File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

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

MOTION BRIEF OF THE MONITOR

(**Motion for Stay Extension, Approvals to Facilitate Settlements and Other Relief**)

DATE OF HEARING: WEDNESDAY, OCTOBER 16, 2013, AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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(collectively, the "APPLICANTS")

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

MOTION BRIEF OF THE MONITOR

INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. The Notice of Motion with the Proposed Orders attached as Appendices "1" and "2";

2. The Thirteenth Report of the Monitor dated October 10, 2013 (the "**Thirteenth Report**"); and

3. Such further and other materials as counsel may advise and this Court may permit.

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab	
1	QBR 2.03, 3.02(1), 16.04, 16.08, 37.07(1) and 37.08(2)
2	*Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (hereinafter "CCAA") ss. 11, 11.02, 11.52, 19 and 20
3	*Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
4	*Re Arctic Glacier Income Fund et al*, Canadian Retail Class Action Settlement Order (Mar. 7, 2013)
5	*Calpine Canada Energy Ltd., Re*, 2007 ABQB 504, leave to appeal ref'd 2007 ABCA 266
6	*Grace Canada Inc., Re*, 2008 CanLII 54779 (ON SCJ)
7	*Nortel Networks Corp., Re*, 2010 ONSC 1708
8	*Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647
9	*Great Basin Gold Ltd., Re*, 2012 BCSC 1773
10	*Re Arctic Glacier Income Fund et al*, Direct Purchasers' Advisors' Charge Order (May 15, 2012)
11	*Re Steel Industrial Products*, 2012 BCSC 1501

PART III LIST OF POINTS TO BE ARGUED

1. This motion is for Orders:

   (a) abridging the time for service of the Notice of Motion and supporting materials such that the motion is properly returnable on October 16, 2013 at 10:00 a.m. and dispensing with further service thereof;

   (b) extending the Stay Period until February 7, 2014;

   (c) approving the Thirteenth Report of the Monitor and the activities described therein;

   (d) in respect of and facilitating the proposed settlement of the Indirect Purchaser Claim (the "**Indirect Purchaser Settlement**") and granting the Class Counsel Charge; and

   (e) approving the proposed settlement of the Desert Mountain Motion, Desert Mountain Proofs of Claim and the Guarantee Proof of Claim, all as defined in the Thirteenth Report.

2. The key points to be argued on this motion are as follows:

   (a) *Abridging Time For Service*: An order abridging the time for service should be granted because the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients;

(b) *Stay Of Proceedings*: An order extending the Stay Period is appropriate to enable the Monitor to continue to conduct the Claims Process for the benefit of the stakeholders and to deal with other matters incidental to the administration of the Applicants' estate;

(c) *Approving Thirteenth Report And Activities*: An order approving the Thirteenth Report and the Monitor's activities as described therein should be approved as the stakeholders have had a reasonable opportunity to review and take issue with the Thirteenth Report;

(d) *Indirect Purchaser Settlement*: An order authorizing the Monitor and the CPS (on behalf of AGIF, AGI and AGII) to enter into the Indirect Purchaser Settlement should be granted. It is (a) fair and reasonable; (b) beneficial to the stakeholders generally; and (c) consistent with the purpose and spirit of the CCAA. The Class Counsel Charge should be granted because it is necessary to ensure the effective participation of the Indirect Purchaser Claimants in these CCAA Proceedings; and

(e) *Desert Mountain Settlement*: An order approving the Desert Mountain Settlement and ordering that, once the conditions precedent to the abandonment of the Desert Mountain Motion are satisfied, the Desert Mountain Motion be and be deemed to be abandoned with prejudice and without costs to any party should be granted because it is (a) fair and reasonable; (b) beneficial to the debtor and its stakeholders generally; and (c) consistent with the purpose and spirit of the CCAA.

A. Validate Service/Abridge Service

3. Notwithstanding the ordinary requirements of service under the QBR, this Court has authority to abridge the time requirements, to validate defective service or even dispense with service where necessary in the interest of justice.

(**Tab 1** – QBR 2.03, 3.02(1), 16.04, 16.08, 37.07(1) and 37.08(2))

4. The Notice of Motion and Thirteenth Report were served on all parties listed in the Service List (prepared in accordance with paragraph 66 of the Initial Order) on October 10, 2013.

5. It is respectfully submitted that the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients and it is appropriate in the circumstances for this Honourable Court to validate service and proceed with the hearing for the relief requested.

B. The Stay Of Proceedings Should Be Extended

6. The existing stay expires on October 18, 2013. To enable the Monitor to continue to conduct the Claims Process and to deal with other estate matters, it is necessary to extend the stay. CCAA s. 11.02 gives the Court discretion to grant or extend a stay of proceedings. CCAA 11.02(2) applies when a stay of proceedings is requested other than on an initial application. It provides as follows:

> **11.02**(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > *(a)* staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)*(a)*;
> >
> > *(b)* restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > *(c)* prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

7. According to CCAA 11.02(3), the Court must be satisfied that (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

(**Tab 2** – CCAA, s. 11.02(3))

8. As set out in the Thirteenth Report, the Monitor believes that the Applicants have acted and continue to act in good faith and with due diligence. In addition, significant progress has been made in resolving Proofs of Claim that were unresolved as of the date of the Twelfth Report.

9. In considering whether circumstances exist that make the order appropriate, the Court "must be satisfied that an extension of the Initial Order and stay will further the purposes of the CCAA." The Monitor believes that an extension of the Stay Period until February 7, 2014 is appropriate, as it should allow sufficient time for the Monitor, in consultation with the Applicants, to continue to resolve Claims filed in the Claims Process and to implement the settlements described in the Thirteenth Report.

Furthermore, the proposed Stay extension date of February 7, 2014 is being requested in light of the projected timeline necessary to seek U.S. Bankruptcy Court approvals for the Indirect Purchaser Settlement should the Canadian Approval Order be granted.

> (**Tab 3** – *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 [Pearlman J.] at paras. 13-15)

C. Approval Of Monitor's Reports And Activities

10. In accordance with the practice that has developed, the stakeholders have had a reasonable opportunity to review and take issue with the Thirteenth Report and the activities described therein and, absent any significant objection, this Report should be approved by this Honourable Court.

D. The Canadian Approval Order For The Indirect Purchaser Settlement Should Be Granted

11. The Monitor asks this Honourable Court to grant an Order authorizing the Monitor and the CPS (on behalf of AGIF, AGI and AGII) to enter into the Indirect Purchaser Settlement, which Settlement shall be subject to approval by the U.S. Bankruptcy Court. Pursuant to the requested Order, if the U.S. Bankruptcy Court approves the Indirect Purchaser Settlement, then the Indirect Purchaser Claim shall be deemed to be accepted by the Monitor in an amount not to exceed US$3,950,000.

12. The Monitor requested and this Honourable Court granted a similar order in respect of the Canadian Retail Class Action Settlement on March 7, 2013.

> (**Tab 4** – *Re Arctic Glacier Income Fund et al*, Canadian Retail Class Action Settlement Order (Mar. 7, 2013))

13. Although final approval of the Indirect Purchaser Settlement will be dealt with by the U.S. Bankruptcy Court, the Monitor submits that the case law relating to approval of settlements in CCAA proceedings is relevant to the Order being sought, because the Order would permit the CPS (on behalf of AGIF, AGI and AGII) and the Monitor to enter into the Indirect Purchaser Settlement.

14. There is ample authority establishing that this Honourable Court has jurisdiction to approve settlements before a plan of arrangement is presented to creditors.

> (**Tab 5** – *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 at paras. 75, 77-78; leave to appeal ref'd 2007 ABCA 266, at para. 26)
>
> (**Tab 6** – *Grace Canada Inc., Re*, 2008 CanLII 54779 at para. 34)
>
> (**Tab 7** – *Nortel Networks Corp., Re*, 2010 ONSC 1708 at paras. 68-71)
>
> (**Tab 8** – *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 at para. 22)
>
> (**Tab 9** – *Great Basin Gold Ltd., Re*, 2012 BCSC 1773 at para. 16)

15. In the CCAA context, Courts will approve a settlement when it is (a) fair and reasonable; (b) beneficial to the debtor and its stakeholders generally; and (c) consistent with the purpose and spirit of the CCAA.

> (**Tab 5** – *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 at paras. 56, 62, 75; leave to appeal ref'd 2007 ABCA 266)
>
> (**Tab 6** – *Grace Canada Inc., Re*, 2008 CanLII 54779 at para. 42)
>
> (**Tab 7** – *Nortel Networks Corp., Re*, 2010 ONSC 1708 at para. 73)
>
> (**Tab 8** – *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 at para. 22)
>
> (**Tab 9** – *Great Basin Gold Ltd., Re*, 2012 BCSC 1773 at para. 17)

16. The Indirect Purchaser Settlement is fair and reasonable; it is beneficial to the stakeholders generally; and it is consistent with the purpose and spirit of the CCAA:

(a) ***The Indirect Purchaser Settlement is reasonable and fair***: The Indirect Purchaser Settlement was reached after several months of vigorous, arms'-length negotiations between the Monitor, the Applicants and Class Counsel, including with the assistance of the Honourable Mr. George Adams. The Monitor believes that the Indirect Purchaser Settlement represents a fair and reasonable resolution of the Indirect Purchaser Claim, in particular because the total consideration to be given in exchange for the full and final resolution of the Indirect Purchaser Claim is less than the amount that the Monitor and the Applicants would expend in litigating the Indirect Purchaser Claim before the Special Claims Officer. This view is shared by the Monitor's independent U.S. anti-trust counsel.

(b) ***The Indirect Purchaser Settlement is beneficial to the Applicants and their stakeholders generally because it creates certainty and will facilitate distributions to the Applicants' stakeholders***: Due to the significant and uncertain quantum of the Indirect Purchaser Claim as filed, no distribution can be made to any holders of Proven Claims absent the implementation of the Indirect Purchaser Settlement. Accordingly, the Monitor believes that consummation of the proposed settlement agreement is in the best interests of the Applicants, their creditors, and other stakeholders and will allow the Monitor to distribute the funds it holds in a more timely manner than if the matter was litigated before the Special

Claims Officer and then through any appellate process. The Indirect Purchaser Settlement provides a degree of certainty with regard to costs and timing that cannot be achieved through continuing litigation before the Special Claims Officer, which is estimated to last several more years.

(c) ***The Indirect Purchaser Settlement is consistent with the purpose and spirit of the CCAA***: It resolves the most significant Claim in the estate, removing the key hurdle to the ultimate distribution of funds to stakeholders.

17. In addition, the Indirect Purchaser Settlement contemplates the Monitor seeking a charge over the Property of the Applicants in favour of Class Counsel in the amount of US$200,000 as security for the professional fees and disbursements of Class Counsel (the "**Class Counsel Charge**"). The Class Counsel Charge will rank *pari passu* with the Administration Charge (as defined in the Initial Order) and will be deemed discharged immediately on payment of professional fees and disbursements of Class Counsel in the amount of US$200,000 that are separate and apart from the Attorneys' Fees and Attorneys' Costs (both as defined in the Indirect Purchaser Settlement).

18. The Court has jurisdiction to order such a charge pursuant to CCAA 11.52(1), which provides:

> **11.52(1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of: . . .

> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

19. This Court has granted a similar charge previously in these CCAA Proceedings, namely, the Direct Purchasers' Advisors' Charge.

> (**Tab 10** – *Re Arctic Glacier Income Fund et al*, Direct Purchasers' Advisors' Charge Order (May 15, 2012))

20. Similarly, a charge pursuant to CCAA 11.52(1)(c) was sought and granted by the British Columbia Supreme Court in *Re Steel Industrial Products*. The factors supporting the granting of the charge in *Re Steel Industrial Products.* are applicable in the case before this Court. The Class Counsel Charge is necessary in light of the extremely complex nature of the Indirect Purchaser Claim and the cross-border process before this Court and the U.S. Bankruptcy Court required to implement the Indirect Purchaser Settlement. The Monitor is seeking the Class Counsel Charge as the Monitor believes that such a charge is necessary to facilitate the Indirect Purchaser Claimants' effective participation in the CCAA Proceedings.

> (**Tab 11** – *Re Steel Industrial Products*, 2012 BCSC 1501 at paras. 53-54)

21. The Monitor submits that the requirements in CCAA 11.52(1) are met and the Class Counsel Charge should be granted.

E. The Desert Mountain Settlement Should Be Approved

22. The Monitor asks this Honourable Court to grant an Order approving the Desert Mountain Settlement and ordering that, once the conditions precedent to the abandonment of the Desert Mountain Motion are satisfied, the Desert Mountain Motion be and be deemed to be abandoned with prejudice and without costs to any party. The Monitor has provided notice of its request by serving the Notice of Motion as well as the Monitor's Thirteenth Report and this Motion Brief on the Service List.

23. As set out in the Thirteenth Report and in previous Monitor's Reports, Desert Mountain is the Applicants' former landlord pursuant to the Arizona Lease. The principal of Desert Mountain, Mr. Robert Nagy, is the former Chief Executive Officer of AGI and a former trustee of AGIF. In the CCAA Proceedings:

(a) Desert Mountain filed and served the Desert Mountain Motion seeking payment of $12.5 million in relation to the Purchase Option in the Arizona Lease from either the Purchaser and/or the Applicants;

(b) Desert Mountain submitted the Desert Mountain Proofs of Claim, seeking payment in relation to essentially the same claim that is advanced in the Desert Mountain Motion; and

(c) Mr. Nagy filed the Nagy Proof of Claim, which includes the Guarantee Proof of Claim in relation to the Arizona Lease.

24. The parties to the Desert Mountain Motion and the Monitor attended a Judicially Assisted Dispute Resolution conference before the Honourable Mr. Justice

Martin on June 19, 2013. Subject to the approval of this Court, the Applicants, the Monitor, Desert Mountain and Mr. Nagy resolved the Desert Mountain Motion, the Desert Mountain Proofs of Claim, the Guarantee Proof of Claim and all issues related to the Purchase Option and the Arizona Lease (the "**Desert Mountain Settlement**"). The parties also resolved the remainder of the Nagy Proof of Claim (in other words, the Nagy Personal Claim), which resolution does not require court approval.

25. Counsel for the Applicants, the Monitor, Desert Mountain and Mr. Nagy executed the Minutes of Settlement effective June 19, 2013 in relation to both the Desert Mountain Settlement and the Nagy Personal Claim. The material terms of the Desert Mountain Settlement are as follows:

(a) ***Step 1***: payment will be made from the monies currently being held by the Monitor to counsel for Desert Mountain in trust in the amount of $1,250,000 (the "**Settlement Amount**") within 7 business days of Court approval of the Desert Mountain Settlement, and the parties will exchange certain mutual releases in a form satisfactory to each party.

(b) ***Step 2***: On completion of Step 1, (i) the Desert Mountain Motion shall be and be deemed to be abandoned with prejudice and without costs to any party; (ii) the Desert Mountain Proofs of Claim and the Guarantee Proof of Claim shall be deemed to be automatically withdrawn from the Claims Process without the need for any further act or formality; and (iii) Desert Mountain shall immediately take all steps necessary to dismiss, with

prejudice and without costs to any party, its appeal of the U.S. Sale Recognition Order.

26. The Desert Mountain Settlement fairly balances the interests of the Applicants, Desert Mountain, Mr. Nagy and the other stakeholders in the CCAA Proceedings; it is beneficial to the stakeholders generally; and it is consistent with the purpose and spirit of the CCAA:

(a) ***The Desert Mountain Settlement is reasonable and fair***: The Desert Mountain Settlement was reached after lengthy without prejudice negotiations between the Applicants, the Monitor and Desert Mountain and after the parties benefitted from the assistance of the Honourable Mr. Justice Martin. The Settlement Amount represents 10% of the amount being claimed by Desert Mountain. It is the Monitor's view that a compromise at 10% of the payment claimed in the Desert Mountain Motion largely reflects the litigation risk and is reasonable.

(b) ***The Desert Mountain Settlement is beneficial to the Applicants and their stakeholders generally because it***:

(i) ***Creates certainty***: It settles all matters relating to the Desert Mountain Motion, the Desert Mountain Proofs of Claim, the Guarantee Proof of Claim and the Arizona Lease. The Minutes of Settlement also resolve the Nagy Personal Claim; and

(ii) ***Reduces legal expenses***: It resolves both the Desert Mountain Motion (which is scheduled for a four-day hearing) and also the Desert Mountain's appeal of the U.S. Sale Recognition Order. It also prevents any further litigation with respect to the Desert Mountain Proofs of Claim and the Guarantee Proof of Claim.

(c) ***The Desert Mountain Settlement is consistent with the purpose and spirit of the CCAA***. It resolves a significant claim in the estate, removing a hurdle to the ultimate distribution of funds to stakeholders.

(**Tab 5** – *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 at paras. 56, 62, 75; leave to appeal ref'd 2007 ABCA 266)

(**Tab 6** – *Grace Canada Inc., Re*, 2008 CanLII 54779 at para. 42)

(**Tab 7** – *Nortel Networks Corp., Re*, 2010 ONSC 1708 at para. 73)

(**Tab 8** – *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 at para. 22)

(**Tab 9** – *Great Basin Gold Ltd., Re*, 2012 BCSC 1773 at para. 17)

27. The Monitor is of the view that the Desert Mountain Settlement resolves a significant group of interrelated issues and potential liability with respect to the Applicants' estate at a reasonable cost when compared to the potential exposure. The Desert Mountain Settlement is beneficial to the Applicants and their stakeholders generally by substantially reducing the claims made against the estate and resolving the Desert Mountain Motion. The Monitor submits that the Desert Mountain Settlement should be approved.

CONCLUSION

28. It is respectfully submitted that this Honourable Court ought to grant the proposed orders as they are consistent with the underlying purposes of the CCAA and will benefit the Applicants' estate and stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2013.

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Appendix "1"

Court File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO
(collectively, the "APPLICANTS")

ORDER

(Motion for Stay Extension, Approval of Desert Mountain Settlement and Other Relief)

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Court File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MADAM	)	WEDNESDAY, THE 16th DAY
JUSTICE SPIVAK	)	OF OCTOBER, 2013.

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

ORDER

THIS MOTION, made by Alvarez & Marsal Canada Inc., in its capacity as monitor of the Applicants (the "**Monitor**"), for an order (i) extending the Stay Period as defined in paragraph 30 of the Order of the Honourable Madam Justice Spivak made February 22, 2012 (the "**Initial Order**") until February 7, 2014; (ii) approving the Desert Mountain Settlement; and (iii) approving the Thirteenth Report and the Monitor's activities as described therein; was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

ON READING the Notice of Motion and the Thirteenth Report of the Monitor (the "**Thirteenth Report**"), and on hearing the submissions of counsel for the Monitor, counsel for the Applicants and Glacier Valley Ice Company, L.P. (California) (together, "**Arctic Glacier**" or the "**Arctic Glacier Parties**"), and counsel for ●, no one appearing for any other party although duly served as appears from the affidavit of service, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of this Motion and the Thirteenth Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. THIS COURT ORDERS that all capitalized terms used herein and not otherwise defined herein shall have the meaning ascribed thereto in the Thirteenth Report.

STAY EXTENSION

3. THIS COURT ORDERS that the Stay Period is hereby extended until February 7, 2014.

MONITOR'S ACTIVITIES AND REPORT

4. THIS COURT ORDERS that the Thirteenth Report of the Monitor and the activities described therein are hereby approved.

APPROVAL OF DESERT MOUNTAIN SETTLEMENT

5. THIS COURT ORDERS that the Desert Mountain Settlement be and is hereby approved in its entirety, and the Monitor and Applicants are hereby authorized and directed to comply with their obligations in respect thereof.

6. THIS COURT ORDERS that once the conditions precedent to the abandonment of the Desert Mountain Motion as provided for in the Desert Mountain Settlement are satisfied, then the Desert Mountain Motion shall be and be deemed to be abandoned with prejudice and without costs to any party.

GENERAL PROVISIONS

7. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, including the United States Bankruptcy Court for the District of Delaware, or in any other foreign jurisdiction,

to give effect to this Order and to assist the Arctic Glacier Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Arctic Glacier Parties and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Arctic Glacier Parties and the Monitor and their respective agents in carrying out the terms of this Order.

_____

SCHEDULE "A" - ADDITIONAL APPLICANTS

Arctic Glacier California Inc.
Arctic Glacier Grayling Inc.
Arctic Glacier Lansing Inc.
Arctic Glacier Michigan Inc.
Arctic Glacier Minnesota Inc.
Arctic Glacier Nebraska Inc.
Arctic Glacier Newburgh Inc.
Arctic Glacier New York Inc.
Arctic Glacier Oregon Inc.
Arctic Glacier Party Time Inc.
Arctic Glacier Pennsylvania Inc.
Arctic Glacier Rochester Inc.
Arctic Glacier Services Inc.
Arctic Glacier Texas Inc.
Arctic Glacier Vernon Inc.
Arctic Glacier Wisconsin Inc.
Diamond Ice Cube Company Inc.
Diamond Newport Corporation
Glacier Ice Company, Inc.
Ice Perfection Systems Inc.
ICEsurance Inc.
Jack Frost Ice Service, Inc.
Knowlton Enterprises, Inc.
Mountain Water Ice Company
R&K Trucking, Inc.
Winkler Lucas Ice and Fuel Company
Wonderland Ice, Inc.

Appendix "2"

Court File No. CI 12-01-76323

THE QUEEN'S BENCH
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(collectively, the "APPLICANTS")

ORDER

(Indirect Purchaser Claim Settlement)

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Court File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MADAM	)	WEDNESDAY, THE 16th DAY
JUSTICE SPIVAK	)	OF OCTOBER, 2013.

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

ORDER

(Motion Regarding Indirect Purchaser Claim Settlement)

THIS MOTION, made by Alvarez & Marsal Canada Inc., in its capacity as monitor of the Applicants (the "**Monitor**"), for an order seeking certain relief in respect of the Indirect Purchaser Claim Settlement, was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

ON READING the Notice of Motion and the Thirteenth Report of the Monitor (the "**Thirteenth Report**"), and on hearing the submissions of counsel for the Monitor, counsel for the Applicants and Glacier Valley Ice Company, L.P. (California) (together, "**Arctic Glacier**" or the "**Arctic Glacier Parties**"), and counsel for the Indirect Purchaser Claimants, no one appearing for any other party although duly served as appears from the affidavit of service, filed:

DEFINED TERMS

1. THIS COURT ORDERS that all capitalized terms used herein and not otherwise defined herein shall have the meaning ascribed thereto in the Thirteenth Report.

SERVICE

2. THIS COURT ORDERS that the time for service of the Notice of Motion and the supporting materials is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

INDIRECT PURCHASER CLAIM SETTLEMENT

3. THIS COURT AUTHORIZES 7088418 Canada Inc. o/a Grandview Advisors, in its capacity as Chief Process Supervisor, on behalf of AGIF, AGI and AGII, and the Monitor, to enter into a settlement agreement, substantially in the form attached as Appendix "*" to the Thirteenth Report, to settle the Indirect Purchaser Claim, which settlement (the "**IPC Settlement**") shall be subject to approval by the United States Bankruptcy Court for the District of Delaware (the "**U.S. Bankruptcy Court**").

4. THIS COURT ORDERS that, should approval of the IPC Settlement by the U.S. Bankruptcy Court be granted, the Indirect Purchaser Claim filed by Wild Law Group PLLC ("**Class Counsel**") in these CCAA Proceedings relating to the Indirect Purchaser Litigation shall be deemed to be accepted by the Monitor, in accordance with the terms and conditions of the IPC Settlement, in an amount not to exceed US$3,950,000, which amount of US$3,950,000 shall constitute the maximum amount of the Proven Claim (as defined in the Claims Procedure Order of this Court dated September 5, 2012) of the Indirect Purchaser Claimants against AGIF, AGI and AGII collectively.

5. THIS COURT ORDERS that the Monitor is authorized, without further Order of this Court, to make the payments contemplated in the IPC Settlement to the Claims Administrator on account of the Notice and Administration Costs (as defined in the IPC Settlement), if the preconditions in the IPC Settlement to each of such payments have been satisfied, respectively.

6. THIS COURT ORDERS that Class Counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Class Counsel Charge**") in the amount of US$200,000 on the Property (as defined in the Initial Order of this Court dated February 22, 2012), as security for the professional fees and disbursements of Class Counsel. The Class Counsel Charge shall rank *pari passu* with the Administration Charge (as defined in the Initial Order of this Court dated February 22, 2012) and shall be deemed discharged immediately on payment of professional fees and disbursements of Class Counsel in the amount of US$200,000 that are separate and apart from the Attorneys' Fees and Attorneys' Costs (both as defined in the IPC Settlement).

ADDITIONAL PROVISIONS

7. THIS COURT ORDERS that the Monitor and the Applicants are hereby authorized to take such additional steps, execute such additional documents and fulfill their respective obligations under the IPC Settlement, as may be necessary or desirable for the completion of the transactions, settlements and compromises contemplated by the IPC Settlement, including seeking the Preliminary Approval Order and the U.S. Approval Order from the U.S. Bankruptcy Court.

8. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order, the Claims Procedure Order, the Transition Order, and any other order of the Court in the CCAA Proceedings, is hereby authorized and empowered to take such other actions and fulfill such other roles as are authorized by this Order or incidental thereto.

9. THIS COURT ORDERS that (i) in carrying out the terms of this Order, the Monitor shall have all of the protections given to it by the CCAA, the Initial Order, other orders in the CCAA Proceedings, and this Order, or as an officer of the Court, including the stay of proceedings in its favour, (ii) the Monitor shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, (iii) the Monitor shall be entitled to rely on the books and records of the Arctic Glacier Parties and any information provided by the Arctic Glacier Parties, and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

GENERAL PROVISIONS

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

_____

SCHEDULE "A" - ADDITIONAL APPLICANTS

Arctic Glacier California Inc.
Arctic Glacier Grayling Inc.
Arctic Glacier Lansing Inc.
Arctic Glacier Michigan Inc.
Arctic Glacier Minnesota Inc.
Arctic Glacier Nebraska Inc.
Arctic Glacier Newburgh Inc.
Arctic Glacier New York Inc.
Arctic Glacier Oregon Inc.
Arctic Glacier Party Time Inc.
Arctic Glacier Pennsylvania Inc.
Arctic Glacier Rochester Inc.
Arctic Glacier Services Inc.
Arctic Glacier Texas Inc.
Arctic Glacier Vernon Inc.
Arctic Glacier Wisconsin Inc.
Diamond Ice Cube Company Inc.
Diamond Newport Corporation
Glacier Ice Company, Inc.
Ice Perfection Systems Inc.
ICEsurance Inc.
Jack Frost Ice Service, Inc.
Knowlton Enterprises, Inc.
Mountain Water Ice Company
R&K Trucking, Inc.
Winkler Lucas Ice and Fuel Company
Wonderland Ice, Inc.

COURT OF QUEEN'S BENCH RULES

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Effective date of service

16.04(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

Service dispensed with

16.04(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08 Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

TIME FOR SERVICE

Where to master or other officer or uncontested

37.07(1) Where a motion is made on notice in any of the cases mentioned in clauses 37.05(2)(a) and (b), the notice of motion shall be served at least four days before the date on which the motion is to be heard.

Immediate hearing where urgent, etc.

37.08(2) In a case of urgency or where otherwise appropriate, the judge may proceed to hear the motion.

***Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended**

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Marginal note: Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Marginal note: Burden of proof on application

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Marginal note: Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Marginal note: Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Worldspan Marine Inc. (Re),*
2011 BCSC 1758

Date: 20111221
Docket: S113550
Registry: Vancouver

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

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44
and the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc.,
Queenship Marine Industries Ltd., 27222 Developments Ltd.
and Composite FRP Products Ltd.

Petitioners

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products	J.R. Sandrelli & J.D. Schultz
Counsel for Wolrige Mahon (the "VCO"):	K. Jackson & V. Tickle
Counsel for the Respondent, Harry Sargeant III:	K.E. Siddall
Counsel for Ontrack Systems Ltd.:	J. Leathley, Q.C.

Counsel for Mohammed Al-Saleh:	D. Rossi
Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.:	G. Wharton & P. Mooney
Counsel for Canada Revenue Agency:	N. Beckie
Counsel for Comerica Bank:	J. McLean, Q.C.
Counsel for The Monitor:	G. Dabbs
Place and Date of Hearing:	Vancouver, B.C. December 16, 2011
Place and Date of Judgment:	Vancouver, B.C. December 21, 2011

INTRODUCTION

[1] On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

[2] The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

[3] The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

[4] The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

[5] These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

[6] The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

[7] Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

[8] Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

[9] Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have

> gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

[10] Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

[11] As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

[12] On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

[13] In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

[14] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the

> means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

[16] In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

[17] In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

[18] At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[19] In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[20] As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

[21] Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

[22] Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

[23] The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

[24] The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

[25] There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while

> recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.
>
> (c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

[26] All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

[27] On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

[28] Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

[29] On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

[30] On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222

Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

[31] Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

[32] The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

[33] After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

Sargeant	$20,945.924.05
Capri Insurance Services	$ 45,573.63
Cascade Raider	$ 64,460.02
Arrow Transportation and CCY	$ 50,000.00
Offshore Interiors Inc.	$659,011.85
Continental Hardwood Co.	$ 15,614.99
Paynes Marine Group	$ 35,833.17
Restaurant Design and Sales LLC	$254,383.28

[34] The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

[35] In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

[36] The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

[37] The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

[38] An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

[39] Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor

company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.

[40] I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

[41] The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

[42] Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an

Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

[43] The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

[44] The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

[45] There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

[46] I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

[47] Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders

of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

[48] Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

[49] While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

[50] In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

[51] This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

[52] In *Re San Francisco Gifts Ltd*., at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good

faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

[53] The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

[54] The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

"PEARLMAN J."

File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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 OF WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

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

ORDER
"Canadian Retail Class Action Settlement"
DATE OF HEARING: MARCH 7, 2013 AT 10:00 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MADAM	)	THURSDAY, THE 7TH
	)	
JUSTICE SPIVAK	)	DAY OF MARCH, 2013

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 OF WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

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

ORDER

(Motion Regarding Canadian Retail Class Action Settlement)

THIS MOTION, made by the Applicants for an Order, among other things, authorizing 7088418 Canada Inc. o/a Grandview Advisors in its capacity as Chief Process Supervisor (the "**CPS**") to enter into a settlement agreement on behalf of Arctic Glacier Inc. (now known as New Holdco) ("**AGI**") to settle four Canadian class actions against AGI, including the class action commenced in the Ontario Superior Court in Court File No. CV-10-14457 (the "**Ontario Action**"), and lifting the stay of proceedings provided in paragraph 30 of the Initial Order of the Honourable Madam Justice Spivak dated February 22, 2012 (the "**Initial Order**"), as extended by subsequent Orders to March 15, 2013 (the "**Stay**") for the sole purpose of taking such steps as may be

necessary to complete the settlement of such class actions, was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

ON READING the Notice of Motion, the affidavit of Bruce Robertson, sworn February 27, 2013 and the Exhibits thereto, and the Tenth Report of the Monitor, and on hearing the submissions of counsel for the Applicants, and counsel for Alvarez & Marsal Canada Inc., in its capacity as Monitor, with counsel for the Purchasers, Arctic Glacier LLC, Arctic Glacier Canada Inc., and Arctic Glacier USA Inc., counsel for the US Direct Purchaser Antitrust Settlement Class and counsel for Desert Mountain Ice LLC, Robert Nagy, Peggy Johnson and Keith Burrows appearing in person or by telephone, no one appearing for any other party although duly served as appears from the affidavit of service, filed:

DEFINED TERMS

1. THIS COURT ORDERS that capitalized terms used in this Order and not defined herein shall have the meaning set out in order of this Court dated September 5, 2012 (the "**Claims Procedure Order**").

SERVICE

2. THIS COURT ORDERS that the time for service of the Notice of Motion and the supporting materials is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

CONFIDENTIAL EXHIBIT

3. THIS COURT ORDERS that the Confidential Exhibit to the affidavit of Bruce Robertson, sworn February 27, 2013 (as defined therein), be sealed, kept confidential and not form part of the public record.

CLASS ACTION SETTLEMENT AND LIMITED LIFT STAY

4. THIS COURT AUTHORIZES the CPS to enter into a settlement agreement on behalf of AGI substantially in the form attached hereto, to settle the Ontario Action and the three other Canadian class actions against AGI (collectively, the "**Canadian Retail Litigation**"), which settlement (the "**Settlement**") shall be subject to approval of the Ontario Superior Court;

5. THIS COURT ORDERS that the Stay against AGI is lifted solely for the purpose of allowing the parties to the Ontario Action to take such steps as may be necessary to complete the Settlement, including bringing motions before the Ontario Superior Court for approval of the Settlement.

6. THIS COURT ORDERS that, should approval of the Settlement by the Ontario Superior Court be granted, the Proof of Claim filed by Harrison Pensa LLP ("**Plaintiffs' Counsel**") in these CCAA proceedings relating to the Canadian Retail Litigation shall be deemed to be accepted in the amount of C$2 million, which shall constitute the Proven Claim of the Canadian Retail Litigation Claimants against AGI, and any distributions made in these CCAA proceedings on account of such Proven Claim (the "**Settlement Funds**") shall be made to the Plaintiffs' Counsel in the Ontario Action, in trust, for distribution in accordance with the distribution protocol set out in the Settlement (the "**Distribution Protocol**").

Date: March 18, 2013

L. SPIVAK

SPIVAK, J.

SCHEDULE "A" - ADDITIONAL APPLICANTS

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

In the Court of Appeal of Alberta

Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABCA 266

Date: 20070817
Docket: 0701-0222-AC
0701-0223-AC
Registry: Calgary

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

And in the matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited and 3094479 Nova Scotia Company
(the "CCAA Applicants")

Between:

Calpine Power L.P.

Appellant/Applicant (Creditor)

- and -

The CCAA Applicants and Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership

Respondents (Applicants)

And Between:

Calpine Canada Natural Gas Partnership

Respondent (Applicant/ CCAA Party)

- and -

Calpine Energy Services Canada Partnership and Lisa Winslow, Trustee of Calpine Greenfield Commercial Trust

Respondents (CCAA Applicant and Interested Parties)

- and -

Calpine Power L.P.

Appellant/Applicant (Creditor in CCAA Proceedings)

Reasons for Decision of
The Honourable Mr. Justice Clifton O'Brien
In Chambers

Application for Leave to Appeal and
Stay Pending Appeal of the Orders granted by
The Honourable Madam Justice B. E. Romaine
Dated the 24th day of July, 2007
Filed on the 27th day of July, 2007
(Dockets: 0501-17864; 0601-14198)

Reasons for Decision of
The Honourable Mr. Justice Clifton O'Brien
In Chambers

Introduction

[1] Calpine Power L.P. (CLP) applies for a stay pending appeal and leave to appeal three orders granted on July 24, 2007 in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (CCAA). At the request of counsel, the applications have been dealt with on an expedited basis. Oral submissions were heard on August 15, at the close of which I undertook to deliver judgment by the end of the week. I do so now.

Background facts

[2] In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the CCAA. At the same time, the parties referred to as the US Debtors sought and obtained similar protection under Chapter 11 of the U. S. Bankruptcy Code.

[3] A monitor, Ernst & Young Inc., was appointed under the CCAA proceedings and a stay of proceedings was ordered against the CCAA Applicants and against Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership. The latter three parties collectively are referred to as the CCAA Parties and those parties together with the CCAA Applicants as the CCAA Debtors.

[4] This insolvency is extremely complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets has been made more difficult by a number of cross-border issues.

[5] As described in the Monitor's 23rd Report, dated June 28, 2007, the CCAA Debtors and the US Debtors concluded that the most appropriate way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the material cross-border issues between them. The parties negotiated a global settlement agreement (GSA) subject to the approval of both Canadian and U. S. courts, execution of the GSA and the sale by Calpine Canada Resources Company of its holdings of Calpine Canada Energy Finance ULC (ULC1) Notes in the face amount of US$359,770,000 (the CCRC ULC1 Notes). Counsel at the oral hearing informed me that the Notes were sold on August 14, 2007, yielding a net amount of approximately US $403 million, an amount exceeding the face amount.

[6] On July 24, 2007, the CCAA Applicants sought and obtained three orders. First, an order approving the terms of the GSA and directing the various parties to execute such documents and

implement the transactions necessary to give effect to the GSA. Second, an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, an extension of the stay contemplated by the initial CCAA order to December 20, 2007. No objection was taken to the latter two orders and both were granted. The supervising judge also, in brief oral reasons, approved the GSA with written reasons to follow. Written Reasons for Judgment were subsequently filed on July 31, 2007: *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504. The reasons are careful and detailed. They fully set out the relevant facts and canvas the applicable law and as I see no need to repeat the facts and authorities, the reasons should be read in conjunction with these relatively short reasons dealing with the applications arising therefrom.

[7] The applications to the supervising judge were made concurrently with applications by the US Debtors to the US Bankruptcy Court in New York state, the applications proceeding simultaneously by video conference. The applications to the US Court, including an application for approval of the GSA, were also granted.

[8] The applicant, CLP, the Calpine Canada Energy Finance II ULC (ULC2) Indenture Trustee and a group referring to itself as the "Ad Hoc Committee of Creditors of Calpine Canada Resources Company" opposed the approval of the GSA. CPL is the only party seeking leave to appeal.

[9] CLP submits that the supervising judge erred in concluding that the GSA was not a compromise or plan of arrangement and therefore, sections 4 and 5 of the CCAA did not apply and no vote by creditors was necessary.

[10] Sections 4 and 5 of the CCAA provide:

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

[11] CLP further submits that the jurisdiction of the supervising judge to approve the GSA is governed by section 6 of the CCAA. Section 6 provides:

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

[12] The supervising judge found that the GSA is not linked to or subject to a plan of arrangement and does not compromise the rights of creditors that are not parties to it or have not consented to it, and it does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. She concluded that the GSA was not a compromise or arrangement for the purposes of section 4 of the CCAA. In the course of her reasons she cites a number of cases for support that the court has jurisdiction to review and approve transactions and settlement agreements during the stay period of a CCAA proceedings if an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

Test for leave to appeal

[13] This Court has repeatedly stated, for example in *Re Liberty Oil & Gas Ltd.*, 2003 ABCA 158, 44 C.B.R. (4th) 96 at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;
> (2) Whether the point raised is of significance to the action itself;
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) Whether the appeal will unduly hinder the progress of the action.

[14] In assessing these factors, consideration should also be given to the applicable standard of review: *Re Canadian Airlines Corp.*, 2000 ABCA 149, 261 A.R. 120. Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate

knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Re Smoky River Coal Ltd.*, 1999 ABCA 252, 237 A.R. 326 at para. 61.

Analysis

[15] The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was "not a plan of compromise or arrangement with creditors" (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

[16] The statute itself contains no definition of a compromise or arrangement. Moreover, it does not appear that a compromise or an arrangement has been *proposed* between a debtor company and either its unsecured or secured creditors, or any class of them within the scope of sections 4 or 5 of the CCAA. Neither the company, a creditor, nor anyone made application to convene a meeting under those sections.

[17] Rather, the GSA settles certain intercorporate claims between certain Canadian Calpine entities and certain US Calpine entities subject to certain conditions, including the approvals both of the Court of Queen's Bench of Alberta and of the US Bankruptcy Court.

[18] This is not to minimize the magnitude, significance and complexity of the issues dealt with in the intercorporate settlement which, by definition, was not between arm's length companies. The material cross-border issues are identified in the 23rd Report of the monitor and listed by the supervising judge (Reasons, para. 5).

[19] It is implicit in her reasons, if not express, that the supervising judge accepted the analysis of the monitor, and found that the GSA would likely ultimately result in payment in full of all Canadian creditors, including CLP. CLP does not challenge this finding, but points out that payment is not assured, and rightly relies upon its status as a creditor to challenge the approval in the meantime until such time as it has been paid.

[20] The supervising judge further found that the GSA "does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA" (Reasons, para. 51). CPL challenges this finding. In order to succeed in its proposed appeal, CPL must also demonstrate palpable and overriding error in these further findings of the supervising judge which once again, involve findings of fact or of mixed law and fact.

Application in this case

[21] CPL submits that the "fundamental problem" with the approval granted by the supervising judge is that the GSA is in reality a plan of arrangement because it settles virtually all matters in dispute in the Canadian CCAA estate and therefore, entitles the applicant to a vote. CPL argues that the GSA must be an arrangement or compromise within the meaning of sections 4, 5 and 6 of the CCAA because, in its view, the GSA requires non party creditors to make concessions, re-orders the priorities of creditors and distributes assets of the estate.

[22] The supervising judge acknowledged at the outset of her analysis that if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary (Reasons, para. 41). However, she was satisfied that the GSA did not constitute a plan of arrangement with creditors.

[23] The applicant conceded that a CCAA supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors. This concession was proper having regard to case authority recognizing such jurisdiction and cited in the reasons of the supervising judge, including *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.), *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.) and *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 (C.A.).

[24] The power to approve such transactions during the stay is not spelled out in the CCAA. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of the debtor until it can present a plan: *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at para. 8 (Ont. Gen. Div.).

[25] Hunt, J.A. in delivering the judgment of this Court in *Smoky River Coal* considered the history of the legislation and its objectives in allowing the company to take steps to promote a successful eventual arrangement. She concluded at para. 53:

> These statements about the goals and operation of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

and further at para. 60:

> To summarize, the language of s. 11(4) is very broad. The CCAA must be interpreted in a remedial fashion.

[26] In my view, there is no serious issue as to the jurisdiction of a supervising judge to approve a settlement agreement between consenting parties prior to consideration of a plan of arrangement pursuant to section 6 of the CCAA. The fact that the GSA is not a simple agreement between two

parties, but rather resolves a number of complex issues between a number of parties, does not affect the jurisdiction of the court to approve the agreement if it is for the general benefit of all parties and otherwise meets the tests identified in the reasons of the supervising judge.

[27] CPL urges that the legal issue for determination by this Court is where the line is to be drawn to say when a settlement becomes a compromise or arrangement, thus requiring a vote under section 6 before the court can grant approval. It suggests that it would be useful to this practice area for the court to set out the criteria to be considered in this regard.

[28] An element of compromise is inherent in a settlement as there is invariably some give and take by the parties in reaching their agreement. The parties to the GSA made concessions for the purpose of gaining benefits. It is obvious that something more than compromise between consenting parties within a settlement agreement is required to constitute an arrangement or compromise for purposes of the CCAA as if that were not so, no settlement agreement could be approved without a vote of the creditors. As noted, that is contrary to case authority accepted by all parties to these applications.

[29] The CCAA deals with compromises or arrangements sought to be imposed upon creditors generally, or classes of creditors, and a vote is a necessary mechanism to determine whether the appropriate majority of the creditors proposed to be affected support the proposed compromise or arrangement.

[30] As pointed out by the supervising judge, a settlement will almost always have an impact on the financial circumstances of a debtor. A settlement will invariably have an effect on the size of the estate available for other claimants (Reasons, para. 62).

[31] Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the CCAA, and that the settlement merited approval. She recognized the peculiar circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

[32] At the time of granting her approval, the supervising judge had been overseeing the conduct of these CCAA proceedings since their inception – some 18 months earlier. She had the benefit of

the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

[33] CPL submits that the GSA compromises its rights and claims, and thus, challenges the express finding of the supervising judge that the settlement neither compromises the rights of creditors before it, nor deprives them of their existing contractual rights. The applicant relies upon the following effects of the GSA in making this submission:

(i) a priority payment of $75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;
(ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;
(iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and
(iv) the dismissal of the Greenfield Action brought by another CCAA Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

[34] For purposes of the CCAA proceedings, the applicant is a creditor of Calpine Energy Services Canada Ltd., Calpine Canada Power Ltd. and perhaps, also, Calpine Canada Resources Company. The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.

[35] In my view, the submission of the applicant does not show any palpable and overriding error in the findings of the supervising judge that the right of creditors not parties to the GSA have not been compromised or taken away. Firstly, there is no compromise of debt if such indebtedness, as ultimately found due to the applicant, is paid in full, which is the likely result as found by the supervising judge, albeit she acknowledged that this result was not guaranteed (Reasons, para. 81). Secondly, and in any event, the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

[36] The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge,

the settlement between the CCAA Debtors and the US Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

[37] It is correct, of course, that if the claims of CPL are paid in full in the course of the CCAA proceedings, it will never be necessary for it to vote on a plan of arrangement. The applicant should have no complaint with that result. On the other hand, if the claims are not satisfied, it seems likely a plan of arrangement will ultimately be proposed to the applicant, who will then have its right to vote on any such plan.

[38] CPL argues that the supervising judge was not entitled to assess the merits of the GSA *vis-à-vis* the creditors as this was a matter for the exclusive business judgment of the creditors and to be exercised by their vote. As became apparent during the course of its submissions, if a vote were required, from the perspective of the CPL, this would give it veto power over the GSA. Unless clearly mandated by the statute, this is a result to be avoided. While it is understandable that an individual creditor seeks to obtain as much leverage as possible in order to enhance its negotiating position, the objectives and purposes of the CCAA could easily be frustrated in such circumstances by the self interest of a single creditor. Court approval requires, as a primary consideration, the determination that an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. As the supervising judge noted, court approval of settlements and major transaction can and often is given over the objections of one or more parties because the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation.

[39] I am not persuaded that the applicant has demonstrated any reasonably arguable error of law in the reasons of the supervising judge or any palpable and overriding errors in her findings of fact or findings of mixed fact and law. In the absence of any such error, it follows that she had discretion to approve the GSA, which she exercised based upon her assessment of the merits and reasonableness of the settlement, and other factors in accordance with the principles set out in the authorities, cited in her reasons, governing the approval of transactions, including settlements, during the stay period prior to a plan of arrangement being submitted to the creditors.

Conclusion

[40] CPL has failed to establish serious and arguable grounds for granting leave. In particular, two of the factors used to assess whether this criterion is present have not been met. It has not been demonstrated that the point on appeal is of significance to the parties having regard to the fact dependent nature of whether a plan of arrangement has been proposed to creditors. More importantly, having regard to the standard of review and the findings of the supervising judge, the applicant has not demonstrated that the appeal for which leave is sought is *prima facie* meritorious.

[41] The application for leave is dismissed. It follows that the application for a stay likewise fails and is dismissed.

[42] Finally, I would be remiss if I did not acknowledge the excellent quality of the submissions, both written and oral, of counsel on these applications. The submissions were of great assistance in permitting the application to be dealt with in an abbreviated time frame.

Application heard on August 15, 2007

Reasons filed at Calgary, Alberta
this 17th day of August, 2007

O'Brien J.A.

Appearances:

P.T. Linder, Q.C.
R. Van Dorp
for the Applicant, CPL

L.B. Robinson, Q.C.
S.F. Collins
J.A. Carfagnini
for the CCAA Applicants and the CCAA Parties (Respondents)

H.A. Gorman
for the Ad Hoc ULC1 Noteholders Committee

P.H. Griffin
U. Sheikh
for the Calpine Corporation and other US Debtors

F.R. Dearlove
for HSBC

P. McCarthy, Q.C.
J. Kruger
for Ernst & Young Inc., the Monitor

N.S. Rabinovitch
for the Lien Debtholders

R. De Waal
for the Unsecured Creditors Committee

Court of Queen's Bench of Alberta

Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABQB 504

Date: 20070731
Docket: 0501 17864
Registry: Calgary

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

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

Introduction

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

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

Background

[3] Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them

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

[4] During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

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

a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 ½% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;

b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;

c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;

d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;

e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;

f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");

g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;

h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and

i. Marker claims filed by the ULC1 Indenture Trustee.

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

10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.

11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.

12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.

13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...

14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...

17. The [GSA] is subject to the following conditions:

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

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

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

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

c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;

d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;

e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

    i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;

ii. The claims of NOVA Gas Transmission Ltd. (“NOVA”) for the repudiation of certain long-term gas transportation contracts held by CESCA;

iii. The claims of TransCanada Pipelines Limited (“TCPL”) for the repudiation of certain long-term gas transportation contracts held by CESCA;

iv. The claims of Calpine Power L.P. [the “Fund”] for the repudiation of the tolling agreement between [the Fund] and CESCA (the “CLP Toll Claim”);

v. The claims of [the Fund] and Calpine Power Income Fund (“CPIF”) relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the “Island Transfer Fee Claim”); and

vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the “Heat Rate Penalty Claim”); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;

g. The settlement of the Greenfield Action;

h. The withdrawal of the UL1 Indenture Trustee Marker Claim;

i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;

j The resolution of the quantum of the cross-border intercompany claims...;

k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;

l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the “ULC2 Make-Whole Premium”). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an

amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan. . .;

n. Resolution of all jurisdictional issues between Canada and the U.S.; and

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

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

The Applications

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

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

[11] The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power,

L.P.". Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

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

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

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

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

The Ad Hoc Committee's Objections

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

[14] This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

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

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

[17] The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that

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

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

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

[20] The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

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

guarantees under the “low” scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

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

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

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

[25] Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

[26] I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to

be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

[27] As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly 3 ½ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund's Objections

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

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

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

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

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

and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

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

The ULC2 Trustee's Objections

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

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

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

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

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

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

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

Analysis of Law re: Plan of Arrangement

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

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

[43] The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

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

[45] The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in

the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

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

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

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

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

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

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

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

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

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

[55] I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of

$25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

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

[57] In *Playdium*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Re Lehendorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]) and *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.J. [Comm. List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Red Cross*.

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

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

> ... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd. . . .* In *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171

> (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

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

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

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

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

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

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

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

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

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

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

[70] Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by

the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

[71] Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'. "

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

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

> it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted) [Emphasis in *Red Cross*.]

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

[74] While there are clear differences between the *Red Cross* sale transaction and the GSA in this case, what the *Red Cross* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Red Cross*, *Air Canada* and *Playdium*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

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

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

[77] The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

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

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

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

Conclusion

[80] Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the

major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

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

[82] The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Heard on the 24th day of July, 2007.
Dated at the City of Calgary, Alberta this 31st day of July, 2007.

B.E. Romaine
J.C.Q.B.A.

Major Canadian Appearances:

Larry B. Robinson, Q.C. and Sean F. Collins of McCarthy Tetrault LLP
Jay A. Carfagnini, Fred Myers, Brian Empey and Joseph Pasquariello of Goodmans LLP
for the CCAA Debtors

Patrick McCarthy, Q.C. and Josef A. Krueger of Borden Ladner Gervais LLP
for the Monitor

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

Sean F. Dunphy and Elizabeth Pillon of Stikeman Elliott LLP
for the ULC2 Trustee

Howard A. Gorman of Macleod Dixon LLP
for the ULC1 Noteholders Committee

Peter H. Griffin and Peter J. Osborne of Lenczner Slaght Royce Smith Griffin LLP
for the U.S. Debtors

Peter T. Linder, Q.C. and Emi R. Bossio of Peacock Linder & Halt LLP
for the Fund

Ken Lenz of Bennett Jones LLP
for the HSBC Bank USA, N.A., as ULC1 Indenture Trustee

Jay A. Swartz of Davies Ward Phillips & Vineberg LLP
for Lehman Brothers

Rinus De Waal of Fasken Martineau DuMoulin LLP
for the Unsecured Creditors' Committee

Neil Rabinovitch of Fraser Milner Casgrain LLP
for the Unofficial Committee of 2nd Lien Debtholders

B. A. R. Smith, Q.C. of Fraser Milner Casgrain LLP
for Alliance Pipelines

Douglas I. McLean
for TransCanada Pipelines Limited

COURT FILE NO.: 01-CL-4081
DATE: 20081023

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF S. 18.6 OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended**

AND IN THE MATTER OF GRACE CANADA, INC.

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick C. Tay, Orestes Pasparakis and Jennifer Stam for Grace Canada Inc.**

Keith J. Ferbers for Raven Thundersky

Alexander Rose for Sealed Air (Canada)

Michel Bélanger, David Thompson, and Matthew G. Moloci, Representative Counsel for CDN ZAI Claimants

Jacqueline Dais-Visca and Carmela Maiorino for The Attorney General of Canada

HEARD: **SEPTEMBER 30, 2008**

E N D O R S E M E N T

[1] Grace Canada Inc. ("Grace Canada" and with the U.S. debtors, "Grace") bring this motion to seek approval of the Minutes of Settlement ("the Minutes") in respect of claims against Grace relating to the manufacture and sale of Zonolite Attic Insulation ("ZAI") in Canada (the "CDN ZAI Claims").

[2] Under the Minutes, Grace agrees to:

(a) fund a broad multimedia notice programme across Canada;

(b) establish a trust with $6.5 million for the payment of Canada ZAI property damage claims; and

(c) channel any Canadian ZAI personal injury claims to a U.S. asbestos trust which will have in excess of US$1.5 billion in funding.

[3] In consideration, Grace would be discharged of any liability in connection with CDN ZAI Claims.

[4] Although there was no direct opposition to the terms of the Minutes as being fair and reasonable, certain parties proposed amendments to the form of order sought by Grace.

[5] Grace submits that the Minutes ought to be approved in the form submitted. Counsel submitted that Grace's significant settlement contribution is manifestly fair and reasonable, given Grace's defences to CDN ZAI Claims and, in particular, the judicial determination by the U.S. Bankruptcy Court (the "U.S. Court") that ZAI does not pose an unreasonable risk of harm.

[6] Further, counsel to Grace submits that the Minutes are an important step towards the successful reorganization of Grace and with this settlement, these insolvency proceedings, which were filed in April 2001, are nearing completion.

[7] W. R. Grace & Co. and its 61 subsidiaries (the "U.S. Debtors") have filed a joint Chapter 11 plan of reorganization (the "Plan") with the U.S. Court and expect to commence a confirmation hearing for the Plan in early 2009. The Plan incorporates the terms of the settlement before this Court and if confirmed, sees Grace emerging from Chapter 11 protection in 2009.

[8] The chain of events that resulted in the Minutes began in 1963 with Grace's purchase of the assets of the Zonolite Company ("Zonolite"). Zonolite mined and processed vermiculite from a mine near Libby, Montana (the "Libby Mine"). Vermiculite is an insulator which apparently has no known toxic properties. However, the vermiculite ore from the Libby Mine contained impurities, including asbestiform minerals.

[9] One of the products made from the U.S. Debtors' vermiculite was ZAI. ZAI was installed in attics of homes. Some ZAI contained trace amounts of asbestos.

[10] In addition, 40 years ago the U.S. Debtors manufactured a product known as monokote-3 ("MK-3") which had chrysotile asbestos added during the manufacturing process.

[11] Grace stopped manufacturing MK-3 in Canada by 1975 and ceased production of ZAI in 1984 and closed the Libby Mine in 1990.

[12] By the 1970s, the U.S. Debtors began to be named in asbestos-related lawsuits. These included both asbestos-related personal injury claims ("PI Claims") and property damage claims relating to ZAI.

[13] Due to a rise in the number of PI Claims in 2000 and 2001, the U.S. Debtors filed for protection under Chapter 11 of the *United States Bankruptcy Code* on April 2, 2001.

[14] Grace Canada was incorporated in 1997. According to the affidavit of Mr. Finke, it had no direct involvement in any historic use of asbestos.

[15] Rather, Grace's historic business operations in Canada were undertaken by a company now known as Sealed Air (Canada) Co./CIE ("Sealed Air Canada"). Sealed Air Canada is the successor to the Canadian companies with past involvement in the sale and distribution of ZAI and asbestos containing products such as MK-3.

[16] Sealed Air Canada was spun-off from Grace in 1998 and as part of the transaction, Grace Canada and the U.S. Debtors provided certain indemnities to Sealed Air Canada and its parent, Sealed Air Corporation, relating to historic asbestos liabilities.

[17] On April 4, 2001, two days after the Chapter 11 proceedings had been commenced, Grace Canada commenced these proceedings. The Canadian CCAA proceedings were commenced seeking ancillary relief to facilitate and coordinate the U.S. proceedings in Canada. An initial order was granted by this Court pursuant to s.18.6(4) of the CCAA (the "Initial Order").

[18] By 2005, despite the Initial Order, 10 proposed class actions (the "Proposed Class Actions") were commenced across Canada in relation to the manufacture, distribution and sale of ZAI. Grace Canada, some of the U.S. Debtors and Sealed Air Canada were named as defendants, as was the Attorney General of Canada (the "Crown").

[19] The allegations in the Proposed Class Actions include both ZAI PI Claims as well as damages for the cost of removing ZAI from homes across Canada ("CDN ZAI PD Claims").

[20] On November 14, 2005, an order was issued (the "November 14th Order") enjoining the Proposed Class Actions against the U.S. Debtors, Sealed Air Canada and the Crown.

[21] As a result, the Proposed Class Actions were brought within the overall restructuring process.

[22] By order of February 8, 2006 (the "Representation Order"), Lauzon Bélanger S.E.N.C. ("Lauzon") and Scarfone Hawkins LLP ("Scarfone") (jointly, "Representative Counsel") were appointed to act as the single representative on behalf of all of the holders of Canadian ZAI Claims ("CDN ZAI Claimants") to advocate their interests in the restructuring process.

[23] No one has taken issue with the authority of the Representative Counsel to represent all CDN ZAI Claimants in the U.S. Court, this Court or at any of the mediations. The Representation Order provided that Representative Counsel would, among other things, have authority to negotiate a settlement with Grace.

[24] After a long history of negotiations, on June 2, 2008, Grace, Representative Counsel and the Crown announced to the U.S. Court that they had reached an agreement in principle that remained subject to the Crown's acceptance. The Crown was not able to obtain firm instructions on whether to participate in the settlement.

[25] On September 2, 2008, Grace and Representative Counsel signed the Minutes resolving all CDN ZAI Claims against Grace and Sealed Air Canada.

[26] On April 7, 2008, the U.S. Debtors reached an agreement effectively settling all present and future PI Claims (the "PI Settlement") and under this agreement, the U.S. Debtors agreed to pay into trust various assets, including US$250 million, warrants to acquire common stock, proceeds of insurance, certain litigation and deferred payments and it estimates that the total value of the settlement is in excess of US$1.5 billion. Sealed Air Canada is making a contribution to the settlement in excess of $500 million, plus 18 million shares of stock.

[27] On September 21, 2008, the U.S. Debtors filed their draft Plan with the U.S. Court and confirmation hearings are scheduled for early in 2009.

[28] The Minutes contemplate a settlement of all CDN ZAI Claims, both personal injury ("CDN ZAI PI Claims") and property damage, on the following terms:

(a) Grace agrees to provide in its Plan for the creation of a separate class of CDN ZAI PD Claims and to establish the CDN ZAI PD Claims Fund, which shall make payments in respect of CDN ZAI Claims;

(b) on the effective date of Grace's Plan, Grace will contribute $6,500,000 through a U.S. PD Trust to the CDN ZAI PD Claims Fund;

(c) Grace's Plan provides that any holder of a CDN ZAI PI Claim ("CDN ZAI PI Claimant") shall be entitled to file his or her claim with the Asbestos Personal Injury Trust to be created for all PI Claims and funded in accordance with the US$1.5 billion PI Settlement;

(d) Representative Counsel shall vote, on behalf of CDN ZAI Claimants, in favour of the Plan incorporating the settlement; and

(e) Representative Counsel shall be entitled to bring a fee application within the U.S. proceedings and any such payments received would reduce the amount otherwise payable to Representative Counsel under the Settlement.

In addition, Grace has agreed to fund a broad based media notice programme across Canada and an extended claims bar procedure for CDN ZAI PD Claims and Grace has also agreed to give direct notice to any known claimant.

[29] Under the Minutes, the bar date for CDN ZAI PD Claims is not less than 180 days from substantial completion of the CDN ZAI Claims Notice Program. The period for filing ZAI PD Claims in the U.S. is considerably shorter and Grace has scheduled a motion with the U.S. Court on October 20, 2008 to approve the CDN ZAI PD Claims bar date. Grace has indicated that if granted, recognition of the U.S. order will be sought from this Court. There will be no bar date for CDN ZAI PI Claims.

[30] Grace has indicated that it has contemplated that monies will be distributed out of the CDN ZAI PD Claims Fund based on a claimant's ability to prove that his or her property contained ZAI and that monies were expended to contain or remove ZAI from the property.

Based on proof of ZAI in the home and the remediation measures taken by a claimant, that claimant may recover $300 or $600 per property.

[31] The issues for consideration were stated by counsel to Grace as follows:

(a) Does Representative Counsel have the authority to enter into the Minutes on behalf of all CDN ZAI Claimants?

(b) Does the CCAA Court have the jurisdiction to approve the Minutes, including the relief in favour of Sealed Air Canada and the Crown?

(c) Are the Minutes fair and reasonable? In particular, is their prejudice to the key constituencies?

[32] The Representation Order is clear. It gives Representative Counsel broad powers, including the ability to negotiate on behalf of CDN ZAI Claimants. No party has objected to or taken issue with the Representation Order or with the authority of Representative Counsel to represent all CDN ZAI Claims.

[33] I am satisfied that Lauzon and Scarfone have the authority, as Representative Counsel, to enter the Minutes of Settlement on behalf of all CDN ZAI Claimants.

[34] I am also satisfied that the CCAA Court may approve material agreements, including settlement agreements, before the filing of any plan of compromise or arrangement. See *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) and *Calpine Canada Energy Limited (Re)* (2007), 35 C.B.R. (5th) p. 1 (Alta. Q.B.), leave to appeal denied (2007), 35 C.B.R. (5th) 27 (Alta. C.A.).

[35] It is noted that, in this case, the Plan will be voted on by creditors in the U.S. proceedings.

[36] With respect to relief in favour of Sealed Air, Grace has agreed to indemnify Sealed Air Canada for certain liabilities in connection with ZAI. As part of the settlement, Grace seeks to ensure that the release of the CDN ZAI Claims includes a release for the benefit of Sealed Air Canada.

[37] Counsel submits that such release is not only necessary and essential, but also fair given Sealed Air Canada's contribution to the PI Settlement under the Plan in excess of $500 million. I am satisfied that, in these circumstances, the release for the benefit of Sealed Air Canada is fair and reasonable.

[38] The Minutes also provide a limited release in favour of the Crown. Pursuant to the Minutes, the Crown's claims for contribution and indemnity against Grace (being CDN ZAI Claims) are released. Counsel submits that the corollary is that the Crown is relieved of any joint liability it shares with Grace for CDN ZAI Claims.

[39] Counsel to Grace again submits that such a release of the Crown is necessary. Otherwise, Grace could become indirectly liable through contribution and indemnity claims.

[40] Counsel for Grace submits that, in certain circumstances, this Court has ordered third party releases where they are necessary and connected to a resolution of the debtor's claims, will benefit creditors generally, and are not overly broad or offensive to public policy. (See: *Re: Muscletech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59 (Ont. Sup. Ct.) and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. 5th 269 (Ont. Sup. Ct.), aff'd. (2008), ONCA 587 ("Metcalfe"), leave to appeal to S.C.C. denied.)

[41] Subsections 18.6(3) and (4) of the CCAA, allow the Ontario Court to make orders with respect to foreign insolvency proceedings, on such terms and conditions as the Court considers appropriate.

[42] In assessing whether to grant its approval, the Court has to consider whether the Minutes are fair and reasonable in all of the circumstances.

[43] It is the submission of Grace that the Minutes are fair and reasonable, and that resolutions of the CDN ZAI Claims in particular do not prejudice the Crown, CDN ZAI PD Claimants or, CDN ZAI PI Claimants.

[44] Grace also submits that, given the strong defences which it believes are available, the Minutes provide a substantial compromise by Grace, considering the circumstances in which it believes it has no liability for CDN ZAI Claims.

[45] Early in the insolvency proceedings, the U.S. Court held a hearing to determine, as a threshold scientific issue, whether the presence of ZAI in a home created an unreasonable risk of harm. The opinion of the U.S. Court was filed as part of the record. Grace states that the U.S. Court came to the conclusion that ZAI did not pose an unreasonable risk of harm. The background and conclusions of the U.S. Court have been summarized at paragraphs 72 to 85 of the Grace factum.

[46] I have been persuaded by and accept these submissions.

[47] In addition, even if ZAI had been found to pose an unreasonable risk of harm, Grace submits that it still has a complete defence to any claims under Canadian law for the reasons set out at paragraphs 86 to 97 of the factum.

[48] Further, the passage of time is such that Grace submits that many cases would be dismissed outright based on the expiry of the limitation period.

[49] With respect to the issue of prejudice to the Crown, on the one hand, the Crown has asserted claims against Grace. The Crown has estimated that over 2,000 homes located on military bases have been remediated to contain vermiculite attic insulation or ZAI from homes built by the Canadian military. Under the Settlement, the Crown, as a CDN ZAI Claimant, would receive $300 per unit for the sealing of ZAI. Based on the Crown's records, the Crown would potentially have a claim against the Fund for up to $660,000 and if it chose to pursue this claim, the Crown would recover approximately 50% of its remediation expenditures.

[50] On the other hand, the Crown is also a defendant in the Proposed Class Actions. Through the Minutes, the Crown will release its CDN ZAI Claims against Grace, but at the same time, counsel to Grace submits that the Crown is effectively released from any joint liability it may share with Grace. Grace submits that the Crown will be relieved from all CDN ZAI Claims except those for which it is severally responsible.

[51] It is with respect to the release language that the Crown takes exception.

[52] The Crown acknowledges that Representative Counsel has the authority to negotiate on behalf of ZAI Claimants. However, the Crown disputes the authority of Representative Counsel to purport to negotiate away the Crown's Chapter 11 "claim over" for contribution and indemnity.

[53] The Crown supports the approval of the Settlement insofar as it purports to resolve all of Grace's liability with respect to CDN ZAI PD and PI Claims, provided that the approval order expressly recognizes that the Crown's protective "claim over" for contribution and indemnity against Grace is unimpaired by the Settlement and provided that the Approval Order expressly allows the Crown to third party Grace in ZAI related actions where the Crown is sued on a several basis.

[54] Counsel to the Crown submits that to interpret the authority of Representative Counsel to have the power to release the Crown's "claim over" against Grace while they simultaneously reserve the right to pursue the claims against the Crown would conflict with the clear direction in the Representation Order. They submit that CCAA Representative Counsel does not represent the Crown's interest with respect to the contribution and indemnity claim, and would be in conflict of interest with respect to the members of the group it represents if it attempted to do so. They further submit that it has always been the position of the Crown that all ZAI related damages give rise to a contribution and indemnity claims against Grace and that no independent claim lies against the Crown; hence, the Crown has and will continue to assert a contribution and indemnity claim against Grace for the totality of the damages.

[55] At the hearing, the argument of the Crown was presented without the benefit of a factum. I requested and received a factum from the Crown which was then responded to by counsel to Grace and by Representative Counsel.

[56] In my view, the response of Grace is a complete answer to the Crown's submissions. Counsel to Grace notes that the Crown purports to support the Order sought on the proviso that its contribution and indemnity claims against Grace are unimpaired. However, the Minutes do impair the Crown's contribution claims, and with the Order, the Crown will have no claims for contribution and indemnity against Grace.

[57] It is Grace's position that Representative Counsel has the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity. Further, in any event, there is no prejudice to the Crown as pursuant to the Minutes, CDN ZAI Claimants have agreed that they cannot pursue the Crown for claims for which Grace is

ultimately responsible. Consequently, the Crown has no contribution claims to assert against Grace. Simply put, as submitted by counsel to Grace, there is nothing left.

[58] The Representation Order applies to all claims "arising out of or in any way connected to damages or loss suffered, directly or indirectly, from the manufacture, sale or distribution of Zonolite attic insulation products in Canada".

[59] It seems to me that the wording of the Representation Order is clear. Representative Counsel have the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity.

[60] With respect to the Release itself, the Minutes release any claims or causes of action for which the Crown has a right of contribution and indemnity. As submitted by counsel to Grace, Representative Counsel may not pursue the Crown in respect of claims for which Grace is ultimately liable.

[61] Paragraph 13(b)(iii) of the Minutes provides for a release of:

> "…any claims or causes of action asserted against the Grace Parties as a result of the Canadian ZAI Claims advanced by CCAA Representative Counsel against the Crown as a result of which the Crown is or may become entitled to contribution or indemnity from the Grace Parties."

[62] I accept the submission of counsel to Grace that the purpose of this provision is to protect Grace from indirect claims through the Crown. Since any claim for which Grace is ultimately liable cannot be pursued, the Crown has no need nor any ability to "claim over" against Grace.

[63] The Crown also relied on an order of November 7, 2005 of Chaput J. of the Québec Superior Court in the *Brosseau* case which was one of the Proposed Class Actions. The Crown relied on the order of Chaput J. to argue that all claims against the Crown flow through Grace and that Grace is therefore ultimately responsible for any Crown liability.

[64] I agree with the position being taken by Grace to the effect that this argument is misplaced. It was made quite clear at this hearing that the scope of any remaining Crown liability will need to be addressed at a future hearing.

[65] Submissions were also made by counsel on behalf of Ms. Thundersky.

[66] Counsel pointed out certain concerns and suggested that it was appropriate to alter the proposed form of order.

[67] The first concern raised related to the issue of preservation of claims against the Crown and counsel submitted that paragraph 13(b)(iv) creates some ambiguity in this area. In my view, paragraph 13(b)(iv) of the Minutes is clear. The concluding words read as follows:

> "For greater certainty, nothing contained in these Minutes shall serve to discharge, extinguish or release Canadian ZAI Claims asserted against the Crown and which claims seek to establish and apportion independent and/or several liability against the Crown."

[68] I do not share counsel's concern. The issue does not require clarification. In my view, this paragraph is not ambiguous.

[69] Counsel to Ms. Thundersky also raises concern that the draft order provides that all of the legal actions in Canada be "permanently stayed" until all of the actions have formally removed the Grace Parties as defendants which would not occur until the Effective Date of any approved Plan of Reorganization. In my view, this is not a significant concern. This Court retains jurisdiction over the matters before it in these proceedings and to the extent that further direction is required, the appropriate motion can be brought before me.

[70] The third concern raised by counsel to Ms. Thundersky was with respect to the Asbestos PI Fund to be established in the U.S. process. Concerns were raised with respect to the uncertainty surrounding when and in what manner the eligibility criteria for the fund would be established. Counsel to Grace advised that Mr. Ferbers would have the opportunity to provide comment during the Plan process on this issue. I expect that this should be sufficient to alleviate any concerns but, if not, further direction can be sought from this Court.

[71] Finally, concern was also raised with respect to the absence of a personal injury notice program. Counsel to Grace advised that this issue would be communicated to those involved in the U.S. Plan. In the circumstances, this would appear to be a pragmatic response to the concern raised by counsel to Ms. Thundersky.

[72] Counsel to Ms. Thundersky acknowledged that it was difficult to propose a resolution which stayed within the four corners of the Minutes, but that Ms. Thundersky did wish to bring the foregoing concerns to the attention of the parties and the Court in the hopes that they could be taken into account.

[73] Counsel to Grace and Representative Counsel are aware of these issues and will take them into account.

[74] I indicated at the hearing that I was inclined to either approve the Minutes or to reject them. The Minutes are the product of extensive negotiation between the Representative Counsel and the Grace Parties. I am of the view that it is not appropriate for me to examine and evaluate the Minutes on a line-by-line basis, nor to amend or alter the agreement as reached between Representative Counsel and the Grace Parties.

[75] In my view, to accept the submissions of the Crown and Ms. Thundersky would leave the Court in the position of having to reject the Minutes and refuse to approve the Settlement. Having considered all of the circumstances, I do not consider this to be an appropriate outcome.

[76] I have been satisfied that the Minutes are fair and reasonable. The Minutes have been agreed to by Representative Counsel. In my view, the Minutes do not prejudice the interests of the Crown. I am also of the view that there is no prejudice to the ZAI PD Claimants who will have access to a significant fund to assist with their remediation costs. Their alternative is more litigation which, at the end of the day, would have a very uncertain outcome. I am also of the view that there is no prejudice to the ZAI PI Claimants who will have the opportunity to make a claim to the asbestos trust in the U.S. I am satisfied that the ZAI PI Claimants will be receiving treatment that is fair and equal with other PI Claimants. Further, it is noted that counsel to Grace advised that the Thundersky family are the only known ZAI PI Claimants. Their alternative is the continuation of a claim that on its face, would appear to have been statute barred in 1994.

[77] I also accept the conclusions as put forth by counsel to Grace. This Settlement provides CDN ZAI PD Claimants with clear recourse to the CDN ZAI PD Claims Fund and CDN ZAI PI Claimants with recourse to the Asbestos Personal Injury Trust in situations where it is Grace's view that the Canadian claims have little or no value.

[78] I am also satisfied that third party releases are, in the circumstances of this case, directly connected to the resolution of the debtor's claims and are necessary. The third party releases are not, in my view, overly broad nor offensive to public policy.

[79] Counsel to Grace also submitted that Representative Counsel have been continuously active and diligent in both the U.S. and Canadian proceedings and Grace is of the view that it is appropriate that a portion of the funds paid under the settlement go towards compensation of Representative Counsel's fees. I accept this submission and specifically note that the Minutes provide for specified payments to Representative Counsel, a Claims Administrator and a qualified expert to assist in the claims process, in a total amount of approximately CDN$3,250,000.

[80] In conclusion, the Minutes, in my view, represent an important component of the Plan. They provide a mechanism for the resolution of CDN ZAI Claims without the uncertainty and delay associated with ongoing litigation.

[81] The Minutes are approved and an order shall issue in the form requested, as amended.

MORAWETZ J.

DATE: Endorsement released October 17, 2008

With Reasons released October 23, 2008

CITATION: Nortel Networks Corporation (Re), 2010 ONSC 1708
COURT FILE NO.: 09-CL-7950
DATE: 20100326

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants

Lyndon Barnes and Adam Hirsh, for the Nortel Directors

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor

Arthur O. Jacques, for the Nortel Canada Current Employees

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF)

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada

Pamela Huff, for the Northern Trust Company, Canada

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration)

Sorin Gabriel Radulescu, In Person

Guy Martin, In Person, on behalf of Marie Josee Perrault

Peter Burns, In Person

Stan and Barbara Arnelien, In Person

HEARD: MARCH 3, 4, 5, 2010

ENDORSEMENT

INTRODUCTION

[1] On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

[2] The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and

(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

[3] Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

[4] Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality

is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

[5] The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

[6] The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;

(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis; [1]

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

[7] The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

[8] The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

[9] The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

[10] The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

[11] The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

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[1] On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue concernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

THE FACTS

A. Status of Nortel's Restructuring

[12] Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

[13] In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

[14] Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

[15] Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

[16] Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

[17] On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

[18] Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

[19] On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

[20] As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

[21] In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

[22] The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT

The Applicants

[23] The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;

(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;

(c) prevents disruption in the transition of benefits for current employees;

(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;

(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and

(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

[24] Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and

such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

[25] The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

[26] In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

[27] Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

[28] Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

[29] In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

[30] Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

[31] The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] OJ. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

[32] The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

[33] The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

[34] The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

[35] The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

[36] Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

[37] Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that this is the best agreement they could have negotiated.

[38] Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

[39] In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and

wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

[40] The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

[41] The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

[42] The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

[43] The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

[44] Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

[45] The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

[46] The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

[47] Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

[48] Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

[49] Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

[50] A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

[51] The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

[52] Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

[53] The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

[54] The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

[55] Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

[56] The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

[57] The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

[58] Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

LAW AND ANALYSIS

A. Representation and Notice Were Proper

[59] It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008, supra* at para 32.

[60] The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

[61] In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

[62] Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

[63] I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.,* [2009] O.J. No. 2529 at para 16. I am satisfied that this objective has been achieved.

[64] The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

[65] I am satisfied that the notice process was properly implemented by the Monitor.

[66] I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

[67] The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra,* at paras. 44 and 61.

[68] Three sources for the court's authority to approve pre-plan agreements have been recognized:

> (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
>
> (b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
>
> (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

[69] In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

[70] In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

[71] I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.*, [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra*, and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

[72] Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

[73] A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

[74] The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

[75] There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

[76] There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

[77] Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

[78] The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

[79] In *Grace 2008, supra*, and *Grace 2010, supra*, I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

[80] In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

[81] The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and

reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

[82] Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

[83] The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

[84] The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

[85] This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

[86] The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

[87] The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

[88] Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

[89] The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

[90] It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

[91] One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

[92] The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

[93] It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

[94] I do not consider Clause H.2 to be fair and reasonable in the circumstances.

[95] In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

[96] Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;

(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and

(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

[97] The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

[98] With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

[99] Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

DISPOSITION

[100] I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

[101] I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

[102] In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

[103] In *Grace 2008, supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992) 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

[104] Accordingly, the motion is dismissed.

[105] In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

[106] Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

MORAWETZ J.

Date: March 26, 2010

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

SUPERIOR COURT OF JUSTICE
(Commercial List)

RE: IN THE MATTER OF THE CO*MPANIES' 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 PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON, Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC., Defendants

BEFORE: Pepall J.

COUNSEL: *Kirk Baert*, for the Plaintiff

Peter J. Osborne and *Kate McGrann*, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants

Ashley Taylor and *Maria Konyukhova*, for the Monitor

REASONS FOR DECISION

Overview

[1] On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by

Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

[2] The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

[3] The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

[4] As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any

electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

> C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

[5] As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

[6] The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

[7] Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

[8] When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[9] Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

[10] Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided

more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

[11] In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;

2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;

3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and

4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

[12] The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

[13] In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;

b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;

c) the action would be dismissed as against CPI;

d) CPI did not admit liability; and

e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

[14] The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

[15] After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

[16] In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class

> against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

[17] In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> … The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.

> … a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

[18] The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

[19] The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

[20] Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

[21] As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing – A Tale of Two Plans*"[1]:

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc.,* and *(Re:) Hollinger Inc.* … The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

[22] Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]*; Re Air Canada*[4]*;* and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the

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[1] Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

[2] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at 31.

[3] [2007] A.B.Q.B. 504 at para. 71; leave to appeal dismissed [2007] A.B.C.A. 266 (Alta. C.A.).

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

[5] (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine.*[7]

(ii) Class Proceedings Settlement

[23] The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992[8]. That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[24] The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the

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[6] *Supra.* at para. 9.

[7] *Supra.* at para. 59.

[8] S.O. 1992, C.6.

settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

[25] A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[26] Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*[11]

(iii) The Robertson Settlement

[27] I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

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[9] [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

[10] (1998) 40 O.R. (3rd) 429 at para 30.

[11] [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

[28] As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

[29] The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

[30] In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

[31] The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from

> them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

[32] The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.[13]

[33] In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore,

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[12] [2009], O.J. No. 2650 at para. 15.

[13] *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

[34] The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Pepall J.

Released: March 15, 2011

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON,

Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC.,

Defendants

REASONS FOR DECISION

Pepall J.

Released: March 15, 2011

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Great Basin Gold Ltd. (Re),* 2012 BCSC 1773

Date: 20121120
Docket: S126583
Registry: Vancouver

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

and

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

and

In the Matter of Great Basin Gold Ltd.

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Petitioner:	P.J. Reardon J. Cockbill
Counsel for Certain Unaffiliated Holders of the Petitioner's Senior Unsecured Convertible Debentures (the "Noteholders"):	J.R. Sandrelli C. Cheuk (via teleconferencing) R. Jacobs
Counsel for Credit Suisse, AG:	P. Rubin (via teleconferencing) K. McEachern
Counsel for Monitor, KPMG Inc.:	J.I. McLean, Q.C.
Place and Date of Trial/Hearing:	Vancouver, B.C. November 20, 2012
Place and Date of Judgment:	Vancouver, B.C. November 20, 2012

[1] **THE COURT:** Much of the history of this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding is outlined in my earlier reasons: *Great Basin Gold Ltd. (Re),* 2012 BCSC 1459.

[2] Broadly speaking, there were substantial issues joined between the principal combatants, Credit Suisse and the Ad Hoc Group, as defined in those reasons. Those issues principally related to the approval of the DIP loan facility that I had earlier granted in favour of Credit Suisse. The Ad Hoc Group disputed the granting of that DIP facility and launched an appeal of my October 1 order. I also understand that certain proceedings were commenced in the United States by the Ad Hoc Group towards a challenge of the granting of the guarantee and security by the U.S. companies of the group.

[3] Following the issuance of those reasons on October 1, 2012, Credit Suisse and the Ad Hoc Group arrived at a tentative settlement of the issues arising between them. On October 16, 2012, I granted an order authorizing the petitioner to enter into this settlement agreement. The order also provided that the petitioner and the trustee under the trust indenture, Computershare Trust Company of Canada, were authorized to enter into such agreements as are required by the terms of the settlement. The members of the Ad Hoc Group are participants under the trust indenture.

[4] An important aspect of the settlement negotiated by the Ad Hoc Group for the benefit of the entire debentureholders group is a guarantee from the U.S. holding company, Great Basin Gold Inc. ("GBGI"), and also certain subordinate security issued by GBGI in relation to that guarantee. From the debentureholder group's perspective, this settlement results in a substantial improvement of their current position. As with most settlement agreements, in return for these benefits, the debentureholder group must give up certain things. The agreements also provide that the debentureholder group will not proceed with certain challenges asserted to date, that being principally relating to the Credit Suisse guarantee and security that was approved by my earlier orders. The debentureholder group must also abandon

the appeal proceedings and the U.S. proceedings which are referred to above. Finally, the debentureholder group must also agree to abandon the criminal interest rate issue, and other challenges to such matters as the KERP and the appointment of CIBC World Markets as the financial advisor.

[5] Understandably, Credit Suisse requires that any settlement be approved by the entire debentureholders group and they also require an opinion from a lawyer to the effect that the documentation to evidence the settlement, including an intercreditor agreement, is binding upon the entire debentureholder group.

[6] The significance of the settlement is that it buys peace between Credit Suisse and the Ad Hoc Group. At the present time, the Credit Suisse DIP facility is in default and further funding under the DIP facility is in limbo pending a finalization of the settlement. Accordingly, the finalization of the settlement is of tremendous significance in this case such that it will allow a continuation of the DIP financing to be advanced to the GBG Group who is desperately in need of these funds.

[7] The difficulty that arises in terms of finalizing the settlement relates to how the parties can ensure that the entire debentureholder group will be bound by the settlement. The trust indenture does provide for the calling of meetings to consider resolutions by the debentureholder group. However, counsel for the Ad Hoc Group candidly points out that the full extent of what is intended to be agreed to by the debentureholder group under the settlement may not be within the specific terms of resolutions contemplated by the trust debenture.

[8] In any event, I note that with respect to some matters at least, the trust indenture does provide for a meeting process by which a meeting may be held and written resolutions would be voted upon. I am also advised that those matters would require a special resolution, or in other words, a two-thirds majority.

[9] It is of some significance on this application that the Ad Hoc Group, together with another debentureholder who is also in support of this application, hold in excess of a two-thirds majority from among the overall debentureholder group.

[10] I am advised that it is not possible in the circumstances to even call a meeting that the debentureholders under the trust indenture given the exigencies of the situation in relation to the need for funding. Nevertheless, there has been some effort to engage the trustee under the trust indenture, Computershare. There have been ongoing discussions between the Ad Hoc Group and Computershare in that the trustee has been kept apprised of the settlement negotiations and the terms of the tentative settlement. I am advised that Computershare is fully supportive of the settlement and has no difficulty, subject to these issues relating to process, in proceeding with these transactions.

[11] There have also been efforts to engage other debentureholders who are not represented by the Ad Hoc Group and the other debentureholder who supports the application. Following my earlier order on October 16, Computershare forwarded to the debentureholders copies of certain pleadings relating to this transaction which reference the terms of the proposed settlement. I am also advised by counsel for the Ad Hoc Group that their offices have fielded a number of calls from these other debentureholders. So it cannot be said that the other debentureholders are entirely in the dark in terms of what has been tentatively agreed to by the Ad Hoc Group and what is intended to be accomplished through the settlement agreement.

[12] The issue in the first instance is whether I have the jurisdiction to provide the relief granted. The relief sought is not only an approval of the settlement agreement, but also an order authorizing the trustee, Computershare, to execute the various documents related to the settlement agreement such that these documents will be legal, valid and binding obligations of the trustee and all debentureholders.

[13] The applicable statutory authority is s. 11 of the *CCAA* which endows the court with a wide statutory discretion to grant such orders as are "appropriate in the circumstances":

> General power of court
>
> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the

> matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[14] As discussed by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the *CCAA* is a remedial statute and the court has "broad and flexible authority" to facilitate the reorganization of the debtor towards achieving the objectives of the *CCAA*, including avoiding the social and economic losses arising from restructuring proceedings: paras. 15-19. The exercise of the court's discretion was further discussed by the Court at paras. 59-72. In particular, the Court stated:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] The last paragraph of the above quote makes the point that the chances of achieving a successful restructuring proceeding increase where the parties can agree on certain issues. Settlement agreements between the parties in these types of proceedings are very much encouraged where resolutions take place in the boardroom, as opposed to the courtroom. There is every reason to encourage such settlements, with approval and implementation subject to appropriate judicial oversight.

[16] There is ample authority to the effect that s. 11 of the CCAA provides the court with jurisdiction to approve settlements even before the presentation of a plan of arrangement: *Calpine Canada Energy Ltd.*, *(Re)*, 2007 ABCA 266 at para. 26, *Nortel Networks Corp.*, *(Re),* 2010 ONSC 1709 at para. 71.

[17] In *Nortel Networks*, Mr. Justice Morawetz sets out the test to be applied in approving a settlement agreement:

> [73] A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

[18] I have no difficulty in concluding that the settlement agreement between Credit Suisse, the Ad Hoc Group and the petitioner group is fair and reasonable in the circumstances. The crux of the issue here is whether it is fair and reasonable to those debentureholders who have not yet participated in this process and have not perhaps fully appreciated the import of the agreement, particularly as it relates to the benefits to be achieved by the debentureholder group and the rights that the group will be giving up as a result of the transactions.

[19] I would emphasize again this settlement has arisen by extensive negotiations as between Credit Suisse and the Ad Hoc Group. While those negotiations have taken place on the part of the Ad Hoc Group towards its own interests, inevitably the gains will accrue to the debentureholder group as a whole. Having considered the terms of the overall settlement agreement, I would be astounded if any debentureholders who were fully aware of those matters were to take a contrary position towards opposing the settlement agreement. Again, it is of significance that as a result of this settlement, funding under the DIP facility will continue, which will be a benefit to all stakeholders.

[20] Nevertheless, I agree that fairness and reasonableness dictate in these proceedings that those other debentureholders have some input. The process already undertaken by the Ad Hoc Group has addressed that matter to a certain extent. What is proposed is that a more fullsome notice of the settlement agreement be given to the debentureholder group as a whole.

[21] Firstly, it is proposed that there be a press release which will include reference to not only the pleadings but the specific settlement documents which are

posted on the Monitor's website. In addition, the press release will refer to counsel for the Ad Hoc Group, in Canada, the U.S. and South Africa, who are available to respond to any enquiries from debentureholders regarding the settlement agreement. Secondly, Computershare is to request that CDS send a notice to the debentureholders of the order sought today (called the "Settlement Implementation Order"). That notice will, as will the press release, highlight to the debentureholders that the deadline for any debentureholder to apply to vary, rescind or otherwise object to the Settlement Implementation Order will be within 21 days of the date of the Order. If there is no objection with that 21-day period, the settlement agreement will be fully effective and will constitute legal, valid and binding obligations of Computershare and all of the debentureholders and the consequences of not applying to challenge this Order will also be brought specifically to the attention of those persons reading the press release and the notice.

[22] The Monitor had earlier indicated its support of the settlement agreement in accordance with the Third Report which was considered on the earlier application. Counsel for the Monitor has again confirmed its support of the settlement agreement and the process by which notice is to be given to the other debentureholders outlined above. Not surprisingly, the GBG Group is also in support.

[23] I am satisfied that this process is appropriate and will give any other debentureholder sufficient time to challenge the Order if they wish. Again, I would emphasize that it is a critical aspect of this restructuring that this settlement be put in place as soon as possible so that the funding for the restructuring can proceed. It has already been stalled to some extent and no doubt to the detriment of the stakeholders as a whole. It is time to put an end to this prejudice delay and more the restructuring forward. Accordingly, the order sought is granted.

"Fitzpatrick J."

File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC. AND ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO"

(collectively, the "**Applicants**")

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

ORDER
DATE OF HEARING: TUESDAY, MAY 15 2012 AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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Doc#11399504v6

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THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MADAM	)	TUESDAY, THE 15th
	)	
JUSTICE SPIVAK	)	DAY OF MAY, 2012

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC. AND ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO"

(collectively, the "**Applicants**")

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

ORDER

THIS MOTION, made by the class of direct purchaser plaintiffs (the "**Direct Purchasers**") in a certain class action in case No. 08-MDL-01952 in the United States District Court, Eastern District of Michigan, South Division, for various relief including an Order requiring the Applicants and the Monitor provide the Direct Purchasers with certain confidential information presently subject to a sealing order in accordance with the Initial Order of the Honourable Madam Justice Spivak dated February 22, 2012 (the "**Initial Order**"), was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

ON the consent of the Applicants, the Monitor, the DIP Lenders, the Lenders and the Direct Purchasers, and on hearing the submissions of counsel for the Trustees, and on being advised that a settlement has been reached in respect of this Motion, no one appearing for any other party although duly served as appears from the affidavit of service,

1. THIS COURT ORDERS that capitalized terms herein shall have the meaning ascribed thereto in the Initial Order.

DISCLOSURE OF SEALED INFORMATION AND DOCUMENTS

2. THIS COURT ORDERS that paragraph 63 of the Initial Order be varied to permit the Applicants to disclose a summary of the financial terms of the Financial Advisor Engagement Letter and a copy of the DIP Fee Letter to the attorney for the Direct Purchasers bound by the settlement, his Canadian counsel and his financial advisor (the "**Recipients**") on the terms set out in the confidentiality agreement agreed to by the Applicants and the Recipients, attached hereto as Schedule "B" (the "**Confidentiality Agreement**"), and that such information and documents shall remain confidential and shall be kept confidential by the Recipients as set out in the Confidentiality Agreement.

PAYMENT OF CERTAIN PROFESSIONAL COSTS OF THE DIRECT PURCHASERS

3. THIS COURT ORDERS that the Applicants shall pay the documented professional expenses actually incurred by the Direct Purchasers for the fees and disbursements of the Recipients solely for the purpose of monitoring these proceedings and for evaluating financial information with respect to the Applicants and information concerning the sale or restructuring of the Business and expressly not including fees and/or disbursements incurred for non-consensual litigation services or litigation support services (the "**Permitted Advisor Fees**"), to the limit of $100,000 in the aggregate.

4. THIS COURT ORDERS that the Recipients shall be entitled to the benefit of and are hereby granted a charge (the "**Direct Purchasers' Advisors' Charge**") in the amount of C$100,000 on the Property, as security for payment of the Permitted Advisor Fees as

provided in paragraph 3 above. The Direct Purchasers' Advisors' Charge shall rank *pari passu* with the Administration Charge and the Financial Advisor Charge and shall be deemed discharged immediately on payment of the Permitted Advisor Fees in full or on the payment of C$100,000 on account of the Permitted Advisor Fees, whichever occurs first.

DISCLOSURE OF BID SUMMARY TO LENDERS

5. THIS COURT ORDERS that the portion of paragraph 43(d) of the Initial Order that provides that "the Monitor, the Financial Advisor, the CPS and the Arctic Glacier Parties shall not provide information to the Agent or the DIP Lenders concerning the SISP except in accordance with the SISP" be varied by adding the following proviso "provided that, in the event that no Credit Bid is submitted prior to the Phase 2 Bid Deadline, the Monitor, the Financial Advisor, the CPS and the Arctic Glacier Parties may provide information concerning the bids received in Phase 2 of the SISP (which information shall be at least as detailed as the information provided to the Recipients) to the Agent and/or the Lenders."

BALANCE OF THE MOTION DISMISSED

6. THIS COURT ORDERS that the balance of the relief requested by the Direct Purchasers in this Motion is hereby dismissed.

7. THIS COURT ORDERS that there shall be no order as to costs.

L. SPIVAK

SPIVAK, J.

May 15, 2012.

SCHEDULE "A" - Additional Applicants

Arctic Glacier California Inc.
Arctic Glacier Grayling Inc.
Arctic Glacier Lansing Inc.
Arctic Glacier Michigan Inc.
Arctic Glacier Minnesota Inc.
Arctic Glacier Nebraska Inc.
Arctic Glacier Newburgh Inc.
Arctic Glacier New York Inc.
Arctic Glacier Oregon Inc.
Arctic Glacier Party Time Inc.
Arctic Glacier Pennsylvania Inc.
Arctic Glacier Rochester Inc.
Arctic Glacier Services Inc.
Arctic Glacier Texas Inc.
Arctic Glacier Vernon Inc.
Arctic Glacier Wisconsin Inc.
Diamond Ice Cube Company Inc.
Diamond Newport Corporation
Glacier Ice Company, Inc.
Ice Perfection Systems Inc.
ICEsurance Inc.
Jack Frost Ice Service, Inc.
Knowlton Enterprises, Inc.
Mountain Water Ice Company
R&K Trucking, Inc.
Winkler Lucas Ice and Fuel Company
Wonderland Ice, Inc.

SCHEDULE "B" – Confidentiality Agreement

CONFIDENTIALITY AGREEMENT

Confidentiality agreement dated May 14, 2012 between Arctic Glacier Income Fund on its own behalf and on behalf of its subsidiaries that are Applicants in proceedings (the "**CCAA Proceedings**") commenced by an Initial Order (the "**Initial Order**") made by the Manitoba Court of Queen's Bench on February 22, 2012 under the *Companies' Creditors Arrangement Act* (collectively, the "**Company**") and (1) Kohn, Swift & Graf, P.C., the attorneys for the representative plaintiffs in a certain class action, case No. 08-MDL-01952 in the United States District Court, Eastern District of Michigan, South Division which was settled by a settlement agreement dated March 30, 2011 and an amendment to settlement agreement dated October 26, 2011 (the "**Class Action**"), (2) MNP Ltd., the financial advisor to Kohn, Swift & Graf, P.C. and (3) Dickinson Wright LLP counsel to Kohn, Swift & Graf, P.C. (together, the "**Counterparties**") (the Company and the Counterparties are collectively the "**Parties**" or individually a "**Party**").

Solely for purposes of evaluating steps taken by the Company in the CCAA Proceedings, including the Company's efforts to implement a transaction as contemplated by the sales and investment solicitation process ("**SISP**") approved in the Initial Order (the "**Permitted Purpose**"), the Counterparties have asked the Company to disclose confidential information relating to the CCAA Proceedings and its business and affairs. This Agreement sets out the terms under which the Company is willing to disclose Confidential Information (as defined below) and the terms under which the Counterparties may receive and use such Confidential Information.

Section 1 Non-Disclosure of Confidential Information.

1. The Counterparties shall (i) keep confidential all information disclosed by the Company to the Counterparties relating to the CCAA Proceedings and/or the Company's business, operations, assets, liabilities, plans, prospects and affairs, including without limitation the information and documents previously subject to a sealing order in accordance with the Initial Order, regardless of whether such information is provided in oral, visual, electronic, written or other form and whether or not it is identified as "confidential" and including all notes, analyses, compilations, forecasts, data, studies, interpretations, or other documents prepared by, on behalf of or for the benefit of, the Counterparties that contain, reflect, summarize, analyze, discuss or review any of the foregoing (the "**Confidential Information**"), (ii) use the Confidential Information solely for the Permitted Purpose and not directly or indirectly for any other purpose, and (iii) not disclose such Confidential Information to any person, including without limitation the representative plaintiffs in the Class Action, except as expressly permitted by this Agreement. Confidential Information does not include any information that:

   (a) is or becomes generally available to the public (other than as a result of disclosure directly or indirectly by the Counterparties);

   (b) is or becomes available to the Counterparties on a non-confidential basis from a source other than the Company provided such source does not owe a duty of confidentiality to the Company or to any other person; or

   (c) is or was independently acquired or developed by the Counterparties without use of any information disclosed by the Company.

2. The disclosure restrictions contained in this Agreement do not apply to any information that is required to be disclosed by law. However, prior to making such disclosure, the Counterparties must unless prohibited by law:

(a) immediately advise the Company of the requirement;

(b) cooperate with the Company in limiting the extent of the disclosure;

(c) provide the Company with a reasonable opportunity to obtain a protective order or other remedy in order to preserve the confidentiality of the information required to be disclosed; and

(d) disclose only that portion of the Confidential Information which the Counterparties are advised by legal counsel is required to be disclosed.

3. At the Company's request, at any time, the Counterparties shall promptly redeliver to the Company all Confidential Information delivered to the Counterparties and will not retain, in any form, any copies of any such Confidential Information in whole or in part, and the Counterparties shall ensure that all documents, memoranda and notes, in any form, prepared by the Counterparties based on the Confidential Information shall be promptly destroyed, and will certify to the Company in writing that such redelivery and destruction have taken place. Notwithstanding the return or destruction of the Confidential Information, the Counterparties shall continue to be bound by their confidentiality and other obligations hereunder.

4. The Counterparties shall take all steps reasonably necessary to ensure that their respective representatives and employees who have access to the Confidential Information for the Permitted Purpose are aware of and comply with the provisions of this Confidentiality Agreement.

Section 2 No Representation or Warranty.

Each of the Counterparties acknowledges and agrees that the Company and the Monitor make no representation or warranty, expressed or implied, in relation to any of the Confidential Information, its adequacy, accuracy, sufficiency, completeness, or suitability for any particular purpose, and that neither the Company nor its advisors or representatives or the Monitor will have any liability to any of the Counterparties or to any other person for any losses, liabilities, damages, claims, demands, or expenses resulting from, connected with or arising out of resulting from any inadequacy, inaccuracy, insufficiency, incompleteness or unsuitability of the Confidential Information or the use of or reliance on the Confidential Information. Nothing in this Agreement or in the disclosure of any Confidential Information confers any interest in the Confidential Information on the Counterparties. It is specifically agreed that the disclosure of confidential information to the Counterparties does not confer any licence under any patent, trademark, copyright, or any other intellectual property right, by implication or otherwise.

Section 3 Remedies.

In the event of a breach of any of the Counterparties' obligations under this Agreement, the Counterparties must, immediately following discovery of the breach, give notice to the Company of the nature of the breach and take all commercially reasonable and necessary steps to limit the extent of the breach. The Counterparties agree that any breach of this Agreement will give rise to irreparable injury to the Company inadequately compensable in damages. The Company may, in addition to any other remedy, enforce the performance of this Agreement by way of injunction or specific performance upon application to a court of competent jurisdiction without proof of actual damages (and without the requirement of posting a bond or other security) and without the need to establish irreparable harm and each of the Counterparties agrees not to

plead sufficiency of damages as a defence in any such proceeding and further agrees (and will agree in any proceeding) that the fact of disclosure causes irreparable harm to the Company. The rights and remedies provided in this Agreement are cumulative and are in addition to, and not in substitution for, any other rights and remedies available at law or equity. Further, upon discovery of a breach of any of the Counterparties' obligations under this Agreement which is confirmed by the Monitor, if any fees are payable by the Company to the Counterparties, such fees will not be paid pending a resolution of all issues surrounding such breach.

Section 4 Entire Agreement.

This Agreement constitutes the entire agreement among the Parties in respect of Confidential Information and supersedes all prior agreements, representations, warranties covenants or understandings, whether written or oral, relating to the subject matter of this Agreement. This Agreement may be amended or modified only by written instrument executed by all of the Parties. This Agreement shall be construed, interpreted and enforced in accordance with the laws of the Province of Manitoba and each of the Counterparties attorns to the non-exclusive jurisdiction of the Province of Manitoba. In case any provision of this Agreement shall be invalid, illegal or otherwise unenforceable, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby.

Section 5 Other Covenants and Agreements.

In respect of Confidential Information relating the to the business and affairs of the Company, including the implementation of the SISP, the Parties share a common legal and commercial interest in all Confidential Information which is and remains subject to all applicable privileges, including solicitor-client privilege, anticipation of litigation privilege, work product privilege and privilege in respect of "without prejudice" communications. No waiver of any privilege is implied by the disclosure of Confidential Information to any person pursuant to the terms of this Agreement.

Section 6 Miscellaneous.

1. Time is of the essence in this Agreement.

2. No waiver of any provision of this Agreement constitutes a waiver of any other provision.

3. This Agreement is binding on and enures to the benefit of the Parties and their respective successors and permitted assigns.

4. Neither this Agreement nor any of the rights or obligations under this Agreement is assignable or transferable by a Party without the prior written consent of the other party.

5. This Agreement may be executed in any number of counterparts (including by facsimile) and all counterparts taken together constitute one and the same instrument.

6. The Parties acknowledge that Arctic Glacier Inc. is signing on behalf of Arctic Glacier Income Fund and on behalf of its subsidiaries that are Applicants in the CCAA Proceedings, it is entering this Agreement solely on behalf of the Company and the obligations of the Company hereunder shall not be personally binding upon any trustee of Arctic Glacier Income Fund or any registered or beneficial holder of units or any annuitant under a plan of which the holder of units acts as a trustee or carrier, and that resort shall not be had to, nor shall recourse or satisfaction be sought from, any of the

foregoing or the private property of any of the foregoing in respect of the indebtedness, obligation or liability of the Company arising hereunder or arising in connection with or from the matters to which this Agreement relates.

IN WITNESS WHEREOF this Agreement has been executed.

ARCTIC GLACIER INC.
on its own behalf and on behalf of Arctic Glacier Income Fund and its subsidiaries that are applicants for the CCAA Proceedings (as defined herein)

Per: _____
Name: Keith McMahon
Title: President + CEO

Kohn, Swift & Graf, P.C.

By: _____

MNP Ltd.

Per: _____
Name:
Title:

Dickinson Wright LLP

By: _____

foregoing or the private property of any of the foregoing in respect of the indebtedness, obligation or liability of the Company arising hereunder or arising in connection with or from the matters to which this Agreement relates.

IN WITNESS WHEREOF this Agreement has been executed.

ARCTIC GLACIER INC.
on its own behalf and on behalf of Arctic Glacier Income Fund and its subsidiaries that are applicants for the CCAA Proceedings (as defined herein)

Per: _____
Name:
Title:

Kohn, Swift & Graf, P.C.

By: _____

MNP Ltd.

Per: _____
Name:
Title:

Dickinson Wright LLP

By: _____

foregoing or the private property of any of the foregoing in respect of the indebtedness, obligation or liability of the Company arising hereunder or arising in connection with or from the matters to which this Agreement relates.

IN WITNESS WHEREOF this Agreement has been executed.

ARCTIC GLACIER INC.
on its own behalf and on behalf of Arctic Glacier Income Fund and its subsidiaries that are applicants for the CCAA Proceedings (as defined herein)

Per: _____
Name:
Title:

Kohn, Swift & Graf, P.C.

By: _____

MNP Ltd.

Per: _____
Name: Jeffrey Heuchowicz
Title: Senior Vice President

Dickinson Wright LLP

By: _____

foregoing or the private property of any of the foregoing in respect of the indebtedness, obligation or liability of the Company arising hereunder or arising in connection with or from the matters to which this Agreement relates.

IN WITNESS WHEREOF this Agreement has been executed.

ARCTIC GLACIER INC.
on its own behalf and on behalf of Arctic Glacier Income Fund and its subsidiaries that are applicants for the CCAA Proceedings (as defined herein)

Per: _____
Name:
Title:

Kohn, Swift & Graf, P.C.

By: _____

MNP Ltd.

Per: _____
Name:
Title:

Dickinson Wright LLP

By: _____

Editor's Note: Corrigendum released on December 3, 2012. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re),* 2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.

Petitioner

Corrected Judgment: The text of the judgment was corrected at paragraph 28 where changes were made on December 3, 2012.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. October 11, 2012

[1] The question raised on this application is whether certain unsecured creditors should obtain funding within this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding for the purpose of investigating the claims of other creditors who are related to the petitioner, 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd. ("Steels").

Background Facts

[2] Steels was a supplier of construction materials in British Columbia and Alberta. It operated from various leased premises across those provinces. On April 5, 2012, Steels sought protection from its creditors pursuant to the *CCAA*. On that same date, I granted an initial order staying proceedings and granting other ancillary relief. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[3] The ancillary relief included the appointment of Wayne Wood as Chief Restructuring Officer ("CRO") of Steels, since all the directors had resigned. Mr. Wood was the Vice-President, Finance and Administration of Steels. It was intended that he would be assisted in his duties relating to the restructuring to some extent by Steels' financial advisor, Ernst & Young Inc. ("E&Y").

[4] Steels resolved fairly quickly, with the assistance of E&Y and with the concurrence of the Monitor, to commence a sale and investment solicitation process toward selling its assets. On July 30, 2012, I approved a sale of the majority of Steels' assets to Brock White Canada Company, LLC. That sale has now completed and net proceeds of sale, which are discussed in more detail below, are being held for the benefit of unsecured creditors.

[5] In anticipation of a sale of the assets, I approved a Claims Process Order on June 8, 2012.

[6] By the date of the granting of the Claims Process Order, it was apparent that a substantial portion of the claims would be advanced by related parties. In fact, Mr. Wood discussed these claims in his affidavit sworn April 5, 2012 in support of the granting of the Initial Order.

[7] Mr. Wood's evidence indicated that Steels is a wholly owned subsidiary of S.I.P. Holdings Ltd. ("S.I.P. Holdings") and that S.I.P. Holdings is, in turn, a wholly owned subsidiary of Fama Industrial Supplies Ltd., a privately owned company. Mr. Wood's evidence further indicated that S.I.P. Holdings also owns Steels Holdings (BTC) Ltd. ("Holdings BTC"). Mr. Wood attached various financial documentation in respect of claims against Steels by both S.I.P. Holdings and another company, Fama Holdings Ltd. ("Fama Holdings"):

a) S.I.P. Holdings' audited consolidated financial statements for the 12 months ending December 31, 2010. These consolidated financial statements included both Steels and Holdings BTC;

b) Unaudited financial statements for Steels for the 12 months ending December 31, 2011; and

c) Steels' unaudited financial statements for the two months ending February 29, 2012.

[8] Mr. Wood stated that there is a shareholder loan in the amount of approximately $17.3 million owed to Fama Holdings. He stated:

> The Shareholder Loan is owed to Fama Holdings Ltd. ("FHL"). It does not bear interest, and there are no repayment terms. In 2005, Steels consolidated with Gasmaster Industries Ltd. ("Gasmaster") for the purposes of utilizing Gasmaster's tax losses to offset Steels' profits. Gasmaster owed the amount of $17.3 million to FHL. Gasmaster is no longer a division of Steels, having been spun off, but the amount owing from Gasmaster to FHL remains on Steels' books.

[9] Indeed, Note 9 of the consolidated balance sheet in the 2010 audited financial statements (entitled "Related Party Balances and Transactions") does reference an amount owing to Fama Holdings in the amount of approximately $17.3 million as at the end of 2010. The statements refer to Fama Holdings as a "company under common control", although the relationship between Fama Holdings, on the one hand, and S.I.P. Holdings and Steels, on the other, is not apparent.

[10] Similarly, the unaudited financial statements as at December 31, 2011 indicate a "shareholder loan" owing in the amount of approximately $17.3 million.

[11] In his April 5 affidavit, Mr. Wood also referred to a balance due to "affiliated companies" of approximately $7.9 million. With respect to this amount, he stated as follows:

> The balance owing to affiliated companies is due to SIP Holdings. This amount relates to certain proceeds from the sale of the Lands. Some of the Lands were transferred to Steels before the sale, so the amount owing to SIP [Holdings] is in respect of the purchase price paid for the Lands.

[12] Given that the 2010 audited financial statements are consolidated and include both Steels and S.I.P. Holdings, there is no reference in those statements to the amount said to be due to S.I.P. Holdings by Steels. Nevertheless, the unaudited financial statements of Steels as at December 31, 2011 do reference an amount owing to "affiliated companies" of $7,018,037.

[13] Despite the above evidence of Mr. Wood relating to these claims at the outset of this proceeding, there was no question in the minds of Steels, and in particular that of Mr. Wood as the CRO, that issues might be raised with respect to these related party claims. The Claims Process Order, in paragraph 21, provided that filed Proofs of Claim were to be reviewed by Steels with the assistance of both the Monitor and E&Y. The Claims Process Order further provided:

> 25. Any Creditor (a "Disputing Creditor") may apply to this Court to dispute any such accepted Claim by filing a Notice of Application ... Upon receipt of any such filed application, the Petitioner shall provide the Disputing Creditor with any Proof of Claim and other material documents in its possession in respect of the disputed Claim, and paragraphs 26, 27 and 28 of this Order apply.
>
> 26. In the event that the Petitioner, with the assistance of the Monitor, is unable to resolve a dispute regarding any Claim with a Creditor or between two Creditors, the Petitioner shall so notify the Monitor and the Creditor, and either of the Petitioner, Monitor, or Creditor may apply to the Court to resolve the dispute. ...
>
> 27. In the event an application is filed pursuant to paragraphs 25 or 26 of this Order, there shall be a preliminary hearing before the Court to determine

> the procedure for the application and to determine whether the matter will be decided based on the material before the Petitioner or on a *de novo* basis.

[14] This additional procedure by which another creditor could challenge any claim was a matter raised by the Monitor in relation to these third party claims. The Monitor stated in its Third Report dated June 6, 2012, in support of the application for the Claims Process Order, that "any creditor(s) will have the right, possibly at its (their) own cost, to challenge the claims of others":

> ... in order to provide additional stakeholder protection before any distribution is made to creditors ...

[15] Accordingly, the Claims Process Order specifically contemplated a procedure by which other unsecured creditors, who might be affected by the acceptance of the related party claims, were entitled to take steps to independently review those proofs of claim and have the dispute heard by the Court if it could not be resolved otherwise.

[16] In July 2012, S.I.P. Holdings and Fama Holdings filed their Proofs of Claim with Steels.

[17] Fama Holdings' Proof of Claim is in the amount of $13,159,689.25. Few particulars are provided. The amount is said to be derived from the $17.3 million figure from the 2010 audited financial statements (which are attached) less reductions in the amounts of $1,776,634, which is identified as a credit from a portion of the proceeds of sale of real estate owned by S.I.P. Holdings, and $4,101,845. This latter figure is stated to have "occurred as reflected in the financial statements of Steels, as prepared by Steels and accordingly, details of the constitution of the loan repayment are known to Steels". No other documentation is provided in support of this claim.

[18] S.I.P. Holdings' Proof of Claim is in the amount of $5,954,155.75. Documents in support include the 2010 consolidated financial statements (which do not in fact disclose any amount owed to S.I.P. Holdings, as noted above), together with various promissory notes dated January 1, February 1, March 1 and July 1, 2011. As with

the Fama Holdings Proof of Claim, some particulars are also provided. Specifically, the Proof of Claim refers to Steels being indebted to S.I.P. Holdings in the amount of $7,018,036.85 as of July 1, 2005. This is the amount reflected on the 2011 unaudited financial statements. The Proof of Claim also indicates:

> ... Subsequent to that date, SIP sold real estate in Surrey, Kamloops, Calgary and Edmonton occupied by Steels as tenant to Steels in consideration of preferred shares and $7,924,498.29 evidenced by promissory notes as follows:
>
> (i) Surrey property: $2,150,780.64
>
> (ii) Kamloops property: $573,539.00
>
> (iii) Calgary property: $2,016,181.46
>
> (iv) Edmonton property: $3,183,989.19
>
> for a total indebtedness of $14,942,527.14. This indebtedness was reduced during the course of 2011 and 2012 by $8,988,372.26 through payment by Steels of lease payments and other real estate related indebtedness. The particulars of such payments are known to Steels and are reflected in the financial statements of Steels.

[19] No detail is provided by S.I.P. Holdings with respect to the origins of the original $7,018,036.85 said to be owed as of July 1, 2005.

[20] In its Fifth Report dated July 26, 2012, the Monitor states that Steels and the CRO had accepted the claims of S.I.P. Holdings and Fama Holdings, together with a small claim by another related party. Importantly, the Monitor also stated that Steels did not request the assistance of E&Y with respect to the review and evaluation of these claims. Nor did the Monitor perform any further work on these claims - beyond a review of the documentation provided - pending a determination as to whether any other creditors wished to challenge the claims under paragraph 25 of the Claims Process Order.

[21] The significance of these related party claims cannot be understated. The amount available for distribution to unsecured creditors is expected to be in the range of $4 to $4.2 million. The total claims filed to date pursuant to the Claims Process Order amount to approximately $31 million, which indicates an estimated recovery of between 13% and 14%. Given that the amounts claimed by both Fama

Holdings and S.I.P. Holdings total approximately $19.2 million, these two creditors alone stand to recover approximately 62% of the total monies that will be available for distribution to unsecured creditors.

Discussion

[22] This application is brought by two unsecured creditors: Henry Company Canada Inc. and Canadian Stone Industries Inc. These two creditors are owed approximately $900,000. They say Wolrige Mahon Ltd., a forensic accountant, should be retained to assist them in reviewing and assessing the claims of Fama Holdings and S.I.P. Holdings. They are applying for an order that the reasonable fees and expenses of Wolrige Mahon Ltd.'s services be secured by a priority charge on Steels' assets ranking in priority to all other charges except for the existing Administrative Charge. They seek a priority charge not to exceed $50,000.

[23] It appears that other unsecured creditors of Steels have joined with the applicants. At this time, the total unsecured creditor group (who I will refer to as the "Disputing Creditors") who wish to have these related claims investigated have aggregated claims of approximately $2.6 million, which represents 8% of the present claims.

[24] The Disputing Creditors assert that given the nature of the Fama Holdings and S.I.P. Holdings claims, it is not possible to assess them without the assistance of an accountant with forensic experience. The expertise of Michael Cheevers, President of Wolrige Mahon Ltd., is well known to this Court. In fact, Mr. Cheevers has been appointed by this Court in many instances as a receiver, trustee and bankruptcy monitor. In addition, Mr. Cheevers practices as a forensic accountant and his qualifications in that area are not in question.

[25] Mr. Cheevers indicates that he expects that if appointed, he would review the accounting records of Steels, including banking records and relevant contracts, going back as far as 2005 (which is a date referred to in the S.I.P. Holdings Proof of Claim). He estimates that the fees of Wolrige Mahon Ltd. to undertake this engagement would be between $25,000 and $50,000.

[26] As mentioned earlier in these reasons, it is clear that, contrary to the terms of paragraph 21 of the Claims Process Order, neither the Monitor nor E&Y, as Steels' financial advisors, have assisted Steels or Mr. Wood as CRO in reviewing these Proofs of Claim toward either accepting or revising or rejecting them. The Monitor acknowledges that it was never intended that a review by only Mr. Wood as CRO would be sufficient for a final determination in respect of the Proofs of Claim to be accepted for distribution.

[27] The only evidence from Mr. Wood filed on this application was a very general response on August 23, 2012:

> I have also spent significant time managing the Petitioner's claims process, the details of which are set out [in] the Monitor's Fifth Report to Court filed in this proceeding. I understand that certain creditors have sought information related to those related parties claims, and I have spent time reviewing information related thereto and expect to spend more time on that issue going forward.

[28] Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

[29] Counsel for Steels/the CRO and S.I.P. Holdings and Fama Holdings argue that any further review of the related party claims is not necessary. They say that the 2010 financial statements were audited and thus confirmed the amounts owing in that document. In addition, they say that Mr. Wood, as the CRO and the accountant of Steels, has "independently" reviewed these claims. It is apparent from Mr. Wood's prior involvement with Steels, as the Vice-President of Finance and Administration, that he would have some knowledge of these claims. They further argue that as the

CRO, he is an independent officer of the court and, in particular, independent of the related parties. The suggestion is made that his review of the claims is entitled to substantial deference and that funding for any further review should be refused. I would note again, however, that even as late as August 23, 2012, Mr. Wood indicated that he was still in the process of reviewing information regarding these claims.

[30] For all that Mr. Wood appears to have some knowledge of these claims, it is of some significance to me that he has provided no assistance, as an officer of this Court, to the Court in terms of the level of his knowledge with respect to all aspects of these claims. Nor has he disclosed any further work that he has done in reviewing these claims subsequent to receiving the Proofs of Claim and the objections of the Disputing Creditors.

[31] Furthermore, I consider that the Proofs of Claim, with the limited information disclosed and limited documentation attached, leave much to be desired in terms of fully understanding these claims.

[32] There is absolutely no backup with respect to the amounts claimed by S.I.P. Holdings as of July 1, 2005. There appear to be complex transactions after that date involving sales of real estate and tenancy arrangements. No doubt, there is a wealth of documentation which supports those transactions and presumably, the amounts or debts said to arise from those transactions and reductions or payments made.

[33] With respect to the Fama Holdings claim, I appreciate that this amount is referenced in the audited 2010 financial statements. But later reductions are said to arise from real estate sales by S.I.P. Holdings and no details relating to those transactions are provided.

[34] Support for both Proofs of Claim is sparse in terms of particulars provided; there appear to be only vague references to figures that are “reflected in the financial statements of Steels” or “known to Steels”. Such general statements do little to

provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

[35] To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying “trust the auditors” and “trust me”. Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

[36] We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors’ position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

[37] Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

[38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that “[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible”.

[39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356.

To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[40] Indeed, this was the underlying basis upon which the Claims Process Order was granted, particularly as it related to a review of the third party claims. That Order clearly contemplated that other creditors would have the ability to challenge these third party claims, even in the face of the claims process as originally crafted. Again, as stated above, the process set out in the Order was not followed in that there was no independent involvement or assistance by the Monitor or E&Y, as was initially intended. Nor did Steels provide any of the Disputing Creditors with "other material documents in its possession" as contemplated by paragraph 25 of that Order.

[41] In this case, no report from the Monitor has been prepared in any case. As for Mr. Wood in his capacity as CRO, I do not accede to the arguments that this Court should grant any particular deference to his review or conclusions, particularly in the face of the evidentiary deficiencies with respect to the Proof of Claims and his failure to further assist the Court in addressing such deficiencies. Fama Holdings and S.I.P. Holdings have the burden of proving their claims, and this requires more than providing general statements and unclear financial statements.

[42] In all of these circumstances, I have no hesitation in concluding that an independent review of these related parties claims is appropriate and should be undertaken. In addition to understanding how these particular transactions arose and the financial consequences arising from those transactions, an independent review would also focus on the proper characterization of the amounts said to be owed. It is possible, as suggested by counsel for the Disputing Creditors, that some or all of these amounts may have been equity investments in Steels, as opposed to debt. In that event, such equity claims would only be satisfied after all unsecured claims were paid. A similar issue was raised by the disputing creditors in *Pine Valley Mining*.

[43] Counsel for Steels/the CRO and also counsel for S.I.P. Holdings and Fama Holdings contend that the application is premature. Counsel for Steels/the CRO states that Mr. Wood will cooperate in speaking to counsel for the Disputing Creditors in providing documents as requested. No similar offer has been made by S.I.P. Holdings and Fama Holdings. Further, it is suggested that paragraph 27 of the Claims Process Order contemplates a preliminary hearing to discuss the claims and that the issues, including the provision of any further information and documentation, can be addressed at that time.

[44] I would not accede to these arguments that the application is premature. The related party claims have been presented and it does not appear that there is cooperation between the parties, at least to this point in time, with respect to providing the necessary information and backup documentation. In addition, even once such information and documentation is provided to counsel for the Disputing Creditors, it is evident to me that a forensic accounting of these claims will be required in the circumstances. I see no need to engage the court process in addressing these claims until that full review has taken place and positions are crystallized. It may be, for example, that upon that full review, the Disputing Creditors are satisfied that there are no issues to be addressed and that these are valid claims.

[45] I would also note that there is some urgency in dealing with these third party claims. I understand that matters relating to the assets sale are moving to a conclusion which will dictate the actual amount of funds to be distributed. It is intended that a plan will be submitted later this year which will provide for distributions to unsecured creditors. A failure to resolve issues relating to these claims, or resolve them in a timely manner, will result in delayed payment to all unsecured creditors. This is to be avoided if at all possible.

[46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims

would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[47] The question then becomes who should complete this independent review and who should bear the costs of the review.

[48] The Monitor to this point in time has risen above the fray while these procedural matters are being sorted out. Nevertheless, the Monitor indicates that if directed by the Court, it will, of course, complete an independent review of the claims. In that event, as with any review of a claim that they would have undertaken from the outset, the cost will be borne by the estate. The Monitor, however, raises the issue that if it completes such a review and prepares a report, it would share that report with others who would be interested in the issue.

[49] Counsel for the Disputing Creditors submits that Wolrige Mahon Ltd. should be the party to complete this review. At this stage, it is, at least on the face of it, an adversarial process and the Monitor can remain as the neutral third party in respect of the matter. There would not appear to be any costs considerations in that respect; the Monitor has no vested knowledge of the related party claims that would reduce the cost of completing this review. It is also stated that Wolrige Mahon Ltd.'s expertise with respect to forensic accounting is of particular importance in this case, while the Monitor does not advocate any particular expertise in that regard.

[50] I noted that in *Pine Valley Mining*, the monitor had reviewed and accepted the claim that was the subject of the dispute in *CCAA* proceedings. Madam Justice Garson (as she then was), at para. 13, concluded that the role of the monitor was to determine the validity and amount of the claim, but that it did not do so in an adversarial process. As such, while the monitor's report was to be considered in the dispute, there was no deference to be accorded to that report "in the sense that would alter the burden of proof ordinarily imposed on the claimant".

[51] In my view, the appropriate disposition of this matter is to have the review completed by Wolrige Mahon Ltd. In that event, counsel for the Disputing Creditors can deal directly with Wolrige Mahon Ltd. in terms of the review, which may not necessarily result in a formal report being prepared. This may alleviate the higher costs normally associated with preparing a formal report.

[52] The next issue is whether the results of Wolrige Mahon Ltd.'s review should be shared. Under a *BIA* claims process, a trustee in bankruptcy would review claims. Normally, a trustee would seek the input of the inspectors appointed, however, it may not do so if, for example, there was some concern that an inspector had an interest relating to a potentially disputed claim. If the cost of the report is to be borne as an administrative cost, there is no reason why other interested parties should not have equal access to Wolrige Mahon Ltd.'s work product in respect of this independent review. Accordingly, I am ordering that Wolrige Mahon Ltd.'s work product be shared with the Monitor and any other unsecured creditor (other than the related parties) who wishes to join in a challenge of the related party claims, on terms as might be agreed between then.

[53] The Disputing Creditors seek a charge in favour of Wolrige Mahon Ltd. in an amount limited to $50,000. The *CCAA* provides:

> s. 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of:
> ...
>
> (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[54] I consider that it would be unfair to the Disputing Creditors for them to bear the costs of retaining Wolrige Mahon Ltd., which will not only provide the independent review that was contemplated by the Claims Process Order, but will also potentially benefit the unsecured creditors as a whole. In my view, this charge in favour of Wolrige Mahon Ltd. is necessary for the effective participation by the

Disputing Creditors in these proceedings (and perhaps others who might join in or benefit from such a review).

[55] The final issue is raised by S.I.P. Holdings and Fama Holdings. They take the position that while a charge may be granted at this time, there should be a provision in the order allowing them to seek recovery of some or all of the amounts paid to Wolrige Mahon Ltd. in the event that a review of the related party claims is not fruitful or alternatively, any challenge to those claims is not successful. Such a "comeback" provision is opposed by the Disputing Creditors.

[56] Usually, the cost of an independent review would be borne by the estate and would be indirectly borne by the creditors whose claims were potentially subject to challenge. In this case, I see no reason to depart from the usual manner in which this independent review is to be conducted, which would not include any ability to recoup these expenses. I would note, in any event, that if a challenge to these related party claims is brought against S.I.P. Holdings and Fama Holdings, and that challenge is ultimately unsuccessful, then the related parties will have the ability to seek costs against the unsuccessful applicant creditors at the end of the day.

[57] Accordingly, the order sought is granted. There will be a priority charge in favour of Wolrige Mahon Ltd. not to exceed $50,000, for the purpose of Wolrige Mahon Ltd. assisting the Disputing Creditors to review and assess the claims of Fama Holdings and S.I.P. Holdings. This charge is to rank in priority to all other charges except for the existing Administrative Charge.

"Fitzpatrick J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re),*
2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.
Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Corrigendum to the Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, BC October 11, 2012
Place and Date of Corrigendum:	Vancouver, B.C. December 3, 2012

[58] This is a corrigendum to my Reasons for Judgment issued October 11, 2012. Paragraph 28 of those Reasons is amended to read as follows:

> [28] Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

"Fitzpatrick J."