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature that any such Person may be entitled to assert, including, without limitation, any and all claims for accounting, reconciliation, contribution or indemnity, restitution or otherwise, whether known or unknown, matured or unmatured, direct, indirect or

derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing, termination, disclaimer or repudiation of any contract, lease or other agreement, whether written or oral or other occurrence existing or taking place on or prior to the Effective Time relating to, arising out of or in connection with any Equity Claims; provided, however, that nothing herein shall release a director or current or former officer in respect of any claim of the kind referred to in subsection 5.1(2) of the CCAA.

Section 8.7(ii):

(ii) All Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Equity Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Company (or any successor thereto or the Sponsor Subsidiary) or any current or former officer or director thereof; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Company (or any successor thereto or the Sponsor Subsidiary), any current or former officer or director thereof, or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against the Company (or any successor thereto or the Sponsor Subsidiary) or any current or former officer or director thereof; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Company (or any successor thereto or the Sponsor Subsidiary), any current or former officer or director thereof, or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply in respect of any claim against a director or current or former officer of the kind referred to in subsection 5.1(2) of the CCAA.

Section 8.7(iii):

(iii) All Persons (regardless of whether or not such Persons are Affected Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any claim ~~against a current or former director of the Company as of the date hereof~~ of the kind referred to in subsection 5.1(2) of the CCAA, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Company (or any successor thereto or the Sponsor Subsidiary) or ~~any current or former officer thereof~~ its property; (ii) enforcing, levying, attaching, collecting or

otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Company (or any successor thereto or the Sponsor Subsidiary), ~~any current or former officer thereof, or their or its~~ its property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against the Company (or any successor thereto or the Sponsor Subsidiary) or ~~any current or former officer thereof~~ its property; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Company (or any successor thereto or the Sponsor Subsidiary), ~~any current or former officer thereof, or their or its~~ its property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; and the sole recourse for any such claims against a current or former director or officer of the Company as of the date hereof shall be, and is hereby, limited to any recoveries available from the Company's insurance policies in respect of its current or former directors or officers, and that the holder of any such valid and proven claim shall be subrogated to the rights of any such director or officer to any insurance coverage available in respect of such a claim.

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 ARRANGEMENT AND REORGANIZATION OF ALLEN-VANGUARD CORPORATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND SECTION 186 OF THE *ONTARIO BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B.16, AS AMENDED

Court File No. CV-09-00008502-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

SANCTION ORDER

LANG MICHENER LLP
Brookfield Place
P.O. Box 747
181 Bay Street, Suite 2500
Toronto, Ontario
M5J 2T7

Alex Ilchenko
Telephone: (416) 307-4116
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Law Society No.: 33944Q

Lawyers for the Applicant

TAB 23

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2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260

Stelco Inc., Re

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

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

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

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: January 17, 18, 20, 2006

Judgment: January 20, 2006

Docket: 04-CL-5306

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Counsel: Michael Barrack, James D. Gage, Geoff R. Hall for Applicants

Robert Thornton, Kyla Mahar for Monitor

Peter Jervis, George Glezos, Karen Kiang for Equity Holders

John Varley for Salaried Employees

David Jacobs for USW Locals 8782, 5328

Aubrey Kauffman for Tricap Management Ltd.

Kevin Zych, Rick Orzy for 8% and 10.4% Stelco Bondholders

Lawrence Thacker for Directors of Stelco

Sharon White for USW Local 1005

Ken Rosenberg for USW International

Kevin McElcheran for GE

Gale Rubenstein, Fred Myers for Superintendent of Financial Services

Derrick Tay for Mittal

David R. Byers, Sean Dunphy for CIT Business Credit as DIP and ABL Lender

V. Gauthier for BABC Global Finance

L. Edwards for EDS Canada Inc.

Peter Jacobsen for Globe & Mail

Paul Macdonald, Andy Kent for Sunrise, Appalloosa

Murray Gold, Andrew Hatnay for Salaried Retirees

Flaviano Stanc for himself

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Business associations --- Changes to corporate status — Arrangements and compromises — With shareholders — Reorganization

Corporation negotiated plan of arrangement and reorganization to present to shareholders for approval — Arrangement acknowledged that subsequent reorganization could result in cancellation of reorganized corporation's shares based on those shares' having no value — Shareholder group claimed that sufficient value in corporation existed to fully satisfy claims of affected and unaffected creditors and to provide some additional value to shareholders — All shareholders and creditors voted on and approved arrangement in excess of statutory two-thirds requirements — Corporation brought application for order sanctioning and approving arrangement — Group brought cross-motion for adjournment of approval of arrangement for 60 days — Motion dismissed — Plan was fair, reasonable and equitable regarding existing equity — Group had not presented credible evidence that existing equity had any value independent of proposed arrangement — Despite very comprehensive capital raising and asset sale process and with market well canvassed, no interested party had come forward to conclude another deal — Significant majority of shareholders had approved of arrangement with large quorum present — No creditor opposition to arrangement existed — Creditors were accounted for and had been involved in negotiations to create arrangement.

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

Corporation negotiated plan of arrangement and reorganization to present to shareholders for approval — Arrangement acknowledged that subsequent reorganization could result in cancellation of reorganized corporation's shares based on those shares' having no value — Shareholder group claimed that sufficient value in corporation existed to fully satisfy claims of affected and unaffected creditors and to provide some additional value to shareholders — All shareholders and creditors voted on and approved arrangement in excess of statutory two-thirds requirements — Corporation brought application for order sanctioning and approving arrangement — Group brought cross-motion for adjournment of approval of arrangement for 60 days — Motion dismissed — Plan was fair, reasonable and equitable regarding existing equity — Group had not presented credible evidence that existing equity had any value independent of proposed arrangement — Despite very comprehensive capital raising and asset sale process and with market well canvassed, no interested party

2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260

had come forward to conclude another deal — Significant majority of shareholders had approved of arrangement with large quorum present — No creditor opposition to arrangement existed — Creditors were accounted for and had been involved in negotiations to create arrangement.

Cases considered by *Farley J.*:

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — considered

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 48 C.B.R. (4th) 205, 2004 CarswellQue 810 (Que. S.C.) — considered

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

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

Laidlaw, Re (2003), 2003 CarswellOnt 787, 39 C.B.R. (4th) 239 (Ont. S.C.J.) — referred to

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — considered

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

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 191 — considered

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

Generally — referred to

CROSS-MOTION by shareholder group for adjournment of arrangement implementation for 60 days.

Farley J.:

1 The Applicants (collectively "Stelco") moved for:

- (a) a declaration that Stelco has complied with the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") and the orders of this court made in this CCAA proceeding;
- (b) a declaration that the Stelco plan of arrangement pursuant to the CCAA and the reorganization of Stelco Inc. ("S") under the *Canada Business Corporations Act* ("CBCA") (collectively the "Plan") as voted on by the affected creditors of Stelco is fair and reasonable;
- (c) an order sanctioning and approving the Plan; and
- (d) an order extending the Stay Period and Stay Date in the Initial Order until March 31, 2006.

2 This relief was unopposed by any of the stakeholders except for various existing shareholders of S (who may also be employees or retirees of Stelco). In particular there was organized objection to the Plan, especially as in essence the Plan would eliminate the existing shareholders, by a group of shareholders (AGF Management Ltd., Stephen Stow, Politt & Co., Levi Giesbrecht, Joe Falco and Phil Dawson) who have styled themselves as "The Equity Holders" ("EH"). On December 23, 2005 the EH brought in essence a cross motion seeking the following relief:

- (a) An order extending the powers of the Monitor, Ernst & Young, in order to conduct a sale of the entire Stelco enterprise as a going concern through a sale of the common shares or assets of Stelco on such terms and conditions as are considered fair;
- (b) An order authorizing and directing the Monitor to implement and to take all steps necessary to complete and fulfill all requirements, terms, conditions and steps of such a sale;
- (c) An order authorizing and directing the Monitor to conduct the sale process in accordance with a plan for the sale process approved by the court;
- (d) An order directing the Monitor to retain such fully independent financial advisors and other advisors as necessary to conduct this sale process;
- (e) An order confirming that the powers granted herein to the Monitor supersede any provision of any prior Order of this Court made in the within proceedings to the extent that such provision of any prior order is inconsis-

ent with or contradictory to this order, or would otherwise limit or hinder the power and authority granted to the Monitor;

(f) An order directing Stelco and its directors, officers, counsel, agents, professional advisors and employees, and its Chief Restructuring Officer, to cooperate fully with the Monitor with regard to this sale process, and to provide the Monitor with such assistance as may be requested by the Monitor or its independent advisors;

(g) In the alternative, an order suspending the sanctioning of the Proposed Plan of Arrangement, approved by the creditors on December 9, 2005, for a period of two months from the date of such order, so that the Monitor may conduct the independent sale process that may result in a more profitable outcome for all stakeholders, including the Equity Holders;

(h) In the further alternative, an order lifting the *Companies' Creditors Arrangement Act* stay of proceedings in respect of Stelco without approving the Plan of Arrangement, as approved by the creditors on December 9, 2005, pursuant to such terms as are just and are directed by court; and

(i) Such further and other relief as counsel may advise and this Honourable Court may permit.

3 In its factum, the EH requested that the court adjourn approval of the Plan for 60 days and direct the Monitor to conduct an independent sale process for the shares of S. In the attendances on January 17 and 18, 2006, the EH then asked that approval of the Plan be adjourned for 30 days in order to see if there were expressions of interest for the shares of S forthcoming in the interim.

4 I indicated that I would defer my consideration of the adjournment request until after I had had submissions on the motions before me as set out above. I also indicated that while there did not appear to be any concern by anyone including the EH as to the first two elements concerning CCAA plan sanctioning as discussed in *Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at p. 3:

In a sanction hearing under the *Companies' Creditors Arrangement Act* ("CCAA") the general principles to be applied in the exercise of the court's discretion are:

(a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

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

(c) The Plan must be fair and reasonable.

See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201; *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at pp. 172-3; *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.), leave to appeal dismissed, [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers]).

it would not be sufficient to only deal in this hearing with the third test of whether the Plan was fair and reasonable (including the aspect of "fair, reasonable and equitable" as discussed in *Sammi Atlas Inc., Re* [1998 CarswellOnt 1145

(Ont. Gen. Div. [Commercial List])). Rather the court also had to be concerned as to whether the Plan was implementable. In other words, it would be futile and useless for the court to approve a plan which stood no reasonable prospect of being implemented. That concern of the court had been raised by my having been alerted by the Monitor in its 46th Report at paragraphs 8-9:

8. The Monitor has had discussions with the proposed ABL lenders, Tricap, the Province and Stelco regarding the status of the ABL Loan and the Bridge Loan. The Monitor has been advised that the parties are continuing to work at resolving issues that are outstanding as at the date of this Forty-Sixth Report. However, all of the parties remain optimistic that acceptable solutions to the outstanding issues will be found and implemented.

9. In the Monitor's view, the principal issues to be resolved include:

(a) the corporate structure of Stelco, which could involve the transfer of assets of some of the operations or divisions of the Applicants to new affiliates; and

(b) satisfying the ABL lenders and Tricap as to the priority of the new financing.

These issues need to be resolved primarily among the proposed ABL lenders, Tricap and Stelco and will also involve the Province insofar as they affect pension and related liabilities.

5 I was particularly disquieted by the lack of progress in dealing with these outstanding matters despite the passage of 39 days since the Plan was positively voted on December 9, 2005. I do appreciate that Christmas, Hanukkah and New Year's were celebrated in this interval and that there had been a certain "negotiation fatigue" leading up to the December 9th revisions to the Plan and that I have advocated that counsel, other professionals and litigation participants balance their lives and pay particular attention to family and health. However I find it unfortunate that there would appear to have been such a lengthy hiatus, especially when the workers at Stelco continued (as they have for the past two years while Stelco has been under CCAA protection) to produce steel in record amounts. I therefore demanded that evidence be produced forthwith to demonstrate to my satisfaction that progress was real and substantial so that I could be satisfied about implementability. As a side note I would observe that in the "normal" case, sanction orders are typically sought within two or three days of a positive creditor vote so that it is not unusual for documentation to be sorted out for a month before a plan is implemented with a closing.

6 The EH filed material to support its submission that the Plan is not fair, reasonable and equitable because it is alleged that there is currently sufficient value in Stelco to fully satisfy the claims of affected and unaffected creditors and to provide at least some value to current shareholders. The EH prefers to have a search for some entity to take out the current shareholders for "value". Fabrice Taylor, a chartered financial analyst with Pollit & Co. swore an affidavit on the eve of this hearing which was sent electronically to the service list on January 16, 2006 at approximately 7:30 p.m. In that affidavit, he states:

2. The Dofasco bidding war has highlighted a crucial fact about steel asset valuations, notably that strategic buyers place a much higher value on them than public market investors. Attached as Exhibit "1" is an article entitled "Restructuring of steel industry revives investors' interest", published in the Financial Times on December 14, 2005.

3. I, along with Murray Pollitt and a number of Stelco shareholders, have spent the past three months attempting to attract strategic buyers and/or equity investors in Stelco. These strategic buyers and equity investors are mostly international. Some had already considered buying Stelco or had made bids for the company but had stopped following

the story some months ago. Others were not very familiar with Stelco.

4. Three factors hindered our efforts. First, Stelco is under CCAA protection, a complicated situation involving multiple players and interests (unions, politics, pensions) that is difficult to understand, particularly for foreigners. Second, there has not been enough time for these strategic buyers or equity investors to deepen their understanding or to perform due diligence. Finally, the Dofasco bid process, while providing emphatic evidence that steel assets are increasingly valuable, hinders certain strategic buyers and financial institutions interested in participating in Stelco because they are distracted and/or conflicted by the Dofasco sale. I have been advised by some of the participants in the Dofasco negotiations that they would be willing to carefully consider a Stelco transaction once the Dofasco sale has been resolved.

5. The Forty Fifth Report of the Monitor confirmed that Stelco had not received any offers in the last several months. The report does not answer the question of whether the company or its financial advisors have in fact attempted to attract any offers. I believe that Stelco would have received expressions of interest had the company made efforts to attract offers, or had the Dofasco sale been resolved earlier. I believe that the Monitor should be authorized, for a period of at least 60 days, to canvas interest in a sale of Stelco before the approval of the proposed plan of restructuring.

7 No satisfactory explanation was forthcoming as to why this affidavit, if it needed to be filed at all, was not served and filed by December 23, 2005, in accordance with the timetable which the EH and the other stakeholders agreed to. Certainly there is nothing in the affidavit which is such late breaking news that this deadline could not have been met, let alone that it was served mere hours before the hearing commenced on January 17, 2006. Aside from the fact that the financing arrangements forming the basis of the Plan contained "no shop" covenants which would make it inappropriate and a breach to try to attract other offers, the foregoing excerpts from the Taylor affidavit clearly illustrate that despite apparently diligent efforts by the EH, no one has shown any real or realistic interest in Stelco. Reading between the lines and without undue speculation, it would appear that the efforts of the EH were merely politely rebuffed.

8 Certainly Stelco is not Dofasco, nor is it truly a comparable (as opposed to a contrastor). Stelco has been a wobbly company for a long time. Further as I indicated in my October 3, 2005 endorsement, in the preceding 20 months under the CCAA protection, Stelco has become "shopped worn". The unusual elevation of steel prices in the past two years has helped Stelco avoid the looming liquidity crisis which it anticipated in its CCAA filing on January 29, 2004. However even this financial transfusion has not allowed it to become a healthy company or truly given it a burgeoning war chest to weather bad times the way that other steel companies (including some in Canada) have so benefited. The redness of the visage of Stelco is not a true indication of health and well being; rather it seems that it is rouge to mask a deep pallor.

9 I am satisfied on the evidence of Hap Stephen, the Chief Restructuring Officer of Stelco and of the Monitor that there has been compliance with all statutory requirements and adherence to previous orders of the court and further that nothing has been done or purported to be done that is not authorized by the CCAA.

10 The next question to be dealt with is whether the Plan is fair, reasonable and equitable. I was advised that creditors of the affected creditor classes representing approximately 90% in value of each class voted on the Plan. The Monitor reported at para. 19 of its 44th Report as to the results of the vote held December 9th as follows:

Class of Affected Creditors	Percentage in favour by Number	Percentage in favour by Dollar Value
Stelco	78.4%	87.7%

Stelwire	89.01%	83.47%
Stelpipe	94.38%	86.71%
CHT Steel	100%	100%
Welland Pipe	100%	100%

11 This favourable vote by the affected creditors is substantially in excess of the statutory two-thirds requirement. By itself that type of vote, particularly with such a large quorum present, would ordinarily be very convincing for a court not interfering with the informed decisions of business people. With that guideline, plus the aspect that a plan need not be perfect, together with the lack of any affected creditor opposition to the Plan being sanctioned and the fact that the Plan including its ingredients and nature and amount of compromise compensation to be given to affected creditors having been exhaustively negotiated in hard bargaining by the larger creditor groups who are recognized as generally being sophisticated and experienced in this area, and the consideration of the elements in the next paragraph, it would seem to me that the Plan is fair, reasonable and equitable vis-à-vis the affected creditors and I so find. See *Sammi Atlas Inc., Re*, at p. 173; *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at p. 313; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.

12 I also think it helpful to examine the situation pursuant to the analysis which Paperny J. did in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]). That proceeding also involved an application pursuant to the corporate legislation, the *Business Corporations Act (Alberta)*, concerning the shares and shareholders of Canadian Airlines. In that case, Paperny J. found the following factors to be relevant:

(a) the composition of the vote: claims must have been properly classified, with no secret arrangements to give an advantage to a creditor or creditors; approval of the plan by the requisite majority of creditors is most important (in the case before me of Stelco: the challenge to classification was dismissed; there was no suggestion of secret arrangements; and, as discussed above, the quorum and size of the positive vote were very high);

(b) anticipated receipts in liquidation or bankruptcy: it is helpful if the Monitor or other disinterested person has prepared a liquidation analysis (in Stelco, the Monitor determined that on liquidation, affected creditor recovery would likely range from 13 to 28 cents on the dollar; it should also be observed that Stelco has engaged in extensive testing of the market as to possible capital raising or sale with the aid of established firms and professionals of great experience and had come up dry.);

(c) alternatives to the proposed plan: it is significant if other options have been explored and rejected as unworkable (in Stelco; see comment in (b));

(d) oppression of the rights of certain creditors (in Stelco, this was not a live issue as nothing of this sort was alleged);

(e) unfairness to shareholders (in Stelco, this will be dealt with later in my reasons; however allow me to observe that the interests of shareholders becomes engaged if they are not so far underwater that there is a reasonable prospect in the foreseeable future that the fortunes of a company would otherwise likely be turned around so that they would not continue to be submerged); and

(f) the public interest: the retention of jobs for employees and the support of the plan by the company's unions is

important (in Stelco, the Plan does not call for reductions in employment; there is provision for continuation of the capital expenditure program and its funding; an important enterprise for the municipal and provincial levels of government would be preserved with continuing benefits for those communities; an important customer and supplier would continue in the industry and maintain competition; the USW International Union and its locals (except for local 1005) supported the Plan and indeed were instrumental in bringing Tricap Management Limited to the table (local 1005's position was that it did not wish to engage in the CCAA process in any meaningful way as it was content to rely upon its existing collective agreement which now still has several months to go before expiring).

However that is not the end of that issue: what of the shareholders?

13 Is the Plan fair, reasonable and equitable for the existing shareholders of S? They will be wiped out under the Plan and their shares eliminated. New equity will be created in which the existing shareholders will not participate. They have not been allowed to vote on the Plan.

14 It is well established that a reorganization pursuant to s. 191 of the CBCA may be made in conjunction with a sanction order under the CCAA and that such a reorganization may result in the cancellation of existing shares of the reorganized corporation based on those shares/equity having no present value (in the sense of both value "now" and the likelihood of same having value in the reasonably foreseeable future, absent the reorganization including new debt and equity injections and permitted indulgences or other considerations and adjustments). See *Beatrice Foods Inc., Re* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]) at para. 10-15; *Laidlaw, Re* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.); *Algoma Steel Inc., Re* at para. 7; *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at p. 217. The Dickenson Report, which articulated the basis for the reform of corporate law that resulted in the enactment of the CBCA, described the object of s. 191 as being:

to enable the court to effect any necessary amendment to the articles of the corporation in order to achieve the objective of the reorganization without having to comply with all the formalities of the Draft Act, particularly shareholder approval of the proposed amendment (emphasis added): R.W.V. Dickenson, J.L. Howard, L. Getz, *Proposals for a New Business Corporations Law for Canada*, vol. 1 (Ottawa: Information Canada. 1971) at p. 124.

15 The fairness, reasonableness and equitable aspects of a plan must be assessed in the context of the hierarchy of interests recognized by insolvency legislation and jurisprudence. See *Canadian Airlines Corp., Re* at pp. 36-7 where Paperny J. stated:

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

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

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.

16 The question then is does the equity presently existing in S have true value at the present time independent of the Plan and what the Plan brings to the table? If it does then the interests of the EH and the other existing shareholders must be considered appropriately in the Plan. This is fairly put in K.P. McElcheran, *Commercial Insolvency in Canada* (Toronto, Lexis Nexis Canada Inc.: 2005) at p. 290 as:

If, at the time of the sanction hearing, the business and assets of the debtor have a value greater than the claims of the creditors, a plan of arrangement would not be fair and reasonable if it did not offer fair consideration to the shareholders.

17 However if the shareholders truly have no economic interest to protect (keeping in mind that insolvency and the depth of that insolvency may vary according to which particular test of insolvency is applied in respect of a CCAA proceeding: as to which, see *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), leave to appeal dismissed [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal dismissed [2004 CarswellOnt 5200 (S.C.C.)] No. 30447). In *Cable Satisfaction*, Chaput J. at p. 218 observed that when shareholders have no economic interest to protect, then they have no claim to a right under the proposed arrangement and the "[m]ore so when, as in the present case, the shareholders are not contributing to any of the funding required by the Plan." I do note in the case of the Stelco Plan and the events leading up to it, including the capital raising and sale processes, that despite talk of an equity financing by certain shareholders, including the EH, no concrete offer ever surfaced.

18 If the existing equity has no true value at present, then what is to be gained by putting off to tomorrow (the ever present and continuous problem in these proceedings of manāna — which never comes) what should be done today. The EH speculate, with no concrete basis for foundation as demonstrably illustrated by the eve of hearing Taylor affidavit discussed above, that something good may happen. I am of the view that that approach was accurately described in court by one counsel as a desperation Hail Mary pass and the willingness of someone, without any of his own chips, in the poker game willing to bet the farm of someone else who does have an economic interest in Stelco.

19 I also think it fair to observe that in the determination of whether someone has an economic value, that analysis should be conducted on a reasonable and probable basis. In a somewhat different but applicable context, I observed in *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) at p. 3:

The "highest price" is not the price which could be derived on the basis of the most optimistic and risky assumptions without any regard as to their likelihood of being realized. It also seems to me that prudence would involve a consideration that there be certain fall back positions. Even in betting on horses, the most savvy and luckiest punter will not continue to stake all his winnings of the previous race on the next (and so on). If he does, he will go home wearing the barrel before the last race is run.

Alternatively there is a saying: "If wishes were horses, then beggars would ride."

20 Unless I were to now dismiss the motion for sanctioning and approving the Plan because I found that it was not implementable and/or that it was not fair, reasonable and equitable to the existing shareholders (based upon the proviso that I did determine that the existing shareholders did have a valid present material equity of value), then I see no reason not to dismiss the motion of the EH concerning its request for an adjournment and its request for a further sale (or other related disposition) process. Allow me to observe that no matter how well intentioned the motion of the EH in that regard, I find that that request to be lacking in any valid substance. Rather, the evidence presented was in essence a chimaera. I think it fair to observe that, with all the capital raising and sales processes to date which Stelco has undertaken in conjunction with its experienced and well placed professional advisers together with its Chief Restructuring Officer and the Monitor, the bushes have been exhaustively and well beaten as to any real possible interest. Despite three months of what one must presume to be diligent efforts, the EH have come up with nothing concrete. I do not find that the three factors mentioned by Taylor in his late-blooming affidavit of January 16th to be remotely close to convincing. The first two, if taken at face value, would lead one to the conclusion that no one has the time, interest or ability to take an interest in Stelco in any meaningful timeframe. The third presumes that the losing bidder for Dofasco, be it Arcelor or ThyssenKrupp, will almost automatically want Stelco — and at a price and upon terms which would result in present equity being attributed value. I must say in fairness that this is wishful thinking as neither of these warring bidders pursued any interest in Stelco during the previous processes. It is neither clear nor obvious why mere municipal proximity of Dofasco to Stelco's Hilton Works in Hamilton would now ignite any interest in Stelco.

21 I also think it fair to observe that not proceeding with the sanction hearing now and indeed starting a brand new search for someone who will think Stelco so worthwhile that it will offer such a large amount (with or without onerous conditions) is akin to someone coming into court when a receiver is seeking court approval on a sale — and that someone being allowed to know the price and conditions — and then being able to make an offer for a price somewhat higher. (I reiterate that here we do not even have an offer or a price.) I do not see that such a procedure would be consistent with the principles laid out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.). Given that the affected creditors have rather resoundingly voted in favour of the Plan, all in accordance with the provisions of the CCAA and the Court orders affecting the sanction, I would be of the view that if the existing equity has no value, then the EH's request in this respect would, if granted, be of significant detriment to the integrity of the insolvency system and regime. I would find that inappropriate to attempt to justify proceeding along that line.

22 Allow me to return to the pivotal point concerning the question of whether the Plan is fair, reasonable and equitable, vis-à-vis the existing equity. The EH retained Navigant Consulting which relied upon the views of Metal Bulletin Research ("MBR") which, *inter alia*, predicted a selling spot price of hot roll steel at \$525 U.S. per ton. Navigant's conclusion in its December 8, 2005 report was that the value of residual shareholder equity was between \$1.1 to \$1.3 billion or a per share value of between \$10.76 and \$12.71. However, when Stelco pointed out certain deficiencies in this analysis, Navigant took some of these into account and reduced its assessment of value to between \$745 million to \$945 million for residual shareholder value on per share value of \$7.29 to \$9.24, using a discounted cash flow ("DCF") approach. Navigant tested the DCF approach against the EBITDA approach. It is interesting to note that on the EBITDA analysis approach Navigant only comes up to a conclusion that the equity is valued at \$8 million to \$83 million or \$0.09 to \$0.81

per share. If the Court were to accept that as an accurate valuation, or something at least of positive value even if not in that neighbourhood, then I would have to take into account existing shareholder interests in determining whether the Plan was fair, reasonable and equitable — and not only vis-à-vis the affected creditors but also vis-à-vis the interests of the existing shareholders given that at least some of their equity would be above water. I understand the pain and disappointment of the existing shareholders, particularly those who have worked hard and long with perhaps their life savings tied up in S shares, but regretfully for them I am not able to come to a conclusion that the existing equity has a true positive value.

23 The fight in the Stelco CCAA proceedings has been long and hard. No holds have been barred as major affected creditors have scrapped to maximize their recovery. There were direct protracted negotiations between a number of major affected creditors and the new equity sponsors under the Plan, all of whom had access to the confidential information of Stelco pursuant to Non Disclosure Agreements. These negotiations established a value of \$5.50 per share for the *new* common shares of a *restructured* Stelco. That translates into an enterprise value (not an equity value since debt/liabilities must be taken into consideration) of \$816.6 million for Stelco, or a recovery of approximately 65% for affected creditors. The parties engaged in these negotiations are sophisticated experienced enterprises. There would be no particular reason to believe that in the competition involved here that realistic values were ignored. Further, the affected creditors generally were rather resoundingly of the view by their vote that an anticipated 65% recovery was as good as they could reasonably expect.

24 The 45th Report of the Monitor had a chart of calculations to determine the level of recovery of affected creditors at various assumed enterprise values up to and including the top end of Navigant's range of enterprise value (as contrasted with residual equity value). At the high end of Navigant's range of revised enterprise value, \$1.6 billion, the Monitor calculated that affected creditors would still not receive full recovery of their claims.

25 The EH cited the sale of the EDS Canada claim to Tricap as being at a premium as evidence in support of Navigant's conclusion. However, the fact was that this claim was purchased not at a premium, but rather at a discount. That would be confirmation of the opposite of which the EH has been contending.

26 Despite a very comprehensive capital raising and asset sale process, with the market alerted and well canvassed, and with the ability to conduct due diligence, no interested party came forward to conclude a deal. Even since the December 9, 2005 vote when the terms of the Plan were available, no interested party has come forward with any expression of interest which would attribute value to the existing shareholders.

27 Stelco's experts, UBS and BMO Nesbit Burns, both have given opinions that there is no value to the existing equity. Their expert opinions were not challenged by cross-examination. Both these advisors are large sophisticated institutions; both have extensive experience in the steel industry.

28 UBS calculated the enterprise value of Stelco as being in the range of \$550 million to \$750 million; BMO Nesbitt Burns at \$650 million to \$850 million. On that basis the unsecured creditors would receive less than full recovery of their claims, which would lead to the conclusion that there is no value for the existing shareholders. The Monitor commissioned an independent estimate of the enterprise value from its affiliate, Ernst & Young Orenda Corporate Finance Inc's Valuation Group. That opinion came in at \$635 million to \$785 million.

29 I would note that Farley Cohen, the principal author of the Navigant report, does not have experience in dealing with integrated steel companies. I find it unusual that he would have customized his approach in calculating equity value by not deducting the Asset Based Lenders loan. Brad Fraser of BMO Nesbitt Burns stated that such customization was contrary to the practice at his firms both present and past and that the Navigant's approach was internally inconsistent

with respect thereto as to 2005 to 2009 cash flows as contrasted with terminal value. The Navigant report appears to have forecasted a high selling price for steel combined with low costs for imports such as coal and scrap, which would be contrary to historical complementary movements between steel prices and these inputs.

30 Navigant relies on an average price of \$525 US per ton as provided by MBR. This is a single source as to this forecast. While a single analyst may come up with a forecast which is shown by the passage of time to be dead on accurate, it would seem to me to be more realistic and prudent to rely on the consensus approach of considering the views of a greater number of "representative" analysts, especially when prices appear volatile for the foreseeable future. That consensus approach allows for consideration of the way that each analyst looks at the market and the factors and weights to be given. The UBS opinion reviewed the pricing forecast of eight analysts and BMO Nesbitt Burns' ten analysts. Interestingly, MBR's choice of a price at the top of the band would seem at odds as the statements on the MBR website foreseeing downward pressure on steel prices in 2006 because of falling prices in China; although this inconsistency was pointed out, there was no response forthcoming.

31 Navigant estimated Stelco's financial performance for the last quarter of 2005 and made a significant upward adjustment. However, the actual experience would appear to indicate that such an adjustment would overstate Stelco's results by \$124 million.

32 Navigant's DCF approach involved a calculation of Stelco's enterprise value by adding the present value of a stream of cash flow from the present to 2009 and the present value of the terminal value determined as at 2009 so that the terminal value represents the majority (60% approximately) of enterprise value as calculated by Navigant. MBR chose a 53-year average steel price despite significant changes over that time in the industry. However, coal and scrap costs were determined as at 2009. This produced the anomalous result that steel prices are rising while costs are falling. This would imply great structural difficulties (economically and functionally) in the steel industry generally and a lack of competition. A terminal value EBITDA margin for Stelco would then be implied at approximately 26% or some 11% higher than the EBITDA margin actually achieved by Stelco in the first quarter of 2005, the most profitable quarter in the history of Stelco.

33 Interestingly, since Navigant's approach in fact would decrease calculated value, UBS and BMO Nesbitt Burns used a weighted average cost of capital ("WACC") for Stelco in the range of 10% to 14%; Navigant used 24%. A higher WACC will result, all other things being equal, in a lower enterprise value. Navigant considered that there should be a 10% to 15% company-specific premium because of the risks associated with Stelco vis-à-vis the higher steel prices forecast by MBR. This would appear to imply that there was recognition that either MBR was aggressive in its forecasting or that price volatility would caution one to use consensus forecasting. Colin Osborne, a senior executive of Stelco, with considerable experience in the steel industry provided direct evidence on the substantial differences between each of Stelco, AK Steel, U.S. Steel and Algoma. Mr. Cohen acknowledged in cross-examination that these differences made Dofasco a more valuable company than Stelco. As set out at para. 74 of the Stelco Factum:

74. The specific difference identified by Mr. Osborne which made Dofasco unique include but are not limited to:

- (a) non-union, flexible work environment (vs. Stelco, Algoma, AK Steel and U.S. Steel);
- (b) legacy costs which are very low due to non-conventional profit sharing, which limits liability (vs. Stelco, AK Steel, Algoma and U.S. Steel);
- (c) high historical cap-ex spend per ton (vs. Stelco, Algoma and U.S. Steel);

(d) a flexible steelmaking stream in terms of a hybrid EAF and blast furnace BOF stream in Hamilton and a mini-mill operation in the U.S. (vs. Stelco, Algoma, U.S. Steel and AK Steel which are all blast furnace based steel makers);

(e) a value added product mix focused on coated products and tubing (vs. Stelco and Algoma which focus on hot roll); and

(f) a strong raw material position with excess iron ore and self-sufficiency in coke (Algoma, Stelco and AK Steel all have dependence to various degrees on either iron ore or coke or both).

Dofasco and Stelco are not in my view fungible. There are incredible differences between these two enterprises, to the disadvantage of Stelco.

34 The reply affidavit of Mr. Fraser of BMO Nesbitt Burns calculated the effect of all of the acknowledged corrections to the initial Navigant report and other adjustments. The result of this exercise was a conclusion by him that there was no value available for existing shareholders. This, along with all the other affidavits provided on the Stelco side, was not cross-examined on.

35 While not referred to in the Factum of EH, there were a number of quite serious allegations raised in material filed by the EH against management of Stelco concerning bias and manipulation. Mr. Osborne responded to each of these allegations; he was not cross-examined. I find it unfortunate that such allegations appear to have been made on an unsubstantiated shotgun approach.

36 The position of the EH is that certain of the features of the Plan should be assumed as transportable directly and without change into a scenario where some insolvency rescuer emerges on the scene as the equivalent of a White Knight, one it would seem which has been awakened from slumber. I am of the view that presumes too much. For example, I take it that the Province would not automatically accept this potential newcomer without question; nor would it likely relish the resumption of weeks of hard bargaining. I would think it unwise, impudent and high stakes poker (with other peoples' money) to speculate as did Taylor in para. 41 of his December 23, 2005 affidavit:

41. Were Stelco to emerge from CCAA protection and were the province to carry out its threat to revoke Stelco's entitlement to the benefit of section 5.1 the end result would likely be a liquidation of the company. The Province would be responsible for a substantial portion of Stelco's pension promise. It would clearly not be in the Province's self-interest to force Stelco into liquidation. It was, in other words, an obvious bluff. Yet the notion of calling this bluff does not appear to have crossed management's mind.

This should be contrasted with the views of the Monitor in its 44th Report at para. 61:

61. It should also be noted that the Pension Plan Funding Arrangements and the \$150 million New Province Note embodied in the Approved Plan were agreed to by the Province only in the context of the terms of the Approved Plan and, in particular, the capital structure, liquidity and other elements contemplated therein. The Province has advised that its proposed financing and the Pension Plan Funding Arrangements should not be assumed to be available if any of the elements of the Approved Plan are changed.

37 The end result is that given the above analysis, I have no hesitation in concluding that it would be preferable to rely upon the analysis of UBS, BMO Nesbitt Burns and Ernst & Young Orenda, both as to their direct views as to the en-

terprise value of existing Stelco and as to their criticism of the Navigant and MBR reports concerning Stelco. Therefore, I conclude that the existing shareholders cannot lay claim to there being any existing equity value. Given that conclusion, it would be inappropriate to justify cutting in these existing shareholders for any piece of the emergent restructured Stelco. If that were to happen, especially given the relative values and the depth of submersion of existing equity, then it would be unfair, unreasonable and inequitable for the affected creditors.

38 That then leaves the remaining question: Does it appear likely that the Plan will be implementable? I have been advised on Wednesday, January 18th that I would receive executed term sheets (which would address the issues raised by the Monitor discussed above) by 5 p.m., Friday, January 20th.

39 The motion and adjournment request of the EH is dismissed.

40 There was a request to extend the stay to March 31, 2006. I am of the view that it would be sufficient and desirable to extend the stay (subject, of course, to further extension) to March 3, 2006.

41 I have received the term sheets together with the Monitor's 48th Report by the 5 p.m. January 20th deadline and find them satisfactory as demonstrating to my analysis and satisfaction that the Plan is implementable as discussed above, subject to a comeback provision if anyone wishes to dispute the implementability issue (the onus remaining on Stelco). My decision today re: implementability should in no way be taken as deciding any corporate reorganization issue or anything of that or related nature. I therefore sanction and approve the Plan.

Motion dismissed.

END OF DOCUMENT

TAB 24

2003 CarswellOnt 787, 39 C.B.R. (4th) 239

2003 CarswellOnt 787, 39 C.B.R. (4th) 239

Laidlaw, Re

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of the Business Corporations Act (Ontario), R.S.O. 1990 c. B. 16, as Amended

In the Matter of Laidlaw Inc. and Laidlaw Investments Ltd.

Ontario Superior Court of Justice

Farley J.

Heard: February 28, 2003

Judgment: February 28, 2003

Docket: 01-CL-4178

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Counsel: *J. Carfagnini, B. Empey*, for Laidlaw Applicants

D. Tay, for Ernst & Young Inc., Monitor

S.R. Orzy, K.J. Zych, for Bondholders Subcommittee

D. Byers, for Bank Subcommittee

J. Marin, for Safety Kleen Corporation

R. Jaipargas, for Federal Insurance Company, Chubb Insurance Company

Subject: Corporate and Commercial; Insolvency

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

Applicant debtors and others commenced proceedings under chapter 11 of United States Bankruptcy Code — Joint plan of reorganization for debtors was confirmed by U.S. judge — Debtors brought application for order pursuant to s. 18.6(2) of Companies' Creditors Arrangement Act recognizing and implementing order confirming plan and for order pursuant to s. 18.6(2) of Act recognizing and implementing plan in Canada — Application

granted — Section 18.6(2) of Act provides court with authority to coordinate proceedings under Act with any foreign proceeding — Applicant debtors were entitled to relief under Act and U.S. proceedings had been recognized as foreign proceeding for purposes of Act — Global nature of plan of restructuring was appropriate consideration on application — Over 90% of revenues for debtors were produced by operations in United States — Ontario court had been apprised of developments relating to U.S. proceedings on regular basis — In these circumstances, full force and effect should be given in Canada to confirmation order and to plan of reorganization pursuant to s. 18.6(2) of Act.

Cases considered by *Farley J.*:

Algoma Steel Inc., Re, 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Babcock & Wilcox Canada Ltd., Re, 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — followed

Beatrice Foods Inc., Re (October 21, 1996), Doc. 295-96 (Ont. Gen. Div.) — considered

Loewen Group Inc., Re, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 173 — considered

s. 173(1)(o) — considered

s. 176(1)(b) — considered

s. 191 — considered

s. 191(2) — considered

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

Generally — referred to

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — referred to

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 20 — referred to

APPLICATION by debtors for order recognizing and implementing United States order confirming plan of reorganization and for order recognizing and implementing plan in Canada.

Farley J.:

1 The applicants sought an order as follows:

- a. an order pursuant to section 18.6(2) of the *Companies' Creditors Arrangement Act* (the "CCAA") recognizing and implementing in Canada the Order (the "U.S. Confirmation Order") of the Honourable Judge Kaplan of the United States Bankruptcy Court for the Western District of New York (the "U.S. Court") providing for, *inter alia*, confirmation of the Third Amended Joint Plan of Reorganization of Laidlaw USA, Inc. and its Debtor Affiliates, as may be amended from time to time prior to the date of the U.S. Confirmation Order (the "POR");
- b. an order pursuant to section 18.6(2) of the CCAA recognizing and implementing in Canada the POR;
- c. an order, pursuant to section 191 of the *Canada Business Corporations Act* ("CBCA"), authorizing the amendment of LINC's articles in accordance with articles of reorganization substantially in the form attached as Schedule "A" hereto;
- d. an order extending the stay of proceedings.

2 The facts in this matter have been appropriately summarized in the factum of the applicants as follows:

PART II — THE FACTS

A. The Cross Border Reorganization

.....

3. On June 28, 2001, the Applicants, together with Laidlaw USA, Inc., Laidlaw One, Inc., Laidlaw International Finance Corporation and Laidlaw Transportation, Inc. (collectively, the "Debtors") commenced proceedings under chapter 11 of the United States Bankruptcy Code in the U.S. Court, which proceedings are jointly administered under Case Nos. 01-14099 K through 01-14104 K (the "U.S. Proceedings").
4. Pursuant to the order of this Honourable Court dated June 28, 2001 (the "June 28 Order"), this Honourable Court, among other things, ordered that the Applicants were entitled to relief under the CCAA and granted a stay of proceedings.
5. Pursuant to the June 28 Order, this Court also recognized the U.S. Proceedings as foreign proceedings for the purposes of the CCAA.
6. By Order dated August 10, 2001 (the "August 10 Order"), this Honourable Court, among other things, approved a cross-border insolvency protocol (which has also been approved by the U.S. Court) (the "Protocol") to assist in coordinating activities in these proceedings and the U.S. Proceedings.
7. The Protocol was developed to promote the following mutually desirable goals and objectives:

(a) harmonize, coordinate and minimize and avoid duplication of activities in the proceedings before the U.S. Court and this Court;

(b) promote the orderly and efficient administration of the proceedings in the U.S. Court and this Court to, *inter alia*, reduce the costs associated therewith and avoid duplication of effort, all in order to allow the businesses operated by LINC's subsidiaries to be recognized as a global enterprise; and

(c) promote international cooperation and respect for comity among the Courts.

8. For the past several years, United States-based operations have generated more than 90% of LINC's revenue on a consolidated basis.

B. Single Claims Process

9. Pursuant to the August 10 Order, this Honourable Court also recognized and approved, as the single claims process applicable to and binding on all creditors, wherever located, of the Debtors, a claims process approved by Order of the U.S. Court on August 7, 2001, (the "Claims Process").

10. Notice of the Claims Process was (i) published in the national editions of the *National Post* and *The Globe and Mail* and, in French, in *La Presse*, as well as in *The Wall Street Journal* and *The New York Times*, (ii) mailed to addresses of known creditors of the Debtors in the United States, Canada and elsewhere and (iii) posted on LINC's website.

11. Approximately 950 proofs of claim were received in response to the Claims Process. The Debtors have entered into settlement agreements involving many of the largest unliquidated claims.

C. POR and Disclosure Statement

(a) Previous Versions of the POR and Disclosure Statement

12. Previous versions of the POR and a Disclosure Statement for the POR (the "Disclosure Statement") have been filed with the U.S. Court and with this Honourable Court at the commencement of the respective proceedings in June, 2001 and on August 6, 2002 and September 20, 2002 (the "September Disclosure Statement").

(b) Initial Solicitation Process

13. On September 24, 2002, the U.S. Court entered an order (the "September 24 Order") which, among other things: (a) approved the September Disclosure Statement; (b) approved a form of confirmation hearing notice (the "September Confirmation Hearing Notice"); (c) scheduled the hearing for the confirmation of the POR by the U.S. Court (the "November Confirmation Hearing"); and (d) required the Debtors to publish a notice substantially in the form of the September confirmation Hearing Notice not less than 25 days before the November Confirmation Hearing.

14. On September 27, 2002, this Honourable Court granted an Order (the "September 27 Order") which, among other things: (a) declared that the U.S. Court has the jurisdiction to compromise claims against the Applicants; (b) recognized, and declared to be effective in Canada, the September 24 Order; (c) relieved the Applicants from any obligation to file a separate plan in Canada under the CCAA; (d) provided for the Ap-

plicants to publish a notice of the granting of such relief (the "Canadian Notice") in various newspapers in Canada; and (e) allowed interested persons to bring a motion to apply to this Court to vary or rescind the September 27 Order within 14 days after the publication of the Canadian Notice.

15. The Canadian Notice was published on Friday, October 4, 2002 in the *National Post*, *The Globe and Mail* and *La Presse*. No person has brought a motion to vary the September 27 Order.

(c) Amended POR and Disclosure Statement

16. Following the granting of the September 24 Order and the September 27 Order, the Debtors and their advisors continued their efforts to resolve certain outstanding issues before the September Confirmation Hearing Notice could be published and before the September Disclosure Statement could be printed. Included in those efforts were discussions with the Pension Benefit Guaranty Corporation (the "PBGC") of the United States which contacted the Debtors after the Orders had been granted and advised that it had concerns about the impact of the POR on certain claims that the PBGC had or may assert.

17. As discussions continued, the Debtors and their advisors determined that the September Disclosure Statement would not be printed and the September Confirmation Hearing Notice would not be published until the material issues were resolved. As a result, the Confirmation Hearing did not take place as scheduled.

18. An agreement in principle had been reached between the Debtors and PBGC. The POR and Disclosure Statement have been amended to reflect the discussions and settlement reached among the Debtors and PBGC.

19. The POR provides for, among other things: (a) cancellation of approximately US\$3.4 billion of indebtedness in exchange for cash or newly-issued common stock (the "New Common Stock") of Reorganized LIL ("New LINC"), which will, through a series of restructuring transactions, become the ultimate parent holding company of the remaining Reorganized Debtors and their non-debtor affiliates; (b) the cancellation of the Old Common Stock and Old Preferred Stock of LINC; (c) the assumption, assignment and rejection of certain Executory Contracts and Unexpired Leases to which one or more of the Debtors is a party; (d) settlements of certain disputes between or among the Debtors and various creditor groups; and (e) implementation of the Laidlaw Bondholders' Settlement and the Safety-Kleen Settlement, each of which has previously been approved by this Honourable Court and the U.S. Court.

(d) Amended Solicitation Process

20. As a result of the amendments to the POR and the Disclosure Statement, on January 23, 2003 amended versions of the POR and the Disclosure Statement were filed with the U.S. Court and the U.S. Court granted a further Order (the "January 23 Order") approving the form of Disclosure Statement, establishing procedures for solicitation and tabulation of votes, setting 5:00 p.m., Eastern Time, February 24, 2003, as the Voting Deadline for the submission of ballots, scheduling the Confirmation Hearing before the U.S. Court for February 27, 2003 at 10:00 a.m., Eastern Time, and approving the Form of Notice of the Voting Deadline and the Confirmation Hearing (the "February Confirmation Hearing Notice").

21. Other than the necessary changes to dates involved in the process, neither the January 23, Order nor the February confirmation Hearing Notice are substantially different from the September 24 Order and November Confirmation Hearing Notice which were recognized by this Honourable Court pursuant to the Septem-

ber 27 Order. No party was prejudiced by the subsequent delay in the voting process.

D. Approval of POR

22. The February Confirmation Hearing Notice was published on or about January 31, 2003 in the following newspapers in Canada and the United States: (a) the *National Post*; (b) *The Globe and Mail*; (c) *La Presse*; (d) *The Wall Street Journal*; and (e) *The New York Times*.

23. The Voting Deadline set out in the January 23 Order has now passed. The voting in all relevant Classes has been overwhelmingly in favour of the POR.

24. Prior to the objection deadline established by the U.S. Court and after distribution of over 100,000 copies of the POR and Disclosure Statement to parties in interest, only 6 objections to confirmation of the POR were filed. The Debtors and their advisors expect that these objections (to the extent not resolved or withdrawn) will be overruled at the Confirmation Hearing.

25. On February 27, 2003, the U.S. Court issued the U.S. Confirmation Order. The U.S. Court found, among other things, that the POR complied in all respects with the requirements of the United States Bankruptcy Code and related rules. In particular, the U.S. Court found that:

- (a) the POR contained all provisions required by law;
- (b) the POR was proposed in good faith;
- (c) the POR was in the best interests of the creditors of the Debtors;
- (d) the POR was feasible; and
- (e) the POR satisfied the "cram-down" requirements of the United States Bankruptcy Code.

26. The POR, as approved by the U.S. Confirmation Order, expressly contemplates and requires that the Applicants will seek an order effecting and implementing in Canada certain elements of the Restructuring Transactions and the POR.

3 Allow me now to turn to the law as it applies to this particular fact situation. Section 18.6(2) of the CCAA provides the Court with authority of latitude to coordinate proceedings under the CCAA with any "foreign proceeding" (that term being defined in s.18.6(1) to mean "a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally").

s.18.6(2) The Court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

The applicants are debtor companies entitled to relief pursuant to the CCAA and the U.S. Proceedings have been recognized by the June 28 Order as a "foreign proceeding" for the purposes of the CCAA.

4 The purpose of s. 18.6(2) is to give the Court broad and flexible jurisdiction to facilitate cross-border in-

solvency proceedings which involve concurrent filings in Canada under the CCAA and in a foreign jurisdiction under the insolvency laws of that latter jurisdiction. The discretion given to a Canadian judge thereby must be exercised judicially. In appropriate circumstances, this may include a Canadian Court making an order which recognizes and gives effect to insolvency proceedings in foreign Courts and orders thereby emanating from those foreign Courts. As I observed in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at pp 107-8, factors which reasonably ought to be considered under the "recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged" and that an enterprise should be permitted to "reorganize as a global unit."

5 Given that in this case, there are the following facts:

- (a) the Protocol has been implemented by both this Court and the U.S. Court;
- (b) the U.S. Proceedings are foreign proceedings for the purposes of the CCAA;
- (c) the stakeholders of the Applicants (and the other Debtors) have been subject to a single claims process which treats them equally regardless of the jurisdiction in which they reside;
- (d) the global nature of the restructuring proposed by the POR;
- (e) ample notice has been given of the existence of these proceedings and the U.S. Proceedings;
- (f) over 90% of revenues for the Debtors are produced by operations in the United States; and
- (g) this Court has been apprised of developments relating to the U.S. Proceedings on a regular basis.

and further that in applying the guidelines set out in *Babcock & Wilcox Canada Ltd.* I granted the September 27 Order providing *inter alia*:

- (a) ordering and declaring that the U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interest of claimants against, including creditors and shareholders of, the Applicants; and
- (b) relieving the Applicants from the obligation to file a Plan of Compromise in Canada under the CCAA unless and until the proposed POR was rejected or refused by the U.S. Court.

and further given that I have already determined that the U.S. Court is the appropriate forum for adjudicating, determining, compromising or otherwise affecting all claims against the applicants and given that I have relieved the applicants (in the particular circumstances of this case) of the obligation to file a CCAA plan, it seems to me that it is appropriate in the circumstances to recognize and give full force and effect in Canada, to the Confirmation Order and the POR pursuant to s.18.6(2). I note in that respect that the POR has now been approved by the creditors of the Debtors, including the creditors of the applicants and confirmed by the U.S. Court following a Confirmation Hearing. That approval by the creditors of the applicants was by an overwhelming vote of over 96% in number and over 99% in value of each of the classes of creditors, which creditors had the benefit of fulsome disclosure.

6 The POR expressly contemplates that the Canadian Court would be asked for a s.18.6(2) order recognizing and implementing in Canada the Confirmation Order and the POR. In my view in the circumstances of this

case that would be a fair and reasonable result *vis-à-vis* all affected persons on either side of the U.S. — Canadian border in providing an equitable solution. See *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]) for a case of quite similar circumstances.

7 In addition the applicants sought an order pursuant to s.191 of the CBCA amending LINC's articles. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder or dissent rights.

191(1) In this section, "reorganization" means a court order made under

- (a) section 241;
- (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
- (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

(3) If a court makes an order referred to in subsection (1), the court may also

- (a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and
- (b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by section 19 and 113, if applicable.

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

8 The CCAA is an "other Act of Parliament that affects the rights among the corporation, its shareholders and creditors". See s.20 of the CCAA; *Beatrice Foods Inc., Re* (October 21, 1996), Doc. 295-96 (Ont. Gen. Div.), Houlden J.A., unreported.

9 The amendment to the articles would effect a cancellation of all presently outstanding shares of LINC. This is appropriate in the circumstances since:

- (a) such shares do not have value and are not likely to have value in the foreseeable future;
- (b) subsection 191(2) of the CBCA, which permits the Court to amend articles to effect any change that might be made under Section 173 of the CBCA, grants substantive, and not simply procedural, powers to amend the articles of a CBCA corporation;
- (c) paragraph 173(o) of the CBCA provides that articles may be amended to "add, change or remove any other provision that is permitted by the [CBCA] to be set out in the articles"; and
- (d) Section 173 of the CBCA is supported by paragraph 176(1)(b) of the CBCA, which contemplates amendments to the articles of a corporation to effect the cancellation of all or part of the shares of a class of shares.

See *Beatrice Foods Inc., Re; Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), R. Dickerson, L. Getz and J. Howard, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at p. 124.

10 The requested relief is granted. Order to issue as per my fiat.

11 I would wish to reiterate my comments at the end of today's hearing as to my appreciation to counsel on all sides throughout these CCAA proceedings and to Judge Kaplan of the U.S. Bankruptcy Court who shouldered so well the bulk of the burden of these coordinated U.S./Canadian proceedings.

Application granted.

END OF DOCUMENT

TAB 25

1996 CarswellOnt 5598, 43 C.B.R. (4th) 10

1996 CarswellOnt 5598, 43 C.B.R. (4th) 10

Beatrice Foods Inc., Re

In the Matter of Beatrice Foods Inc.

And In the Matter of an application under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 for a compromise and arrangement with respect to Beatrice Foods Inc. and a reorganization of share capital and appointment of directors of Beatrice Foods Inc. under the Canada Business Corporations Act, R.S.C. 1985, c. C-44

Application Under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36

Ontario Court of Justice (General Division) [Commercial List]

Houlden J.A. (ex officio)

Judgment: October 21, 1996

Docket: 295-96

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Counsel: *Joseph Groia, Barry I. Goldberg and Jonathan Stainsby*, for Beatrice Foods Inc. and Beatrice Foods Holdings Corp.

Patricia D.S. Jackson, David E. Baird and Thomas J. Matz, for Informal Committee of Noteholders

Ronald Walker, Sheryl Seigel for the Senior Banks

Malcolm M. Mercer, Terry Dolan and Norma Priday, for Merrill Lynch Funds

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Application of Act

Applicant brought application for order under Companies' Creditors Arrangement Act (CCAA) for approval of plan of compromise and arrangement and for order under Canada Business Corporations Act (CBCA) amending its articles to effect concurrent reorganization of share capital and to appoint directors — Application granted — Statutory requirements under CCAA had been complied with and plan was fair and reasonable — Section 191 of CBCA conferred jurisdiction on court to amend articles of applicant as requested — Order under CCAA constituted order made under "any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors" within meaning of s. 191 of CBCA — Section 191(2) of CBCA gives substantive and not merely procedural powers to amend articles of CBCA corporation — Court may amend articles to effect any

1996 CarswellOnt 5598, 43 C.B.R. (4th) 10

change that might lawfully be made by amendment under s. 173 of CBCA — Shareholders had no status to object to plan as common shares had no value.

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

Applicant brought application for order under Companies' Creditors Arrangement Act (CCAA) for approval of plan of compromise and arrangement and for order under Canada Business Corporations Act (CBCA) amending its articles to effect concurrent reorganization of share capital and to appoint directors — Application granted — Statutory requirements under CCAA had been complied with and plan was fair and reasonable — Section 191 of CBCA conferred jurisdiction on court to amend articles of applicant as requested — Order under CCAA constituted order made under "any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors" within meaning of s. 191 of CBCA — Section 191(2) of CBCA gives substantive and not merely procedural powers to amend articles of CBCA corporation — Court may amend articles to effect any change that might lawfully be made by amendment under s. 173 of CBCA — Shareholders had no status to object to plan as common shares had no value.

Cases considered by *Houlden J.A. (ex officio)*:

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.*) 88 O.A.C. 161, 1996 CarswellOnt 316 (Ont. C.A.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 173 — considered

s. 173(1)(o) — considered

s. 176(1)(b) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — considered

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

Generally — considered

s. 4 — considered

s. 5 — considered

s. 20 — considered

APPLICATION for order approving plan of compromise and arrangement and for order amending applicant's articles and appointing directors.

Houlden J.A. (ex officio) (orally)::

1 Beatrice Foods Inc. ("Beatrice") is applying for an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") for approval of a plan of compromise and arrangement and under s. 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA") for an order amending the articles of the applicant to effect a concurrent reorganization of share capital of Beatrice and to appoint directors.

2 Beatrice is a corporation under the *CBCA* and operates in the dairy, food products and baked goods businesses in both Canada and the United States. It has some 3,200 employees. Beatrice owes approximately \$172,000,000 to a group of senior banks. It defaulted on its obligations to the senior banks in 1995. The senior banks entered into a standstill arrangement with Beatrice, but under the arrangement Beatrice must pay \$100,000,000 to the senior banks on October 31, 1996. If the plan is not approved, Beatrice lacks the means to make the payment.

3 Beatrice is also indebted to the holders of 12 % senior subordinated notes. The amount owing to the note-holders, together with interest is approximately \$240,000,000.

4 Beatrice Foods Holdings Corp. ("Holdings") holds 100% of Beatrice's issued and outstanding shares. Ninety-eight percent of Holdings is owed by Funds which are represented by Merrill Lynch Capital Partners Inc. The Funds are opposing these applications.

5 The plan in essence, provides for the following:

(a) the repayment in full of indebtedness to the Senior Banks;

(b) the exchange of 12% Senior Subordinated Notes held by Beatrice noteholders for new common shares in Beatrice, rights to buy additional new common shares, new subordinated notes maturing in 30 years bearing interest at 1% and a small amount of cash; and

(c) the cancellation of all issued and outstanding common shares and the issuance to the holder of such shares of:

(1) warrants entitling the holder to purchase new common shares at a specified exercise price; and

(2) a right to purchase all issued new common shares at a fixed price for four weeks after implementation of the Plan.

6 Since Beatrice is a large company with a substantial work force, I propose to say very little about the financial affairs of the company. Detailed information concerning all relevant aspects of Beatrice's finances is contained, however, in the material which has been put before me and I have carefully reviewed it.

7 In January, 1996, Beatrice retained R.B.C. Dominion Securities Inc. for the purpose of exploring all recapitalization, restructuring and disposition alternatives and opportunities available to Beatrice. Although R.B.C.

Dominion Securities contacted over 150 prospective investors, only two binding proposals were received and only one proposal was for the purchase of the entire company. The offer received for the whole company would have paid the claims of the senior banks, but the noteholders would have had a substantial deficiency. In the past two weeks, a further offer has been received but this offer again is not sufficient to pay the noteholders in full. I am satisfied that the common shares held by the Funds have no value and that there is no likelihood in the foreseeable future that they will have any value. The 1995 annual review of operations for Merrill Lynch Capital Appreciation Fund II valued the equity in Beatrice at zero as of May 1996.

8 Dealing first with the *CCAA* application, I am satisfied that the statutory requirements have been complied with, that nothing has been done which is not authorized by the *CCAA* and that the plan is fair and reasonable. Mr. Mercer, for the Funds, has requested that the plan be amended to allocate to the Funds seven percent of the new equity including seven percent of the rights (with the resulting capital contribution applied thereby) or to accord dissent and appraisal rights to the existing common shareholders. I have pointed out to Mr. Mercer that, in my opinion, I have no jurisdiction to make such an amendment. In any event, to make either of those amendments would, in my opinion, render the plan unworkable.

9 Mr. Mercer's principal ground of opposition is that s. 191 of the *CBCA* does not confer jurisdiction on the court to amend the articles of Beatrice as requested by the applicant. Section 191 reads as follows:

191. (1) In this section, "reorganization" means a court order made under

(a) section 241;

(b) the *Bankruptcy Act* approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order referred to in subsection (1) has been made, articles of reorganization in prescribed form shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

10 For an order to be made under s. 191(1)(c), it is necessary, Mr. Mercer submitted, that the other Act of Parliament affect the rights among the corporation and its shareholders and the *CCAA* is not such an act. Under the *CCAA*, the court can, he submits, sanction a compromise or arrangement between a debtor company and its creditors, but it cannot sanction a compromise or arrangement between a debtor company and shareholders. Accordingly, the *CCAA* is not an Act of Parliament that falls within s. 191(1)(c).

11 I have on occasion made orders under the *CCAA* in conjunction with orders under the *CBCA*. Sections 4 and 5 of the *CCAA* contemplates that the court may order a meeting of shareholders. In addition, s. 20 of the *CCAA* provides:

20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them

12 When discussing the reorganization provisions in the *Proposals for a New Business Corporations Law*, the *Dickerson Report*, which formed the basis for the comprehensive reform of Canada's corporations law, clearly anticipated that s. 191 would permit the elimination of issued shares. The Report (*Proposals for a New Business Corporations Law*, Robert W.V. Dickerson et al., v.1: Commentary, Part 14.00: Fundamental Changes, (Toronto: Information Canada, 1971) states, with reference to the section in the draft bill which became s. 191 (at p. 124):

To clear up the obscure meaning of "reorganization", subsection (1) of s. 14.18 states that the term includes a court order made under the *Bankruptcy Act*, s. 19.04 [the oppression remedy] and any other federal law. The object of the section is to enable 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 all the formalities of the Draft Act, particularly shareholder approval of the proposed amendment. 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 note holders or preferred shareholders.

Presumably then the corporation will be in a position to borrow further upon the security of its assets. In addition, the court will have power to reconstitute the board of directors, thus permitting representatives of the creditors of the corporation to take over the administration of the corporation until the corporation is one again solvent.

13 In discussing s. 191 of the *CBCA*, the authors of Fraser & Stewart, *Company Law of Canada*, (6th ed.: 1993), at p. 581, state that:

A reorganization, for purposes of s. 191, is defined in s. 191(1) to be a court order which is made pursuant either to the oppression remedy powers of s. 241, or an order under the *Bankruptcy and Insolvency Act* approving a proposal in bankruptcy, or any other federal act that affects the rights of a corporation, its share-

holders and creditors. An example of such a federal statute would be the *Companies' Creditors Arrangement Act*.

14 In *Central Capital Corp., Re* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.), Weiler J.A. said (at p. 257):

By virtue of s. 20 of the *CCAA*, arrangements under the Act mesh with the reorganization provisions of the *CBCA* so as to affect the company's relations with its shareholders. Shareholders have no right to dissent to a reorganization: s. 191(7). On a reorganization, among other things, the articles may be amended to alter or remove rights and privileges attached to a class of shares and to create new classes of shares: s. 173, *CBCA*. These statutory provisions provide a clear indication that, on a reorganization, the interests of all shareholders, including shareholders with a right of redemption, are subordinated to the interests of the creditors. Where the debts exceed the assets of the company, a sound commercial result militates in favour of resolving this problem in a manner that allows creditors to obtain repayment of their debt in the manner which is most advantageous to them.

15 I agree with the interpretation of the relevant provisions of the *CCAA* and the *CBCA*. I am of the opinion that a court order under the *CCAA* is an order under an Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

16 Section 191(2) of the *CBCA* gives substantive, not simply procedural, powers to amend the articles of a *CBCA* corporation. The court may amend the articles to effect any change that might lawfully be made by an amendment under s. 173 of the *CBCA*. Section 173(1)(o) provides that:

173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

.....

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

17 Section 173 is supported by s. 176(1)(b) which contemplates amendments to the articles of a corporation to effect a cancellation of all or part of the shares of a class of shares. Section 176(1)(b) provides:

176. (1) The holders of shares of a class or, subject to subsection (4), of a series are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (a), (b) and (c), entitled to vote separately as a class or series on a proposal to amend the articles to

.....

(b) effect an exchange, reclassification or cancellation of all or part of the shares of such class.

18 I have found that the common shares have no value. I agree with the applicant that, in these circumstances, the shareholders have no status to object to the plan. An order will therefore go as requested. In the circumstances, there will be no order as to costs.

Application granted.

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TAB 26

2001 CarswellOnt 4640, 30 C.B.R. (4th) 1

2001 CarswellOnt 4640, 30 C.B.R. (4th) 1

Algoma Steel Inc., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 and The Business Corporations Act,
R.S.O. 1990, c. B-16

In the Matter of a Proposed Plan of Arrangement with Respect to Algoma Steel Inc.

Algoma Steel Inc., Applicant

Ontario Superior Court of Justice [Commercial List]

LeSage C.J. Ont. S.C.J.

Heard: December 19, 2001

Judgment: December 19, 2001

Oral reasons: December 19, 2001

Written reasons: January 10, 2002

Docket: 01-CL-4115

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Counsel: *Michael Barrack, James D. Gage, Geoff R. Hall*, for Applicant, Algoma Steel Inc.

Edmond Lamek, for Province of Ontario

John B. Laskin, for Noteholders

James P. Dube, for Union Gas Limited

James Grout, for Monitor

Michael Mazzuca, for (Ontario) Superintendent of Financial Services

Steven J. Weisz, for Independent Pension Counsel

Lily Harmer, for United Steelworkers of America

Subject: Corporate and Commercial; Insolvency

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

Company's second plan under Companies' Creditors Arrangement Act was approved by all classes of affected creditors

except noteholders — Chief restructuring officer reinstated negotiations resulting in third plan — Company brought motion to sanction third plan — Motion granted — Third plan was approved by company's five classes of affected creditors with large quorums of each class by votes substantially in excess of statutory requirements — Prospects for business enterprise of company surviving in long run were better than likely alternative — Survival benefited affected creditors, company's employees, three levels of government and citizens of municipality and surrounding area in which company was situated — Appropriate and reasonable balancing of interests occurred — Third plan was fair and reasonable — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Lesage C.J. Ont. S.C.J.*:

Beatrice Foods Inc., Re (October 21, 1996), Houlden J. (Ont. Gen. Div.) — referred to

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

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

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

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — referred to

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

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

Sammi Atlas Inc., Re (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — followed

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 186 — referred to

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

Generally — considered

MOTION by company for sanction of plan under *Companies' Creditors Arrangement Act*.

***Lesage C.J. Ont. S.C.J.* (orally):**

1 Algoma Steel Inc. ("Algoma") has brought this sanction motion now that its Plan of Arrangement, its Third Plan, has been approved by the statutory majorities of its five classes of affected creditors:

- (1) Municipality of Sault Ste. Marie Unanimous in Writing

(2)	132 Noteholders	80.3% by number; 79.9% by dollar value
(3)	1183 Indexed Pensioners	93.8% by number; 94.8% by dollar value
(4)	677 Non-Indexed Pensioners	99.3% by number; 99.5% by dollar value
(5)	213 General Unsecured Creditors	100% by number; 100% by dollar value

2 In a sanction hearing under the *Companies' Creditors Arrangement Act* ("CCAA") the general principles to be applied in the exercise of the court's discretion are:

- (a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;
- (b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) The Plan must be fair and reasonable.

See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201; *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at pp. 172-3; *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.), leave to appeal dismissed, [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers]).

3 I am satisfied that on the material before me that Algoma was held to be a corporation which was able to avail itself of the CCAA, that the Third Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings (including the adjourned meeting of the Noteholders on December 10 and the "revote" meetings of the other classes on December 17th (with the municipality voting by resolution in writing by December 14th), that the subject meetings were held in accordance with the directions of the court and that the Third Plan was approved by the requisite majority (majority in number representing two-thirds in value of the class represented) with a quorum present. Thus it appears to me that items (a) and (b) have been met.

4 The remaining issue (c) is whether the court determines that the Third Plan is fair and reasonable. The previous Second Plan was overwhelmingly approved by all classes except that of the Noteholders who decisively turned it down on December 7th. On the weekend after the turn down, to their credit the Chief Restructuring Officer Hap Stephen and management of Algoma, with the assistance of the Monitor, reinstated negotiations with advisors to the Noteholders, to the lending banks and to the union. As Justice Farley was brought in on an emergency basis on Sunday, December 9th in the role of facilitator, he did not think it appropriate to sit today in judgment of a plan which he was involved in having a hand in resolving. He therefore asked me to take on the sanction hearing. What evolved out of these negotiations was the Third Plan — the result of discussion, understanding, negotiating and hard bargaining, all in the face of a substantially more unpalatable alternative — the receivership of Algoma with continued unsettled conditions, a severe lack of confidence and a swift erosion of business. The Third Plan on the other hand allows Algoma to go forward with a brighter future relative to the alternative.

5 As Farley J. stated at pp. 173-4 of *Sammi Atlas Inc.* in reference to the 3rd element for consideration:

... Is the Plan fair and reasonable? A plan under the CCAA is a compromise; it cannot be expected to be perfect. It

should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the plan which a majority have approved — subject only to the court determining that the plan is fair and reasonable: see *Northland Properties Ltd.* at p. 201; *Olympia & York Developments Ltd.* at p. 509. ...

Later on the same page he continued:

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

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

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. ...

I accept those observations. Here the Third Plan has been approved in meetings with very large quorums by each class of affected creditors by votes substantially in excess of the statutory requirements and this speaks positively of the view of those voting. As a side note I see that Algoma and the two locals of the Union have reached a tentative agreement on new collective agreements, meeting the requirements of the Third Plan and that ratification votes will soon take place. The prospects for the business enterprise of Algoma surviving in the long run are better than the likely alternative — and this for the benefit of all classes of affected creditors, not to mention for the benefit of all stakeholders in this situation including Algoma's employees, the three levels of government and the citizens of Sault Ste. Marie and its surrounding area. All those who have participated directly or indirectly in the evolution of the Third Plan or in manifesting support for it or its underpinnings are to be congratulated and applauded for their positive and thoughtful contribution.

6 It seems to me that in these circumstances there has been an appropriate, fair and reasonable balancing of interests. I therefore find that the Third Plan is fair and reasonable.

7 The Third Plan is sanctioned and approved. Order accordingly together with the ancillary relief requested including the amendment to Algoma's articles of incorporation to cancel the existing common shares (as not having any value); see s. 186 of the *(Ontario) Business Corporations Act*; *Beatrice Foods Inc., Re* [(October 21, 1996), Houlden J. (Ont. Gen. Div.)] unreported; *Canadian Airlines Corp.*, supra, at pp. 288-90.

8 I pause to note that this is the second time in a decade that Algoma has had to seek insolvency protection under the CCAA. It has been operating in difficult markets in unsettled times. But that is inherent in the nature of competitive markets. Everyone involved will have to do their part — in fact go the extra mile — to ensure to the maximum human possibility that Algoma survives — and prospers, that it is strongly competitive, innovative, flexible and able to withstand temporary adversity. It will take a cooperative team effort. The cost of failure to this beautiful northern Ontario community and the spillover to the three levels of government (including environmental concerns, welfare payments, tax losses, unemployment claims, etc.) would be immense. The benefits of success are obvious to those directly affected — employees, shareholders, pensioners, creditors — but as well there is the positive multiplier effect for the community as well as the breathing space for the three levels of government to look at flexibility and diversification programs. So in

2001 CarswellOnt 4640, 30 C.B.R. (4th) 1

closing, I would say: "Remember the past — but build for the future."

Motion granted.

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TAB 27

2009 CarswellOnt 4572, 56 C.B.R. (5th) 42

2009 CarswellOnt 4572, 56 C.B.R. (5th) 42

Masonite International Inc., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MASONITE INTERNATIONAL INC., MASONITE INTERNATIONAL CORPORATION, MASONITE HOLDING CORPORATION, CROWN DOOR CORPORATION, CASTLEGATE ENTRY SYSTEMS INC., 3061275 NOVA SCOTIA COMPANY and ROCHMAN UNIVERSAL DOORS INC. (Applicants)

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: June 1, 2009

Judgment: July 28, 2009

Docket: 09-8075-00CL

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Counsel: Brian F. Empey, Tom Friedland, Lauren Cappell for Applicants

Lawrence Crozier, Hilary E. Clarke for Royal Bank of Canada

S. Richard Orzy for Ad Hoc Committed Noteholders

Orestes Pasparakis for Monitor

Subject: Insolvency; Corporate and Commercial

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

Applicant companies were granted initial order pursuant to Companies' Creditors Arrangement Act ("CCAA") which included stay of proceedings — Cross border protocol was approved to assist in coordinating CCAA proceedings and contemporaneous reorganization under Chapter 11 of US Bankruptcy Code — Restructuring involved implementation of agreement between applicant and its two main creditors — Essence of reorganization contemplated that stay of proceedings would be lifted for approval of plan of arrangement under Canada Business Corporations Act ("CBCA") — Approval under CBCA plan was granted — US bankruptcy judge approved single process for disclosure and voting and procedure for approval of process — Applicant companies sought order pursuant to s. 18.6 of CCAA which recognized and implemented order of US bankruptcy judge — Order granted — It was appropriate to have single plan — Requirement of separate CCAA plan was potentially con-

fusing and more expensive without producing any greater fairness to creditors — Basis of approval of plan in US was virtually unanimous approval of senior debt holders which represented 100 percent of secured debt and 99 percent of bondholders — Plan fell within definition of arrangement in s. 192(1) of CBCA — Most significant feature for approval of plan was that it was fair and reasonable to all stakeholders and it was not practicable to proceed in any other manner.

Cases considered by C. Campbell J.:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — considered

Olympia & York Developments Ltd., Re (1993), 1993 CarswellOnt 197, (sub nom. *Olympia & York Developments Ltd. v. Royal Trust Co.*) 18 C.B.R. (3d) 176, 102 D.L.R. (4th) 149 (Ont. Gen. Div.) — considered

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

St. Lawrence & Hudson Railway, Re (1998), 76 O.T.C. 115, 1998 CarswellOnt 3867 (Ont. Gen. Div. [Commercial List]) — considered

Stelco Inc., Re (2006), 2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2006), 2006 CarswellOnt 863, 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 192(1) — considered

s. 192(3) — considered

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

Generally — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — pursuant to

HEARING regarding order sought by applicant companies pursuant to s. 18.6 of *Companies' Creditors Arrangement Act* for recognition and implementation of order of US bankruptcy judge.

C. Campbell J.:

1 A complicated, successful cross-border reorganization was completed within the period March 16 to June 9, 2009. The following are the reasons for the approval orders made.

2 The Masonite Applicant Companies (as defined in the material) sought an Order pursuant to s. 18.6 of the *Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as amended* ("CCAA") recognizing and implementing the Order of the Honourable Judge Walsh of the United States Bankruptcy Court for the District of Delaware:

- a) for the purpose of approving a process for reorganization of the Masonite Companies
- b) and establishing the procedure for approval of a Joint Plan of Reorganization of the Masonite Companies; and
- c) if voting approval granted, obtaining an Order for Confirmation of the Plan.

3 On March 16, 2009, this Court granted an Initial Order pursuant to the CCAA, which relief included among other matters a stay of proceedings.

4 Pursuant to the Initial Order, this Court approved a cross-border protocol to assist in coordinating activities between these CCAA Proceedings and those which were contemporaneously initiated in U.S. Bankruptcy Court in Delaware, for the reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§101 et seq., by Masonite Corporation and various affiliates.

5 Masonite continued to operate its business in the ordinary course both in Canada and the United States during the restructuring process. The restructuring involved implementing an Agreement between Masonite Corporation and its two main creditor groups the effect of which was to reduce Masonite's debt by approximately US\$2 billion by cancellation of Senior Secured Claims and notes (as defined) in exchange for new debt of US\$300 million plus equity, leaving other secured claims and ordinary unsecured claims uncompromised.

6 All the Senior debt was treated in the same manner regardless of whether the direct obligations arose in Canada or the United States and involved releasing some affiliates as guarantors.

7 The essence of the reorganization contemplated that the stay of proceedings under the Initial Order would be lifted to permit a new entity, 7158084 Canada Limited ("715"), to apply for approval of a Plan of Arrangement under the *Canada Business Corporations Act, R.S.C. 1985, c. C-44* ("CBCA") ("the CBCA Plan.")

8 Under the CBCA Plan, several of the Applicants together with Masonite Canada were to be amalgamated with the shares of the amalgamated entity acquired by 715 and the Senior debt exchanged for shares in 715.

9 With the concurrence of the Office of the Director under CBCA and the Court, approval was sought and granted to provide for approval of the CBCA Plan and the disclosure and voting process established in the U.S.

proceeding and proposed U.S. Disclosure Statement Order.

10 Classification of creditors for solicitation and voting purposes was restricted to two classes of Senior debt, namely those whose debt was being compromised. Those whose debt was not being compromised were given notice but not a vote in respect of the Plan. There was no objection to this voting procedure.

11 Orders of Judge Walsh of the U.S. Bankruptcy Court dated April 17, 2009 and by this Court dated April 20, 2009 approved a single process for disclosure and voting, together with a procedure for approval of the process in both Courts.

12 I was satisfied that in these circumstances it was appropriate to have a single Plan and that requiring a separate CCAA Plan would be potentially confusing, and certainly more expensive and time-consuming to carry out without producing any greater fairness to creditors in Canada or the United States.

13 On May 29, 2009 in the U.S. Bankruptcy Court and on June 1, 2009 in this Court, Orders were granted both in the United States by Judge Walsh and by me in this Court, giving final approvals necessary to complete the Plan.

14 The basis for this approval was the virtually unanimous approval of the Senior debt holders representing 100% of secured debt (term lenders) and 99% of the bondholders.

15 The elements of approval of the Plan in Canada by this Court are supported by case law. In *Laidlaw, Re* [FN1] reference was made to an Order of this Court which waived the need for a Canadian applicant to file a plan in CCAA proceedings when a plan was being filed in concurrent Chapter 11 proceedings in the United States.

16 The creative portion of this restructuring was to permit the new corporate entity 715 to commence the application under the CBCA. Like the CCAA, a Plan under the CBCA allows for arrangements to carry out complex and novel transactions, including compromise of debts and securities.

17 Section 192(3) of the CBCA provides:

Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

18 The Plan falls within the definition of "arrangement" within s. 192(1) of the CBCA, which among other things permits amalgamation of two or more corporations, transfer of property of a corporation in exchange for securities.

19 Compromise of debt and securities in *Savage v. Amoco Acquisition Co.* [FN2] in the context of a takeover bid was held to be within the section, as it involved an exchange of securities.

20 Like the CCAA itself, which has been held to be broadly interpreted, [FN3] the CBCA section on arrangements has been held to be capable of "flexibility incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators bring to the particular problem at hand." [FN4]

21 All of the corporations involved in the Canadian Plan are incorporated or continued under the CBCA. The sole applicant 715, being a newly capitalized entity, is not insolvent. The transaction is certainly not a sham and the form is appropriate for the intended purpose, even though one or more of the companies at the crux of the arrangement is insolvent.

22 The decision of Blair J. (as he then was) of this Court in *St. Lawrence & Hudson Railway, Re*[FN5] is oft cited for the proposition that where there is more than one corporate applicant, only one needs to meet the s. 192(3) test.

23 Lifting the CCAA stay to permit a plan application to proceed was approved in this Court in *Stelco Inc., Re*[FN6]

24 Perhaps the most significant features for approval of the Plan are that it is fair and reasonable to all stakeholders and that it is not practicable to proceed in any other manner.

25 As the decision in *St. Lawrence & Hudson Railway*[FN7] notes, the test is one of "practicability," not "impossibility." There was nothing in the material before this Court or in oral submissions to suggest that there was any other way to achieve the result of termination of debt, amalgamation, issuance of new shares and continuance of the re-organized company in another jurisdiction. The "practicability" test is certainly met and perhaps even "impossibility."

26 The result of the vote confirmed the process of permitting proceeding under the U.S. Disclosure Statement Order and the fairness and reasonableness of the Plan as approved.[FN8]

27 The completion of this total reorganization of the Masonite Companies both in Canada and the United States so successfully and within only 85 days following initial filings provides a model for cooperative cross-border restructurings and the creative use of statutory remedies. The dedicated and creative effort of the business parties and their professional representatives is demonstrated in the lack of serious dispute in the process among stakeholders and evident in the result. They are all to be commended.

28 For the foregoing reasons, the Orders sought are granted.

Order accordingly.

FN1 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.)

FN2 (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.)

FN3 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 4811 (Ont. C.A.)

FN4 See *Olympia & York Developments Ltd., Re* (1993), 102 D.L.R. (4th) 149 (Ont. Gen. Div.) at p. 162

FN5 [1998] O.J. No. 3934 (Ont. Gen. Div. [Commercial List])

FN6 (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]) at paragraph 5

FN7 *Supra*, at paragraph 18

2009 CarswellOnt 4572, 56 C.B.R. (5th) 42

FN8 See *Stelco Inc., Re* [Sanction Hearing] (2006), 17 C.B.R. (5th) 78 (Ont. S.C.J. [Commercial List])

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**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-
FOREST CORPORATION**

Applicant

***ONTARIO*
SUPERIOR COURT OF JUSTICE
- COMMERCIAL LIST**

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES

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