Court File No. CV-16-11452-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF H.B. WHITE CANADA CORP.

(the "**Applicant**")

BOOK OF AUTHORITIES OF THE APPLICANT

September 16, 2016

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IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985 C. C-36 as amended

And IN THE MATTER OF A Plan of Compromise or Arrangement of the Applicant, Federal Gypsum Company

A.D. MacAdam J.

Heard: November 29, 2007; December 14, 2007
Judgment: December 14, 2007
Written reasons: January 29, 2008
Docket: S.H. 285667

Counsel: Maurice P. Chaisson, Graham Lindfield for Federal Gypsum Company
Carl Holm, Q.C for BDO Dunwoody Goodman Rosen Inc.
Thomas Boyne, Q.C. for Royal Bank of Canada
Robert Sampson, Robert Risk for Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation
Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development), Nova Scotia Business Incorporated
Michael Ryan, Q.C., Michael Schweiger for Black & McDonald Limited

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Headnote

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

Debtor had been granted extensions of stay termination date along with approvals to arrange debtor in possession ("DIP") financing — Debtor's proposed claims bar process was subsequently approved — Debtor prepared plan of arrangement under which bank was classified as sole operating lender while other creditors were classified as either term lenders, lease

lenders, unsecured creditors, or shareholders — Debtor placed secured lender B Ltd. in unsecured class since B Ltd.'s security had no value as result of postponement and subordination agreement executed in favour of bank and term lenders — Debtor brought application for preliminary approval of plan of arrangement and related relief and for permission to increase DIP financing — Application granted — Plan was to be presented to creditors so they could vote on it, stay termination date was extended, and DIP financing was to be increased — Threshold for preliminary approval of plan was relatively low and no basis was shown for altering proposed plan — Placing of B Ltd. in unsecured class was fair and reasonable since B Ltd. was essentially unsecured creditor — Placing of bank in separate secured class was also fair and reasonable — Bank would recover full amount of security in any circumstances while all other secured creditors would face substantial shortfalls — Various secured creditors would each have sufficient votes to derail proposed plan and there was no reason to deny bank same veto power — Additional DIP financing was appropriate in light of debtor's need pending presentation of plan to creditors and absence of material deterioration of value of bank's security.

Table of Authorities

Cases considered by *A.D. MacAdam J.*:

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 10 C.B.R. (3d) 23, 4 B.L.R. (2d) 306, 7 O.R. (3d) 362, 1992 CarswellOnt 159 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Cansugar Inc., Re (2004), 2004 CarswellNB 9, 2004 NBQB 7 (N.B. Q.B.) — considered

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

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12 (N.S. T.D.) — considered

Fairview Industries Ltd., Re (1991), (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32, 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, 1991 CarswellNS 36 (N.S. T.D.) — considered

Fracmaster Ltd., Re (1999), 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 CarswellAlta 461 (Alta. Q.B.) — considered

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

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 964, 94 Alta. L.R. (3d) 389, 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — considered

Keddy Motor Inns Ltd., Re (1992), *(*sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246, 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, *(*sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, 1992 CarswellNS 46 (N.S. C.A.) — considered

Manderley Corp., Re (2005), 2005 CarswellOnt 1082, 10 C.B.R. (5th) 48 (Ont. S.C.J.) — considered

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

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 1990 CarswellNS 33 (N.S. T.D.) — considered

Ontario v. Canadian Airlines Corp. (2001), 2001 CarswellAlta 1488, 98 Alta. L.R. (3d) 277, 306 A.R. 124, 2001 ABQB 983, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373 (Alta. Q.B.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — considered

San Francisco Gifts Ltd., Re (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — considered

Simpson's Island Salmon Ltd., Re (2005), 2005 CarswellNB 781, 2006 NBQB 6, 294 N.B.R. (2d) 95, 765 A.P.R. 95, 18 C.B.R. (5th) 182 (N.B. Q.B.) — considered

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

Ursel Investments Ltd., Re (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.) — considered

Ursel Investments Ltd., Re (1992), *(*sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* [1992] 3 W.W.R. 106, *(*sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 89 D.L.R. (4th) 246, 10 C.B.R. (3d) 61, *(*sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 97 Sask. R. 170, *(*sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 12 W.A.C. 170, 1992 CarswellSask 19 (Sask. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
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s. 4 — considered

s. 5 — considered

s. 11 — pursuant to

s. 11(6) — referred to

APPLICATION by debtor for preliminary approval of plan of arrangement and related relief and for permission to increase debtor in possession financing.

***A.D. MacAdam J.*:**

1 By Order dated September 18, 2007, the Applicant, Federal Gypsum Company, (herein "the Company" or "the Applicant"), obtained an Order providing for a stay of proceedings pursuant to s.11 of the *Companies Creditors Arrangement Act*, R.S.C 1985, c. C-36, (the "CCAA"). BDO Dunwoody Goodman Rosen Inc. was appointed monitor, (herein "the Monitor"). On September 24, 2007 the Applicant successfully applied for approval of debtor in possession, (herein "DIP") financing, in the amount of $350,000.00. The initial Order provided for a stay of proceedings against the Applicant up to and including October 18, 2007, or such later date as the court may by further order determine, and on October 18, 2007 the stay date was extended to November 29, 2007. On November 5, 2007 the Company made a further application for additional DIP borrowing powers, with approval, from the financing, to retire the creditor holding security on the operating line. DIP financing in the amount of $1,500,000.00 was granted, subject to a restriction on the amount to be advanced. The application to pay out the operating line creditor was denied. On November 22, 2007 a further application was made to establish the Claims Bar process which, with minor changes, was approved.

2 At issue is

> 1. Preliminary approval of the plan of arrangement (the "Plan") prepared by Federal Gypsum Company (the "Company") for the purposes of presenting the Plan to the Company's creditors;
>
> 2. Classification of the creditors for the purpose of voting on the Plan;
>
> 3. Calling of a meeting of the Company's creditors pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA");
>
> 4. Extension of the Stay Termination Date set out in the initial order made by this Court on September 18, 2007 (the "Initial Order") pursuant to the CCAA and extended by the subsequent Order of this Court to November 29, 2007 at 4:00 p.m.; and
>
> 5. Arrangements for additional debtor in possession ("DIP") financing to the Company pursuant to the CCAA.

1. Preliminary Court Approval

3 Counsel for the Company, noting there is nothing in the CCAA requiring the approval of the court for the Company's

plan, acknowledges that "...the jurisprudence establishes that such approval is generally necessary prior to calling a meeting of such creditors...". Recognizing the burden is on the Applicant, Counsel suggests the standard to be met is whether the plan is "doomed to failure" as suggested by the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at p.88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at para 7; and *Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 2309 (B.C. C.A. [In Chambers]) at para.25.

4 In his written submission Counsel references the decision of Austin J. in *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.). Citing Doherty J.A. in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), Austin J. at paras. 37, 38 and 39 stated:

> 37. As to the degree of persuasion required, Doherty J.A. in Elan said at p.316 [O.R.]:
>
> > I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: Edwards, 'Reorganizations under the Companies' 'Creditors Arrangement Act', supra, at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the court very uncertain at the time the initial application is made.
>
> 38. In *Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen.Div.), Hoilett J., at p.330 f [O.R.], suggests that the test is whether the plan, or in the present case, any plan, 'has a probable chance of acceptance.'
>
> 39 These two standards are in conflict, Ultracare requiring the probability of success, and Elan requiring something less. Having regard to the nature of the legislation, I prefer the test enunciated by Doherty J.A. in Elan. In *First TreasuryFinancial Inc. v. Cango Petroleums Inc*. (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p.238, I expressed the view that the statute required 'a reasonable chance' that a plan would be accepted. [emphasis added by counsel]

5 Also referenced by counsel is *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43 (N.S. T.D.), where, at para. 80, Glube, C.J.T.D., (as she then was), observed:

> 80 I have no hesitation in accepting the line of cases which are concerned with the concept of requiring a reasonable probability of success in the meetings to be held to deal with any proposal. (See *Diemaster Tool*, supra, and *First Treasury FinancialInc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.)). In my opinion, it would seem to be totally impractical and extremely costly to continue to prepare a plan when there is no hope that it will be approved. [emphasis added by counsel]

6 In his submission, counsel notes the reference to an article by Stanley E. Edwards by Osborn J. in *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), at para.47, (reversed on other grounds at (1992), 10 C.B.R. (3d) 61 (Sask. C.A.)).

> 47 Stanley E. Edwards in his article 'Reorganizations Under the Companies' 'Creditors Arrangement Act' which appeared in (1947) 25 the Can. Bar Rev., 587 outlined the main problems which counsel and the courts will face in applying the Act. This article suggests that the Court before it orders a meeting of the creditors under ss. 4 and 5 of the Act must first be satisfied that:
>
> > (a) The companies should be kept going despite insolvency.
> >
> > (b) The public has an interest in the continuation of the enterprise, particularly if the companies supply

> commodities or services that are necessary or desirable to large numbers of consumers, or if they employ large numbers of workers who would be thrown out of employment by its liquidation.
>
> (c) The plan of reorganization is so framed that it is likely to accomplish its purpose.
>
> (d) The plan should embrace all parties, if possible, but particularly secured creditors.
>
> (e) The reorganization plan should be fair and equitable as between the parties.

7 Counsel says the Company has been in "significant discussions" with the term lenders, Cape Breton Growth Corporation, (herein "CBGC"), and Enterprise Cape Breton Corporation, (herein "ECBC"), (herein collectively referred to as the "Federal Crown Corporations"); Nova Scotia Business Inc., (herein "NSBI") and Nova Scotia — Office of Economic Development, (herein "NSOED"), (herein collectively referred to as the "Nova Scotia Crown Corporations"), each of whom hold or purport to hold, first secured charges on some of the fixed assets of the Company, as do the Federal Crown Corporations. Counsel anticipated, that in view of the plan proposing to retire the operating line provided by Royal Bank of Canada (herein "Royal Bank"), their acceptance of the plan.

8 In fact, the Royal Bank by its counsel in both written and oral submissions indicated its objection to the proposed extension of the stay termination date and the request for additional DIP financing. Counsel for the Royal Bank noted that in the affidavit of Rhyne Simpson, Jr., Director and President of the Applicant, that the Federal Crown Corporations and the Nova Scotia Crown Corporations did not appear to be on side with the proposed plan, and as the Royal Bank had repeatedly taken the position it did not support the process and would object to the plan of arrangement accordingly, "...it would seem clear that the proposed plan of compromise will not be approved." Counsel also suggests the court should consider whether, even if adopted by the creditors, the Plan has a reasonable probability of success. In this respect counsel suggests that to continue the process for another two months would involve "...significant expense and risk to the secured lenders, when it appears that the Company would not be able to successfully implement the plan even if accepted by the creditors." The Plan, in the submission of counsel, is deficient in that notwithstanding the proposal to repay the Royal Bank on the implementation date, the Company did not have the resources to do so. Counsel, referencing the report of the Monitor, and taking into account the extent of the DIP financing and the amount of the outstanding operating loan of the Royal Bank, says the Company would not have sufficient funds in place, on approval of the Plan, to retire the Royal Bank operating loan.

9 Through the course of the Application, counsel for the Federal Crown Corporations and the Nova Scotia Crown Corporations indicated they had no objection to either the extension of the stay termination date or the request for additional DIP financing. In doing so, counsel made it clear that they were not agreeing with the Plan as filed but rather were prepared to provide the Company with an opportunity to continue dialogue and discussions with the creditors concerning the nature and content of the final plan that would be submitted to a vote of the creditors.

10 In respect to the Royal Bank's concern the company would not have the necessary resources to retire its operating loan, even if the plan was approved by the creditors, counsel indicated the Company is in negotiations both with the DIP financing lender and other potential lenders to arrange financing to take effect upon approval of the plan, and presumably would, as a result, have the necessary resources to retire the Royal Bank operating loan.

11 A further concern raised by counsel for the Royal Bank related to the allocation of responsibility for administrative and operating expenses during the stay, as between the various secured creditors. In the earlier applications, it had been stipulated that the share of such expenses would be borne by the secured creditors in proportion to their respective indebtedness. Counsel for the Royal Bank suggested the possibility that some of the other secured creditors could enter into agreements whereby only one or two would recover on their assets and therefore a limitation of responsibility to share any expenses to the amount recovered could adversely affect the share of such expenses borne by the Royal Bank. Counsel for the Monitor advised that although there were agreements between various secured lenders involving a sharing of recovery, there was no agreement suggesting that any of the secured creditors had foregone their entitlement to repayment of their share of any realization on assets on which they held security. Therefore the concern, as acknowledged by counsel for the Royal Bank, was ameliorated.

12 In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

2. Classification of Creditors

13 The proposed Classification of Creditors, as set out in s. 3.3 of the Plan, is as follows:

> (a) Operating Lender — This category will consist of Royal Bank of Canada for the amounts owing under its operating line of credit as of the Filing Date;
>
> (b) Term Lenders — This category will consist of Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation, Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development) and Nova Scotia Business Incorporated (collectively, the 'Term Lenders');
>
> (c) Lease Lenders — This category will consist of Royal Bank of Canada for its leases on rolling stock, Ford Credit Canada Limited, National Leasing Limited, First Union Rail Corporation and Nova Scotia Business Incorporated for its lease on the premises located in Port Hawkesbury, Nova Scotia in which the Business operates (collectively, the 'Lease Lenders');
>
> (d) Unsecured Creditors;
>
> (e) Shareholders of the Company — This category will consist of Federal Gypsum Inc. and Blue Thunder Construction Ltd. (collectively, the 'Shareholders')

14 Counsel for Black and MacDonald Limited, (herein "BML") who purport to hold a subordinate secured charge on assets of the Company, objected to the classification of BML as an unsecured creditor. Counsel for the Federal Crown Corporations and for the Nova Scotia Crown Corporations also indicated a potential concern with the proposed classification and, in particular, the classification of the Royal Bank as a separate secured class. Counsel were invited to submit further written submissions as to their concerns.

15 In his written submission, counsel for the Company references *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), and the observations of Blair, J.A., at paras.23-25:

> 23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
> > In summary, the cases establish the following principles applicable to assessing commonality of interest:
> >
> > 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
> >
> > 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
> >
> > 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
> >
> > 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist

> classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.
>
> . . . . .
>
> 25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

16 In his written submission, counsel also references *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.) and the comments of Davison, J., at paras. 27-29.

> 27 In my view the court should avoid putting in the same class parties with a potential conflict of interest. I see that such a conflict could arise as between subcontractors and those with direct contracts with the owner. They have different contractual rights. A subcontractor may vote for a reduced amount of claim knowing he could still claim the deficiency from the general contractor, and this is cited as only an example of the possibility of conflict.
>
> 28 The test that was suggested by Bowen L.J. in *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573 (C.A.), dealing with the English legislation, is to place in one class persons 'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'
>
> 29 With those principles in mind, I would direct the subcontractors with liens to comprise a separate class.

17 Counsel then references from the further comments of Justice Blair in *Stelco Inc.*, *supra*, at paras. 30 and 35-36:

> 30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re*, *supra* — we prefer the Alberta [ie. *Canadian Airlines Corp., Re* (*supra*)] approach.
>
> . . . . .
>
> 35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: ...
>
> 36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, 'the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.'
>
> [emphasis added by counsel]

18 Counsel for the Company suggested the concerns raised by Davison, J. in *NsC Diesel*, *supra*, were not present here and that the proposed classification system was based on a "commonality of interest" and was appropriate. Any minor

deficiencies, counsel suggests are "...clearly outweighed by the purposive benefits of the classes as presented in the Plan", referencing the comments of Justice Blair at para. 6 in *Stelco Inc., supra*.

3. The Black and MacDonald Limited Classification

19 BML claims as secured creditor of the company, and objects to the classification placing it in the unsecured class. Counsel for BML asserts his client holds a security agreement "... charging all of the companies right, title, and interest in and to all equipment and proceeds thereof", excluding only the leased equipment. Counsel acknowledges BML executed a postponement and subordination agreement in favour of both the term lenders and the operating lender such that it holds a subordinate security on the assets charged in favour of both the term lender and the operating lender. After noting the six principles outlined by Paperny, J. in *Canadian Airlines Corp., Re* [2000 CarswellAlta 623 (Alta. Q.B.)], *supra*, counsel references para 22:

> ... the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A. which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C,C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur. (emphasis added)

20 Paul G. Goodman, President of the Monitor, in an Affidavit filed in this application, deposes:

> ... it is the Monitor's opinion that, subject to the currently intervening charge of the DIP lender and the Administrative Charge, as at the date of the Initial Order and as at December 7:
>
> (a) the assets on which RBC holds security are sufficient to provide for a 100% payout of its Operating Loan;
>
> (b) the assets on which NSBI, OED, CBGF & ECBC hold security, if realized on, would leave each of these creditors with a significant deficiency;
>
> (c) as B & M's security interest is subordinated to those of RBC, NSBI, OED, CBGF & ECBC there would be no assets remaining to be realized on by B & M under its security and in the result its security has no value.

21 The flexibility afforded the Court, in respect to CCAA applications, is to ensure that Plans of Arrangement and Compromise are fair and reasonable as well as designed to faciliate debtor reorganization. Justice Romaine, in *Ontario v. Canadian Airlines Corp.*, 2001 ABQB 983 (Alta. Q.B.), at paras. 36-38 stated:

> [36] The aim of minimizing prejudice to creditors embodied in the CCAA is a reflection of the cardinal principle of insolvency law: that relative entitlements created before insolvency are preserved: *R. v. Goode, Principles of Corporate Insolvency Law*, 2nd ed. (London: Sweet & Maxwell, 1997) at 54. While the CCAA may qualify this principle, it does so only when it is consistent with the purpose of facilitating debtor reorganization and ongoing survival, and in the spirit of what is fair and reasonable.
>
> [37] Paperny J. (as she then was) also discussed the purpose of the CCAA in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201 (Q.B.), aff'd [2000] A. J. No. 1028 (C.A.), online: QL (AJ) (C.A.), leave refused [2001] S.C.C.A. No. 60. At para. 95, she stated that the purpose of the CCAA is to facilitate the reorganization of debtor companies for the benefit of a broad range of constituents.
>
> [38] Paperny J. also noted in para. 95 that, in dealing with applications under the CCAA, the court has a wide discretion to ensure the objectives of the CCAA are met. At para. 94, she identified guidance for the exercise of the discretion in

Olympia &York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen.Div.) at p. 9 as follows:

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

22 Counsel for BML suggests the Court should give weight to its status as a secured creditor. In fact, however, on the evidence presented to date, it would appear that BML's claim has no value, other than as an unsecured claim against the Company. In the opinion of the Monitor, there would be no assets available to BML, in the event of a liquidation of the Company's assets and therefore its security has "no value". I am satisfied that in classifying BML as an unsecured creditor, there is no "confiscation of rights or ... injustice". This security, having no apparent value, they are therefore unsecured and their classification as an unsecured creditor is both fair and reasonable in the circumstances.

4. The Royal Bank Classification

23 The term lenders, being the Nova Scotia Crown Corporations and the Federal Crown Corporations, object to the classification of the operating lender, being the Royal Bank, in a separate class. Counsel for the Federal Crown Corporations references *Stelco Inc., Re, supra*, and the observations of Blair, J. A., at paras 21-22:

> 21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a 'commonality of interest' (or a 'common interest') between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:
>
> At pp. 249-350 Lord Esher said:
>
> > The Act provides that the persons to be summoned to the meeting, all of whom, is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act [FN3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, it a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.
>
> At. p. 251, Bowen L.J. stated:
>
> > The word 'class' used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a class of creditors to be summoned. It seems to me that we must give such a meeting to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.
>
> 22 These views have been applied in the CCAA context. But what comprises those 'not so dissimilar' rights and what are the components of that 'common interest' have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the

> nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

24 Counsel for the Federal Crown Corporations, as well as for the Nova Scotia Crown Corporations, suggest that carving out a separate class for Royal Bank, from the remaining secured creditors, runs contrary to the principles outlined by Justice Paperny in *Canadian Airlines Corp., Re*, *supra*. Although not disputing the appropriateness of the creation of a class of creditors of "lease lenders", "unsecured creditors", and "shareholders", Counsel suggest the classification of two classes of secured creditors would create fragmentation that is unnecessary and contrary to the "commonality of interest" principle. Secured creditors are, in the submission of counsel, secured creditors and there is no reasonable, logical, rational and practical reason not to have all the secured debt within the same class.

25 Counsel for the Federal Crown Corporations refers to *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), and the decision of Justice Freeman, where at paras. 21-22, he notes an article by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, April 5, 1983. The author comments to the effect that the CCAA authorizes the Court to alter the legal rights of parties, other than the debtor company, without their consent, and secondly that the purpose of the Act is to facilitate reorganizations and this is a factor to be considered at every stage of the process, including in the classification of creditors. As such, to accept "identity of interest" in classification of creditors would result in a "multiplicity of discreet classes" making reorganizations difficult, if not impossible.

26 Counsel's submission also refers to *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71, 1991 CarswellNS 36 (N.S. T.D.), where Glube, C.J.T.D., (as she then was), at paras. 32-33, commented as follows:

> I have no difficulty in rationalizing the decisions in *Norcen* and *Elan*. In my opinion, whether the security is on 'quick' assets or 'fixed' assets, the companies listed under Fairview secured creditors and Shelburne secured creditors, except for Central Capital, all have a first charge. There does not have to be a commonality of interest of the debts involved, provided the legal interests are the same. In addition, it does not automatically follow that those who have different commercial interests, that is, those who hold security on 'quick' assets, are necessarily in conflict with those who hold security on hard or fixed assets. Just saying there is a conflict is insufficient to warrant putting them into separate classes.
>
> In the present case, all the secured creditors of Fairview and all the secured creditors of Shelburne, except Central Capital, have a first charge of some sort, even though the security of each differs. They have a common legal interest, excluding Central Capital. I find that there is a commonality or community of interest of the secured creditors of Fairview and the secured creditors of Shelburne. Based on this position, I find that the Fairview secured creditors shall continue as one group.

27 The submission by counsel for the Federal Crown Corporations continues:

> Like the situation in Fairview, both RBC and the Term Lenders each have a first charge of some sort, even though the type of asset differs. There is clearly a common legal interest in the debtor Company amongst each of the secured creditors. The distinction between security on 'quick' assets such as accounts receivable and inventory as opposed to security on hard or fixed assets as has been put forward by RBC (herein referred to as Royal), throughout is clearly not determinative.

28 Counsel also references the additional comments of Chief Justice Glube, at para. 19:

> I suggest that all counsel are reading too much into the two decisions *Norcen Energy Resources Ltd. V. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 AltaL.R. (2d) 139,[1989] 2 W.W.R. 566 (Q.B.) and *Nova Metal Products Inc. v.Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1

> O.R. (3d) 289 [hereinafter *Elan*]. In my opinion the two cases do not set up two 'lines' of cases reaching different conclusions. I suggest that each was decided on their particular facts. The court should be wary about setting up rigid guidelines which 'must' be followed. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the 'C.C.A.A.') is intended to be a fairly summary procedure and should not be stretched out over months and years with protracted litigation. Quite definitely, each case must be decided on its own unique set of circumstances.

29 One of the circumstances considered in the Company's proposal to separately classify the term lenders and the operating lender is the opinion of the Monitor that upon liquidation the operating lender would recover the full amount of its operating loan, while there would be a substantial shortfall in respect to the term lenders. This opinion reflects the reported levels of receivables and inventory outlined in the various Monitor's reports, as compared with the indebtedness to the operating lender, and suggests that on a liquidation the operating lender would be successful in retiring its outstanding indebtedness. Also, the appraisal of the fixed assets, on the basis of an orderly liquidation, would appear to suggest a substantial shortfall in realization by the term lenders. Clearly, in respect to the relationship to the Company by the operating lender and the term lenders, the prospects for recovery on an orderly liquidation, being considerably different, would not be consistent with the "commonality" principle, at least, as it may relate to the prospects for recovery. There is also a very real difference in the nature of the assets on which they are secured, in that in the one instance the security is on fixed real assets and in the other on receivable and inventory. The latter are subject to ongoing fluctuations as the Company continues in operation.

5. Conclusion on Classification

30 There is nothing in the submission of Counsel, nor in the circumstances to warrant altering the classification proposed by the Company. BML's security has, apparently, little or no value. Each of the Federal Crown Corporations and the Nova Scotia Crown Corporations appear to have sufficient votes to derail the proposed Plan. There is no reason to deny the Royal Bank, who would then not have such a veto over the Plan, inclusion in the fixed asset lenders security classification. The Company has not suggested they be in the same class, and no reason has been advanced to warrant departing from the Company's proposed classification.

3. The Creditors' Meeting

31 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.

32 Counsel for the Company references the observation of Paperny J. in *Fracmaster Ltd., Re* (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.), at para.24:

> 24 I also note the principle that even where a plan is proposed, the court need not order a meeting of the creditors or class of creditors. That is because ss.4 and 5 of the CCAA, which provide for such meetings, are permissive, not mandatory. As Houlden and Morawetz state at 10A-11: 'If the court believes that the proposed plan or arrangement is not in the best interests of creditors, it may refuse to make the order...[I]f the plan lacks economic reality, the court will also refuse to make the order.'

33 In the circumstances and having regard to my earlier comments, I am satisfied there should be a meeting of creditors to consider and vote on the Plan.

4. Extension of Stay of Proceedings

34 In view of the preliminary approval of the Plan and the calling of a meeting of creditors to consider and vote on the Plan, it necessarily follows that there should be an extension of the stay to enable the Company to present the Plan to the creditors, to conduct the claims process as previously ordered and to determine whether the creditors have voted in favour or against the Plan. In *Cansugar Inc., Re*, 2004 NBQB 7 (N.B. Q.B.), Justice Glennie, in referencing s.11(6) of the CCAA, noted:

> In my opinion, the requirements of section 11(6) of the C.C.A.A. have been satisfied in this case. The continuation of the stay is supported by the overriding purpose of the C.C.A.A., which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim. [emphasis added by counsel]

35 To similar effect, Topolniski J. in *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.), at para. 28 observed:

> The court's role during the stay period has been described as a supervisory one, meant to: '...preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.' That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained. [emphasis added by counsel]

36 Notwithstanding the objection by the Royal Bank, including the potential prejudice as outlined by counsel in the event there is a deterioration in the value of the assets securing its operating loan, continuation of the stay is to be supported in view of the overriding purpose of the CCAA "...to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court...".

5. Additional DIP Financing

37 According to counsel, providing the court approves presentation of the Plan to the creditors and the extension is granted, the Company will require additional DIP financing. In referencing the cash flow projections and the anticipated need for additional financing, counsel notes that the proposed increase is somewhat smaller than the earlier cash flow projections had anticipated. The reason, counsel suggests, is "...due in part to a slower than anticipated growth in sales which has reduced the Company's cash requirements." Counsel continues:

> It is clear from the cash flow reports prepared by the Company, however, that there is indeed a growth in sales which will require additional financing.

38 Although approval has already been made for initial DIP financing, with its "super-priority" security in favour of the DIP lender and later for additional DIP financing, each application must be considered on its own merits and in the circumstances then existing. In respect to this Application, counsel again references the observations of C. Campbell J. In *Manderley Corp., Re* (2005), 10 C.B.R. (5th) 48 (Ont. S.C.J.), at para.18:

> 18 The operative legal principles are set out in the following quotations from Houlden and Morawetz' Bankruptcy &

> Insolvency Analysis (Carswell, 2004), section N16 — Stay of Proceedings — CCAA — at page 18:
>
> > Although the C.C.A.A. makes no provision for DIP financing, it seems to be well established that, under its inherent powers, the court may give a priority for such financing and for professional fees incurred in connection with the working out of a C.C.A.A. plan.

Also referenced is *Hunters Trailer & Marine Ltd., Re* (2001), 295 A.R. 113 (Alta. Q.B.), and the comment by Wachowich J., at para. 32:

> 32 Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process.

Counsel notes the three issues outlined by Glennie J. in *Simpson's Island Salmon Ltd., Re* [2005 CarswellNB 781 (N.B. Q.B.)], *supra*, at paras.16-17 and 19:

> 16 In order for DIP financing with super-priority status to be authorized pursuant to the CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd., Re*, [1999] B.C.J. No. 2754 (B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409 (B.C.C.A.)
>
> 17 DIP financing ought to be restricted to what is reasonably necessary to meet the debtor's urgent needs while a plan of arrangement or compromises is being developed.
>
> 19 A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself.

39 Counsel recognizes the court is engaged in a "balancing act that is the hallmark of DIP financing" as declared by C. Campbell J. in *Manderley*, *supra*, at para.27. At para.18, in *Simpson's Island Salmon Ltd.*, *supra*, Justice Glennie observed:

> Failure to grant an increase in the Administrative Charge would result in the Applicants no longer being able to continue their attempts at restructuring.

40 Counsel suggests a similar result would occur if the proposed additional DIP was not approved and that so long as a reasonable chance of rehabilitation remains,

> ...a company under CCAA protection should be afforded what measures are available to aid that rehabilitation, despite the concomitant prejudice to its creditors. A successful restructuring continues to be in the best interest of both the Company and its creditors.

In counsel's submission, the "small additional prejudice to creditors" in allowing the additional DIP financing is "far outweighed by the potential benefits to all of the Company's stakeholders of allowing the Company the opportunity to present the Plan." Counsel's written submission concludes by referencing *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) and the comment by Farley, J., to the effect that "...the mere fact that a significant secured creditor objects to such financing in no way precludes the Court's ability to allow DIP financing." The submission continues by noting the observation of Wachowich J. in *Hunters*, *supra*, at para. 32:

> ...If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

41 In his objection, counsel for the Royal Bank reiterates the bank's concern that DIP financing will erode its security. Counsel speculates that the increase in DIP financing means the margin of its debt to the current assets secured by its security would be reduced and indeed, applying a 50 per cent margin rate, would be eliminated. In his written submission, counsel observed:

> Although there is no evidence before the Court as to the estimated diminution in value of current assets in the event of liquidation, there is such evidence regarding the fixed assets. The appraisal provided by Universal Worldwide LLC estimates the value of the fixed assets on 'orderly liquidation' at $2,850,000US but only $950,000 on 'quick/forced sale', a drop of 2/3 in the later case. A drop in value of 50% in the case of the current assets would see the Bank get nothing in the event that the additional DIP financing sought were granted and that a liquidation ensued. This is without consideration of any impact from the Administration Charge.

42 It is clear the value of the security held by the Royal Bank is at risk by the continuation of the stay and the granting of additional DIP financing to enable the Company to present its Plan to its creditors for their consideration. However, the latest report of the Monitor does not reflect a substantial erosion in the value of the assets secured by the Royal Bank. Exhibit 3 to the Monitor's Report of November 26, 2007 shows accounts receivable of $778,383.00, while on November 23 the amount was $958,232.00. With respect to inventory, the raw materials at September 21 are reported at $944,393.00 and finished goods at $561,220.00, for a total of $1,505,613.00. The totals for November 23 were raw materials at $723,465.00 and finished goods at $438,165.00, for a total of $1,161,630.00. Although there has been a decline, it would not appear to be substantial and no evidence was submitted to suggest any greater concern about a potential deterioration during the period encompassed by the request to extend the stay. Although the additional DIP, together with the additional administrative charges, will impact on any recovery on realization of assets in general, there is, notwithstanding the speculation of counsel for the Royal Bank, no evidence the bank's security will be rendered valueless in the event of an eventual liquidation, particularly in view of the allocation of approximately 95 per cent of the burden of the DIP and administrative charges to the assets secured to the Federal Crown Corporations and the Nova Scotia Crown Corporations. In the initial report by the Monitor, the preliminary calculation of secured creditor percentages was 5.53 per cent for the Royal Bank, (taking into account both its operating loan and lease loan), with the remainder to the other secured creditors, including creditors holding leases. Although counsel for the Nova Scotia Crown Corporations suggested he would be submitting a revised figure for their loans, he further indicated it would not materially affect the percentages as outlined in the Monitor's Report. As such, the responsibility of the Royal Bank for the expenses of the restructuring are slightly over five per cent, and absent evidence of a material deterioration in the value of the assets secured under its security, as well as the value of the assets held by the other secured creditors, and in view of the need for the additional DIP financing to permit the Company to meet with and present to its creditors the Plan, I am satisfied to approve the additional financing and to grant the necessary priority contemplated by it.

Application granted.

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Tab 2

2009 NSSC 163, 2009 CarswellNS 283, 177 A.C.W.S. (3d) 294, 55 C.B.R. (5th) 205

2009 NSSC 163
Nova Scotia Supreme Court

ScoZinc Ltd., Re

2009 CarswellNS 283, 2009 NSSC 163, 177 A.C.W.S. (3d) 294, 55 C.B.R. (5th) 205

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 ScoZinc Limited

D.R. Beveridge J.

Heard: May 1, 2009
Judgment: May 1, 2009
Written reasons: May 20, 2009
Docket: Hfx 305549

Counsel: John D. Stringer, Q.C., Ben Durnford for Applicant
Robbie MacKeigan, Q.C. for Daniel Rozon
John McFarlane, Q.C. for Kamatsu

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Company obtained order under s. 11 of Companies' Creditors Arrangement Act for stay of proceedings — This order was, as required by Act, limited to period of 30 days — Order was extended on two occasions and was now due to expire one day

after day on which meeting of creditors was scheduled — There was tentative return date scheduled for one week after meeting of creditors for court to consider sanctioning plan, should it be approved by creditors — Company brought motion seeking order for, inter alia, further stay of proceedings — Motion granted — In light of conclusion that company met threshold for ordering meeting of creditors under ss. 4 and 5 of Act, appropriateness of further extension of stay of proceedings permitting company to return to court within very short period of time following meeting of creditors was patently obvious.

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

Company obtained stay of proceedings under Companies' Creditors Arrangement Act, which was later extended on two occasions — Company brought motion seeking order for, inter alia, meeting of creditors pursuant to ss. 4 and 5 of Act and approval of notice of this motion being given only to certain defined creditors — Motion granted — Court should only decline to give preliminary approval of proposed plan and refuse to order meeting if it was of view that there was no hope that plan would be approved by creditors or, if it was approved by creditors, it would not, for some other reason, be approved by court — Monitor's report indicated proposed plan was reasonable — Given that opinion and in light of terms set out in proposed plan, plan was far from one that was doomed to failure — Plan was one that should be put to creditors for consideration — It was appropriate to exercise discretion set out in ss. 4 and 5 of Act and order meeting of creditors — Given number of creditors that appeared early on in proceedings, it was somewhat impractical to give notice to each of them with volumes of materials that would be required to be produced and served — With respect to prior motions, it had been required that notice be given to all creditors asserting claims against company in excess of $100,000 and all creditors asserting builders liens — In addition, all creditors were apprised of these proceedings by way of mail out to every creditor as required by Act leading to filing of proofs of claim — Status of proceedings, including this motion, was posted on monitor's website — No reason to depart from previous practice.

Table of Authorities

Cases considered by *D.R. Beveridge J.*:

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, *(*sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, *(*sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12 (N.S. T.D.) — considered

Federal Gypsum Co., Re (2007), 2007 NSSC 384, 2007 CarswellNS 630, 261 N.S.R. (2d) 314, 835 A.P.R. 314, 40 C.B.R. (5th) 39 (N.S. S.C.) — considered

ScoZinc Ltd., Re (2009), 2009 CarswellNS 177, 2009 NSSC 108, 52 C.B.R. (5th) 200 (N.S. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 4 — referred to

s. 5 — referred to

s. 11 — referred to

s. 11(4) — referred to

s. 11(6) — referred to

MOTION by company for order for meeting of creditors pursuant to ss. 4 and 5 of *Companies' Creditors Arrangement Act*, further extension of stay of proceedings granted to company under *Act*, and approval of notice of motion being given only to certain defined creditors.

***D.R. Beveridge J.*:**

1 ScoZinc brings a motion seeking an order to accomplish three things. The first is for a meeting of the creditors pursuant to ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. The second is a further extension of the stay of proceedings initially ordered by this Court on December 22, 2008 and extended from time to time. The third is approval of notice of this motion being given only to certain defined creditors.

2 The company has filed an affidavit of William Felderhof referred to as his seventh affidavit, sworn April 28, 2009 and the Monitor has filed its sixth report dated April 30, 2009.

3 As part of its submissions the company notes that there is nothing in the *CCAA* which requires the Court to give prior preliminary approval of ScoZinc's proposed plan before it is presented to the creditors. It notes that the jurisprudence establishes that this approval is generally desirable prior to calling a meeting of the creditors. Some, but not all of this jurisprudence was reviewed by MacAdam J. in *Federal Gypsum Co., Re*, 2007 NSSC 384 (N.S. S.C.).

4 Justice MacAdam in *Federal Gypsum Co., Re* did refer to the two different standards that have been proposed or referred to in cases from Ontario and British Columbia. Some of these cases have expressed the view that the debtor company should establish that the plan has "a reasonable chance" that it would be accepted by the creditors. Other cases have referred to the appropriate test as simply a determination as to whether or not the proposed plan is one that would be "doomed to failure".

5 In a different context, Glube C.J.T.D. (as she then was) in *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43 (N.S. T.D.) cautioned that it would be impractical and extremely costly to continue to prepare a plan when "there is no hope that it would be approved".

6 I think it fair to say that MacAdam J., although not expressly but by necessary implication, preferred the lower standard facing a debtor company in submitting its plan to the Court for a preliminary approval. At para. 12 he wrote:

> [12] In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

7 In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.

8 The Monitor in its sixth report says that the proposed plan is reasonable under the circumstances. This opinion appears to flow from its conclusion that if the plan is rejected and the company forced into receivership or bankruptcy, unsecured creditors will not recover the amount offered in the plan and it is highly unlikely that the secured creditors will recover the amount offered to them. I see no reason to disagree with the opinion offered by the Monitor.

9 Given that opinion and in light of the terms that are set out in the proposed plan I am certainly satisfied that the plan is far from one that is doomed to failure. It is one that should be put to the creditors for their consideration. It is therefore appropriate that I exercise the discretion that is set out in ss. 4 and 5 of the *CCAA* and order a meeting of the creditors on the terms set out in the proposed meeting order.

10 With respect to the extension of the stay of proceedings, as I noted at the outset there had been an initial order of this Court under s.11 of the *CCAA*. This order was granted on December 22, 2008. It was, as required by the statute, limited to a period of 30 days. It has been extended on two previous occasions. It is now due to expire May 22nd, 2009. The meeting of the creditors is scheduled for May 21, 2009. There is a tentative return date scheduled for May 28, 2009 for the Court to consider sanctioning the plan, should it be approved by the creditors.

11 The test with respect to extending the stay of proceedings has been set out in a number of cases that have considered ss. 11(4) and (6) of the *CCAA*. These were reviewed by me in *ScoZinc Ltd., Re*, 2009 NSSC 108 (N.S. S.C.). In these circumstances there is no need to review the test and the evidence in support of that test.

12 In light of my conclusion that the company had met the threshold for ordering a meeting of the creditors under ss. 4 and 5 of the *CCAA* the appropriateness of a further extension permitting the company to return to the Court within a very short period of time following that meeting of the creditors is patently obvious. The extension is therefore granted.

13 The last issue is the approval of notice of this motion being given only to certain defined creditors. Given the number of creditors that appeared early on in the proceedings it was somewhat impractical to give notice to each of them with the volumes of materials that would be required to be produced and served. With respect to the prior motions it was required that notice be given to all creditors asserting claims against the debtor company in excess of $100,000.00 and all creditors asserting builders liens. In addition all creditors were apprised of these proceedings by way of the mail out to each and every creditor as required by the *CCAA* leading to filing of proofs of claim. The status of the proceedings, including this motion, have been posted on the Monitor's website. I see no reason to depart from the previous practice and this aspect of the motion is also granted.

Motion granted.

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Tab 3

2016 ONSC 316
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 589, 2016 ONSC 316, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

G.B. Morawetz R.S.J.

Heard: December 21-22, 2015
Judgment: January 15, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Shawn Irving, Tracy Sandler, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
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Laura M. Wagner, Mathew P. Gottlieb, for KingSett Capital Inc.
Yannick Katirai, Daniel Hamson, for Eleven Points Logistics Inc.
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James Harnum, for Employee
Harvey Chaiton, for Directors and Officers of the Applicants
Stephen M. Raicek, Mathew Maloley, for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada
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Brian Parker, for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.
Roger Jaipargas, for Glentel Inc., Bell Canada and BCE Nexxia
Nancy Tourgis for Issi Inc.

Subject: Insolvency

2016 ONSC 316, 2016 CarswellOnt 589, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval

T Canada sought protection under Companies' Creditors Arrangement Act (CCAA) — Certain landlords reached understanding with T Canada and its parent company T Corp. formalized through addition of paragraph 19A to Initial and Restated Order — Paragraph provided that CCAA proceedings would not be used to compromise guarantee claims landlords had against T Corp. — T Canada developed plan to present to affected creditors — T Canada negotiated structure with T Corp. whereby it would subordinate intercompany claims for benefit of remaining creditors and make other contributions — T Corp. required all claims including guarantees to landlords to be settled — T Canada brought motion to accept joint plan and compromise, establish class of affected creditors, authority to hold meeting of creditors, and to set date for hearing of sanction of plan if it was accepted — Motion dismissed — Plan failed to meet low threshold to authorize holding creditors meeting — There was no reasonable chance of success — Plan would not meet criteria at sanction hearing — Court was required to ensure that CCAA process unfolds in fair and transparent manner — Landlords should not be required through CCAA proceeding to release T Corp. from guarantees in exchange for consideration in plan in form of formula within plan — Landlords were concerned about effect CCAA proceedings would have on guarantees from very beginning — That T Corp. would only consider subordinating its intercompany claims as part of global settlement including landlord guarantees was not reason to approve plan — Without amendment landlords would have considered issuing bankruptcy proceedings as against T Canada — Paragraph 19A was incorporated into Initial and Restated Order with support of both T Corp. and monitor — Varying paragraph 19A so that plan could address guarantee claims landlords had as against T Corp. meant plan required court to completely ignore background that led to paragraph 19A and reliance that parties placed on it — Any change in economic landscape did not justify departure from agreed upon course of action as set out in paragraph 19A — T Canada and T Corp. were trying to use CCAA proceeding as means to secure release of T. Corp. from its liabilities — Proposal clearly contravened agreement memorialized and enforced in paragraph 19A — Paragraph 19A arose in post-CCAA filing environment, with each interested party carefully negotiating its position — All parties knew they were entering into binding agreements supported by binding orders — Agreements were heavily negotiated by sophisticated parties — Plan also established landlord formula amount which was not in original order.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to

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

Alternative Fuel Systems Inc., Re (2003), 2003 ABQB 745, 2003 CarswellAlta 1262, 46 C.B.R. (4th) 8, 20 Alta. L.R. (4th) 265, [2004] 5 W.W.R. 467, 46 C.B.R. (4th) 17, 20 Alta. L.R. (4th) 264 (Alta. Q.B.) — considered

Alternative Fuel Systems Inc., Re (2004), 2004 ABCA 31, 2004 CarswellAlta 64, 47 C.B.R. (4th) 1, 236 D.L.R. (4th) 155, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, *(*sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.)* 346 A.R. 28, *(*sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.)* 320 W.A.C. 28 (Alta. C.A.) — referred to

BlueStar Battery Systems International Corp., Re (2000), 2000 CarswellOnt 4837, [2001] G.S.T.C. 2, 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]) — referred to

Crystallex International Corp., Re (2013), 2013 ONSC 823, 2013 CarswellOnt 3043, 3 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered

Dairy Corp. of Canada Ltd., Re (1934), [1934] O.R. 436, [1934] 3 D.L.R. 347, [1934] O.W.N. 347, 1934 CarswellOnt 33 (Ont. C.A.) — referred to

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp. (2015), 2015 ONSC 4004, 2015 CarswellOnt 9738, 27 C.B.R. (6th) 134 (Ont. S.C.J.) — referred to

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

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

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

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

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219, 1992 CarswellBC 502 (B.C. S.C.) — referred to

ScoZinc Ltd., Re (2009), 2009 NSSC 163, 2009 CarswellNS 283, 55 C.B.R. (5th) 205 (N.S. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 65.2(3) [en. 1992, c. 27, s. 30] — considered

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

s. 4 — considered

s. 11 — considered

s. 20(1)(a)(iii) — considered

MOTION to accept joint plan and compromise, to establish class of affected creditors to vote on plan, and authority to hold meeting of those creditors and vote on plan and related procedures, and to set date for hearing of sanction of plan of it was accepted.

***G.B. Morawetz R.S.J.*:**

1 The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

2 On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

3 These are the reasons.

4 The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order

dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor.[1]

5 The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

6 The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

7 The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner, CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

8 The Monitor also supports the motion.

9 The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

10 In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

11 By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

12 The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

13 The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

14 Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

15 The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

16 The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

17 In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

18 The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 — Breach of paragraph 19A of the Amended and Restated Order

19 First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

20 Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

21 The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order...[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation.

22 The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;
>
> > (a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and

(b) a fair and reasonable balancing of interests.

23 Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP — it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

24 The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 — Breach of paragraph 55 of the Claim Procedure Order

25 Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

26 The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

27 The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

28 In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

29 In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

30 Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

31 Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

32 Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

33 Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

34 The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

35 Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

36 The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula (”Landlord Formula Amount”) derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (”BIA” and “BIA Formula”). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the “Landlord Guarantee Top-Up Amounts”) Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

37 With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

> (i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or
>
> (ii) four years rent.

38 Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

39 The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors’ Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors’ Meeting.

40 The significant features of the Plan include:

> (i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.
>
> (ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 (”Convenience Class Creditors”) to be paid in full;
>
> (iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;
>
> (iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

41 If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

42 Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

43 The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or 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, or 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 shareholders of the company, to be summoned in such manner as the court directs.

44 Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.).

45 Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205 (N.S. S.C.)).

46 Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

47 Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the

court should therefore exercise its discretion to order the Creditors Meeting.

48 Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

49 Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

50 The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), affirmed 2008 ONCA 587 (Ont. C.A.), (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

51 Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

52 With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

53 The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and “real time” nature of a CCAA proceeding.

54 As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

55 At the outset of this proceeding, Target Canada, Target Corporation and Target Canada’s landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

56 Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court’s approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

57 The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords’ claims, including all Landlord Guarantee Claims, using a formula.

58 Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

59 The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

60 With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

61 Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

62 In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp., Re*, 2013 ONSC 823, 2013 CarswellOnt 3043 (Ont. S.C.J. [Commercial List]) . Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

63 In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> > (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
> >
> > (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,
> >
> > (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.
>
> Likewise, the Claims Procedure Order, as amended, clearly provides that:
>
> > (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
> >
> > (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
> >
> > (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.
>
> There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order...

64 With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc., Re*, 2003 ABQB 745, 20 Alta. L.R. (4th) 264 (Alta. Q.B.), aff'd 2004 ABCA 31, 346 A.R. 28 (Alta. C.A.), where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

65 Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

66 Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

67 In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

68 Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

69 As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

70 Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.); *Dairy Corp. of Canada Ltd., Re*, [1934] O.R. 436 (Ont. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at p. 182, aff'd (1989), (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *BlueStar Battery Systems International Corp., Re* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

71 As explained below, the Plan cannot meet the required criteria.

72 It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

73 The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

74 The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph

19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

75 The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

76 Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

77 However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

78 Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

79 This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

80 Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 (Ont. S.C.J.) at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

81 The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

82 The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

83 A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

84 In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

85 It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

86 Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

87 Accordingly, the Plan is not accepted for filing and this motion is dismissed.

88 The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

89 At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Motion dismissed.

Footnotes

[1] Capitalized terms not defined herein have the same meaning as set out in the Plan.

Tab 4

2010 SKQB 429
Saskatchewan Court of Queen's Bench

Clayton Construction Co., Re

2010 CarswellSask 750, 2010 SKQB 429, 203 A.C.W.S. (3d) 466, 365 Sask. R. 301, 74 C.B.R. (5th) 130

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

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE CREDITORS OF CLAYTON CONSTRUCTION CO. LTD. and CLAYTON CONSTRUCTION GROUP INC.

A.R. Rothery J.

Judgment: November 18, 2010
Docket: Saskatoon Q.B. 880/09

Counsel: I.A. Sutherland for Applicants
J.M. Lee for Monitor, Ernst & Young Inc.
D.P. Kwochka for Redhead Equipment Ltd.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

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

Terms of arrangements, meetings regarding arrangements — Debtor construction company entered protection under Companies' Creditors Arrangement Act — Debtor reached agreement with secured creditors — Debtor's plan for unsecured creditors was for payment of 15 per cent of amount owing, with creditors for less than $3,334 having election for lesser amount of $500 or payment of entire claim — Debtor brought application to order meeting of unsecured creditors and extend time of stay — Application granted — Administrative benefit to dealing with smaller claims did not defeat s. 6(1) of Act, as right to vote against plan was preserved — Dissenting creditors still protected by court's discretionary powers — Monitor had undertaken to make appraisal available to all creditors.

Table of Authorities

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

Big Sky Farms Inc., Re (2010), 70 C.B.R. (5th) 88, 2010 CarswellSask 448, 2010 SKQB 255 (Sask. Q.B.) — considered

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

229531 B.C. Ltd., Re (1989), 72 C.B.R. (N.S.) 310, 1989 CarswellBC 330 (B.C. S.C.) — referred to

Statutes considered:

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

s. 4 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 6(1)(a) — considered

APPLICATION by debtor company to approve meeting and to extend stay under *Companies' Creditors Arrangement Act*.

***A.R. Rothery J.*:**

1 The applicants, Clayton Construction Co. Ltd. and Clayton Construction Group Inc., applied pursuant to s. 4 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the "CCAA") for the court to order a meeting of the applicants' unsecured creditors to consider its plan of compromise. The stay of proceedings was granted July 10, 2009, and the applicants now have a proposal.

2 I granted the order calling for a meeting of the unsecured creditors on December 15, 2010 and for a further extension of the stay of proceedings until January 14, 2011. This extension will allow for both the meeting and an application to determine whether the plan of compromise would be sanctioned by the court as provided by s. 6 of the CCAA. Counsel for Redhead Equipment Ltd. ("Redhead") raised concerns about certain aspects of the proposed plan. These are the reasons for granting the order as proposed by counsel for the applicants.

3 The two applicants propose a consolidated plan of compromise; for all intents and purposes, they operate as one business. Theirs is a construction business, providing construction services to the oil field industry and building roads throughout Saskatchewan and Alberta. Following certain construction accidents at Ft. McMurray, Alberta and the subsequent

loss of contracts, along with the global recession in 2008 and the dramatic drop in oil prices, the applicants suffered a sharp drop in revenues. This all led to the initial order under the CCAA.

4 The applicants have been successful in renegotiating payments with all their secured creditors. This has solved in excess of $11 million of the debt. They now have sufficient ability to propose a plan of compromise to their unsecured creditors, who hold about $2.94 million of the debt.

5 The plan of compromise proposed is to pay the unsecured creditors a distribution of money equivalent to 15% of each unsecured creditor's claim, with 7.5% paid initially and 7.5% paid six months later. The monitor anticipates that this distribution is about twice the amount the unsecured creditors would receive if the applicants' businesses were liquidated in bankruptcy.

6 While the unsecured creditors are one class of creditors under the CCAA, this plan of compromise provides for an election for any unsecured creditor owed less than $3334. Those claimants may elect to receive a fixed distribution equal to $500 or the maximum amount of the claim, whichever is less. Otherwise, those claimants may elect to receive a distribution equal to 15% of the claim. Thus, anyone owed less than $3334 would receive a greater benefit if the fixed distribution option were selected. Indeed, some unsecured creditors may see their debt paid in full. The plan of compromise provides that members of this subgroup of unsecured creditors owed $3344 or less and entitled to the fixed distribution are deemed to have elected this fixed distribution and to have voted in favour of the plan of compromise, unless that unsecured creditor votes to the contrary at the meeting of the creditors.

7 It is this deeming provision in the plan of compromise that counsel for Redhead objected to. Counsel argued that the deeming provision was contrary to the intent of s. 6(1) of the CCAA. It provided the unsecured creditors owed less than $3344 a disproportionate voice in the outcome of the vote. These are the creditors who would least likely attend the creditors' meeting at all. The deeming provision could make a substantial difference in the result of the vote.

8 Counsel for the monitor argued that the deeming provision would reduce certain administrative costs for dealing with the less significant claims. Counsel for the monitor also submitted that such plans have been approved by this court in prior CCAA proceedings, citing as an example the deeming provision for creditors owed $4,000 or less to have voted in favour of the plan of compromise in *Big Sky Farms Inc., Re* [2010 CarswellSask 448 (Sask. Q.B.)] Q.B.G. No. 1461 of 2009 J.C.S., (unreported). In that case, there was no provision for those creditors to vote, should they elect to do so. Counsel for the monitor conceded that issue was not addressed by any party in *Big Sky*. So, it may not be of great precedent value in this case.

9 The monitor's fifth report shows that about forty-five of the ninety-seven claimants in the class of unsecured creditors fall into the category of claims less than $3334. The sum of $21,557 will be set aside for the fixed distribution pool.

10 Counsel for Redhead noted that the fixed distribution pool catches about $63,000 of the unsecured debt. That is about 2.1% of the total value of the claims. Redhead itself is owed $412,000, about 14% of the total value of the claims. Counsel for Redhead did not object to the sub-group owed less that $3334 receiving more than 15% of the claim if the plan were to be approved. Counsel argued that the 2.1% of fixed pool distribution could affect whether the two-thirds majority is met at the creditors' meeting.

11 Section 6(1)(a) of the CCAA states:

> 6.(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

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

12 The power of the court to sanction the plan of compromise under s. 6 of the CCAA is a discretionary power. The court must be satisfied that the plan is fair and reasonable. This concept has been described in *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) where McEachern C.J.S.C. referred to numerous authorities on pp. 200-201and summarized the principles as follows:

> The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:
>
> (1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);
>
> (2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;
>
> (3) The plan must be fair and reasonable.

13 There is no doubt that the deeming provisions provided for the fixed distribution claimants may make a difference if the vote is close. However, the requisite two-thirds majority does not, in and of itself, mean that the court will sanction the plan of compromise. Approval is discretionary. (See: *229531 B.C. Ltd., Re* (1989), 72 C.B.R. (N.S.) 310 (B.C. S.C.)).

14 If the requisite majority supports the plan, it does not bar a creditor from objecting to the plan and providing cogent reasons for so doing. Thus, the administrative benefit of dealing with over half the creditors who represent 2.1% of the value of the claims in the efficient manner proposed by the monitor does not defeat the intent of s. 6(1) of the CCAA. Their right to vote against the plan of compromise has been preserved by the plan of compromise itself. Should their collective vote, to a maximum of 2.1%, make a difference to the majority, dissenting creditors are protected by the discretionary powers given to the court at the sanction application. It is for these reasons that the applicants have been permitted to propose its plan of compromise to the unsecured creditors in the form encompassed in the order granted November 4, 2010.

15 On a related matter, counsel for Redhead expressed concern about the appraisal provided to the monitor, upon which reliance was placed by the monitor to conclude that liquidation of the applicants' businesses would only realize about 7.5% of the total debt. The monitor has undertaken to make that appraisal available to all unsecured creditors prior to the meeting of creditors. It is important that the unsecured creditors be convinced of the monitor's recommendations. In this case, the comparison of the liquidation value to the plan's proposal is crucial. It will be a factor not only for the creditors to consider, but also a factor in the court's exercise of its discretion.

Application granted.

End of Document

Tab 5

2014 ONSC 494, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290, 236 A.C.W.S. (3d) 820

2014 ONSC 494
Ontario Superior Court of Justice [Commercial List]

Jaguar Mining Inc., Re

2013 CarswellOnt 18630, 2014 ONSC 494, 12 C.B.R. (6th) 290, 236 A.C.W.S. (3d) 820

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

In the Matter of a Plan of Compromise or Arrangement of Jaguar Mining Inc., Applicant

Morawetz R.S.J.

Heard: December 23, 2013
Judgment: December 23, 2013
Written reasons: January 16, 2014
Docket: CV-13-10383-00CL

Counsel: Tony Reyes, Evan Cobb for Applicant, Jaguar Mining Inc.
Robert J. Chadwick, Caroline Descours for Ad Hoc Committee of Noteholders
Joseph Bellissimo for Secured Lender, Global Resource Fund
Jeremy Dacks for Proposed Monitor, FTI Consulting Canada Inc.
Robin B. Schwill for Special Committee of the Board of Directors

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Effect of stay on subsidiaries — Debtor company was holding company for gold mining business Debtor brought application for protection under Companies' Creditors Arrangement Act for itself and subsidiaries Application granted — Debtor wished to affect recapitalization — Recapitalization was supported by 93 per cent of noteholders, which formed bulk of debt — Debtor was insolvent and facing liquidity crisis — Extending stay to subsidiaries was reasonable as debtor was dependant on them for income — Director's charge granted .

Table of Authorities

Cases considered by *Morawetz J.*:

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

SkyLink Aviation Inc., Re (2013), 2013 CarswellOnt 2785, 2013 ONSC 1500, 3 C.B.R. (6th) 150 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

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

s. 10(2) — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 22(2) — considered

APPLICATION by debtor for prection under *Companies' Creditors Arrangement Act*.

***Morawetz J.* (orally):**

1 On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.

2. Meeting Order granted in form submitted.

3. Claims Procedure Order granted in form submitted.

2 These are my reasons.

3 Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

4 Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

5 Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

6 Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

7 The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

8 The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

9 Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

10 Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

11 Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

12 The Subsidiaries' assets include properties in the development stage and in the production stage.

13 Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

14 Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

15 In aggregate, Jaguar has issued a principal amount of $268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

16 Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

17 Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

18 Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

19 Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

20 The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

21 Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

22 Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million.

23 Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

24 I accept that Jaguar faces a liquidity crisis and is insolvent.

25 Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

26 Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

27 Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

28 Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

29 Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

30 Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

31 Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

32 Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

33 In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

34 Each of the Claims Procedure Order and Meeting Order include a comeback provision.

35 Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

36 I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

37 I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

38 I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

39 In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

40 The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153, 19 C.B.R. (5th) 187 (Alta. Q.B.); *SkyLink Aviation Inc., Re*, 2013 ONSC 1500, 3 C.B.R. (6th) 150 (Ont. S.C.J. [Commercial List]).

41 The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

42 In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate; and

(iii) the charges should extend to all of the proposed beneficiaries.

43 In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and

(b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

44 In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

45 With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate;

(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

46 A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

47 Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

48 In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

49 Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

50 In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

Application granted.

Tab 6

2008 ONCA 587
Ontario Court of Appeal

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

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

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

Heard: June 25-26, 2008
Judgment: August 18, 2008*
Docket: CA C48969

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

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

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XVII Practice and procedure in courts
  XVII.7 Appeals
    XVII.7.b To Court of Appeal
      XVII.7.b.ii Availability
        XVII.7.b.ii.D Miscellaneous cases

Bankruptcy and insolvency

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

Table of Authorities

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

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

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

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

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

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R.

(3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
s. 182 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 192 — referred to

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

Companies Act, 1985, c. 6
s. 425 — referred to

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

s. 4 — considered

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

s. 6 — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

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

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

***R.A. Blair J.A.*:**

A. Introduction

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

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

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

Leave to Appeal

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

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

Appeal

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

B. Facts

The Parties

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

pharmaceuticals retailer, and several holding companies and energy companies.

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

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

The ABCP Market

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

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

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

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

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

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

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

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

maturing ABCP Notes.

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

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

The Montreal Protocol

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

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

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

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

The Plan

a) Plan Overview

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

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity

provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

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

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

b) The Releases

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

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

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

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

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

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

The CCAA Proceedings to Date

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

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

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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

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

38 The appellants attack both of these determinations.

C. Law and Analysis

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

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

(1) Legal Authority for the Releases

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

— is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

> a) on a proper interpretation, the CCAA does not permit such releases;
>
> b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
>
> c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
>
> d) the releases are invalid under Quebec rules of public order; and because
>
> e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the

application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public

dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

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

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at

197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.[4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither

> necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

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

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section.

She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at

> 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action

to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) (*"Stelco II")*. The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date

> when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**

> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

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

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

The Deprivation of Proprietary Rights

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

The Division of Powers and Paramountcy

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

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

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

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

Conclusion With Respect to Legal Authority

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

(2) The Plan is "Fair and Reasonable"

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

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

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

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

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

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

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

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

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

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

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn

out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

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

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

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

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

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

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

D. Disposition

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

***J.I. Laskin J.A.*:**
I agree.

***E.A. Cronk J.A.*:**
I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

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

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

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

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

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

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

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

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

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

End of Document

Tab 7

2008 CarswellOnt 2653
Ontario Superior Court of Justice [Commercial List]

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

2008 CarswellOnt 2653, [2008] O.J. No. 1819, 168 A.C.W.S. (3d) 915, 42 C.B.R. (5th) 102, 45 B.L.R. (4th) 213

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants) AND METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 6932819 CANADA INC. AND 4446372 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents)

C.C. Campbell J.

Heard: April 23, 2008
Judgment: April 24, 2008
Docket: 08-CL-7440

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors

Headnote

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

Plan initiated under Companies' Creditors Arrangement Act ("CCAA") was of unprecedented size, complexity and importance to capital markets of Canada — Some noteholders brought motion for determination that releases contemplated to be required of parties in CCAA process were overly broad and confiscatory of parties' rights and therefore illegal, that noteholders who objected to releases be separate class, and that meeting and vote of noteholders be adjourned until further

information sought was available — Motion for adjournment of noteholder vote dismissed and motion insofar as releases were concerned adjourned — To postpone vote would signal failure of plan, which would have serious consequences — Plan and other information, which was available if sought, were sufficient to enable vote to proceed on as informed basis as possible in circumstances — Legitimate concerns of some noteholders could be accommodated in fairness process and motion insofar as releases were concerned was adjourned for that purpose — It would be helpful for all concerned to know whether plan was accepted and if so by whom — There was no need to provide for different classes of noteholders before vote — Arguments in favour of classification that would give some noteholders in effect veto would mean plan would be defeated — Reclassification would require postponement of vote, which was unacceptable approach — As issue for which some noteholders sought further voting reclassification was directly related to issue of validity and fairness of proposed releases, it was not unfair that vote go ahead in "one vote per noteholder" fashion.

Table of Authorities

Statutes considered:

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

MOTION by some noteholders for determination that releases presently contemplated to be required of parties in process under *Companies' Creditors Arrangement Act* were overly broad and confiscatory of parties' rights and therefore illegal, that noteholders who objected to releases be separate class, and that meeting and vote of noteholders be adjourned until further information sought was available.

Subject:

***C.C. Campbell J.*:**

1 Given the urgent need for a decision in this matter, this brief endorsement will have to suffice until a complete written decision is delivered.

2 The motions of the moving parties seek: (a) a determination that the releases presently contemplated to be required of parties in this CCAA process are overly broad and in the circumstances confiscatory of parties' rights and therefore illegal; (b) that corporate and individual Noteholders who object to the releases be a separate class; and (c) that the meeting and vote of Noteholders be adjourned until further information sought from the Applicants is made available.

3 This CCAA Plan that has been initiated is of unprecedented size, complexity and importance to the capital markets of Canada.

4 I have concluded that the Noteholder vote scheduled for April 25, 2008 should go ahead. To postpone the vote, even if something else were to take place before the April 30 expiry of the Standstill Agreement, would signal the failure of the Plan. A failure of the Plan will have extremely serious consequences.

5 I do not take lightly nor decide against the rights of certain Noteholders to argue that the issue of releases does have a legal validity component to it as well as specific fairness. In my view, those issues should be considered together as part of the fairness process, not be determined in isolation at this time.

6 The issue of third party releases is sufficiently accepted in our Courts that they are at least worthy of consideration in context of whether the Plan as whole is accepted by all or a sufficient portion of Noteholders that it can go forward.

7 If third party releases are a necessary and incidental part of a Plan's success, that is one matter. If the effect of releases is to deprive a party of claims unrelated to the Plan, that is another. There must be a reasonable balance.

8 I am satisfied that the legitimate concerns of some Noteholders can be accommodated in the fairness/sanction process and the motion insofar as releases are concerned is adjourned for that purpose.

9 It will be helpful to all concerned to know whether the Plan is accepted and if so by whom. Since the Monitor will be able to tabulate return information in a fashion that enables Noteholders who argue that there should be a separate class for them to know just who they are and in amounts and particulars, I see no need to provide for different classes of Noteholders before the vote.

10 The arguments in favour of a classification that would give some Noteholders in effect a veto would mean the Plan that is before the Court would be defeated. I do not think this is a desirable result for any of the parties associated in any way with the Plan or for those who participate or observe the financial markets in Canada.

11 A reclassification at this point would in my view require a postponement of the vote, an unacceptable approach. Since the issue for which the moving parties seek further voting classification is directly related to the issue of validity and fairness of the proposed releases, I do not think it unfair that the vote go ahead in a "one vote per Noteholder" fashion at this time.

12 The distinction related to risk and benefit of the Plan to those who seek further consideration of releases in the sanction process can best be dealt with when those parties decide whether they wish to work within the Plan while preserving their ability to argue both validity and fairness of specific releases, or alternatively to vote against the Plan at this stage to signal that they will insist on no compromise of any actual or potential litigation right.

13 In giving this preliminary decision, I am mindful from the very forceful argument of counsel for the moving parties that there is a very serious issue of law of the legally permissible extent of third party releases. An analysis of the authorities will have to wait.

14 I am also mindful of the limits of the mandate of the Applicants in these circumstances. The Plan has been carefully and painstakingly negotiated over a number of months and I have no doubt that if the result of the fairness process were to open up the right of every Noteholder to sue whomsoever they wished for any reason related to their purchase of notes, the Plan will likely be withdrawn.

15 How then to put some focus on the release issues? In some restructurings, the applicants will suggest a claims process that may well bring in those who seek to advance specific claims that affect the debtor and its business, as well as related parties. This is normally done on a consensual basis so that expedition and management can be assured.

16 As has been said in many cases, the purpose of the CCAA is to allow business people an opportunity to "facilitate compromises and arrangements between companies and their creditors."

17 Without in any way defining at the moment just how far that can go in respect of third party rights, I do think that a more defined and principled approach to that issue is appropriate for the sanction process.

18 The Court is simply not in a position to make an informed decision on what may or may not be appropriate claims to be released without more information.

19 The Applicants and those affected should also have full particulars. If there is a ruling favourable to the moving parties, the Applicants and Plan Sponsors will have a decision to make whether or not to continue the Plan.

20 I see no reason that process cannot start as soon as possible after the vote results are known. If the vote favors the Plan, I suggest a directions hearing on April 28 or 29 to see if and under what circumstances the Standstill may be extended.

21 Some moving parties requested that the vote be postponed until further specific information is provided by the Applicants on, among other things, projected recoveries anticipated under the Plan. I am satisfied, at least for the present time, that the Applicants have provided the information that is reasonably available.

22 Some of the Moving Parties chose not to avail themselves of further information as they did not want to sign confidentiality agreements. I am satisfied that the Plan and other information, which was available if sought, are sufficient to enable the vote to proceed on as informed a basis as possible in the circumstances.

23 Again, if the Noteholder vote favours the Plan and there is information required for the issue of validity and fairness of releases, the matter may be raised again. The motion requesting adjournment is dismissed.

24 There are several specific issues that will have to be revisited once the vote results are known. Mr Lax on behalf of Hollinger Publishing urged that the Ironstone Noteholders be simply removed from the Plan. This Court is not in a position at this time to make that Order without rejecting the Plan as a whole, except at the request of the Applicants. The alternative submission, that there be separate classes for the different series of Ironstone Noteholders, can be readdressed when the vote is known and the Monitor reports. That motion is adjourned at this time.

25 The Court was advised that there would likely be accommodation for the relief sought by JTI MacDonald. Counsel may renew that motion if required.

26 If further direction is required by any party as a result of this decision, counsel may make an appointment through the Commercial List Office.

Schedule A

Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B

Applicants

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Order accordingly.

Tab 8

2000 CarswellAlta 623
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 623, [2000] A.W.L.D. 642, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12

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

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

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

Paperny J.

Judgment: May 12, 2000*
Docket: Calgary 0001-05071

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers])

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, and *R.B. Low, Q.C.*, for Canadian Airlines.
V.P. Lalonde and *Ms M. Lalonde*, for AMR Corporation.
S. Dunphy, for Air Canada.
P.T. McCarthy, Q.C., for PricewaterhouseCoopers.
D. Nishimura, for Resurgence Asset Management LLC.
E. Halt, for Claims Officer.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Creditors of corporation gave corporation concessions worth $200 million in exchange for assurance from airline that creditors would cease to be affected by CCAA proceedings — Concessions were reflected in promissory notes assigned to airline in exchange for its guarantee of aircraft leases — Representative of 60 per cent of unsecured noteholders in corporation brought application for order that all unsecured claims held or controlled by airline be placed in separate class from other unsecured claims for voting purposes, and for order striking portion of reorganization plan — Application

2000 CarswellAlta 623, [2000] A.W.L.D. 642, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12

dismissed — Class of creditors should include all those with commonality of interest — Commonality of interest refers to rights creditor has vis-à-vis debtor — "Interest" does not include personality or identity of creditor, and absent bad faith, motivation of creditor for supporting plan is not classification issue — Proper point at which to consider effect of airline's status as assignee of unsecured debt was at fairness hearing — Legal rights of unsecured noteholders and airline were essentially same — Votes cast by airline should be tabulated separately to provide evidentiary record for fairness hearing — Propriety of airline voting to share in pool of cash funded by it for benefit of unsecured creditors was also issue best considered at fairness hearing — Provision of plan that released directors, officers and others should not be struck at classification stage as fairness of proposed compromises or claims was issue for fairness hearing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Paperny J.*:

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, *(*sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, *(*sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — considered

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, *(*sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — applied

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — distinguished

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — considered

2000 CarswellAlta 623, [2000] A.W.L.D. 642, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

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

s. 5.1(3) [en. 1997, c. 12, s. 122] — considered

APPLICATION by unsecured creditors of corporation for order that unsecured claims held by Air Canada should be placed in separate class from other unsecured creditors, and for order striking portion of reorganization plan.

***Paperny J.* (orally):**

1 Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

2 Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.

2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.

3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.

4. An order that there be a separation in class between creditors of CAC and CAIL

5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

3 Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

4 Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise,

and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

5 Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

6 In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.

7 I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.

8 Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

9 By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

10 These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

11 The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.

12 In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

> 1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

13 Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their personalities.

14 The starting point in determining classification is the statute under which the parties are operating and from which the

court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)

15 Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

16 A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).

17 At page 583 (Q.B.), Bowen, L.J. stated:

> The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

18 Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)

19 The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

20 In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

21 It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

22 Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than

the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.

23 The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgagees with different mortgages against different properties were included in the same class.

24 In *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.

25 At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British Columbia Supreme Court in *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

26 Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

27 In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.

28 In *Fairview Industries Ltd.* , the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

29 In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.*, the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

30 Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

31 In summary, the cases establish the following principles applicable to assessing commonality of interest:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor

company, prior to and under the plan as well as on liquidation;

3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

32 With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

33 The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.

34 The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, "*Reorganizations under the Companies Creditors Arrangement Act*", (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

35 Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

36 Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd.*. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.

37 All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

38 Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in

Energy Resources Ltd., and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

39 Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

40 The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

41 It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

42 Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.

43 There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd.* Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

44 I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

45 Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

46 The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of

calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

47 Resurgence relied on *Northland Properties Ltd.* in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd.*. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd.* apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

48 Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;

2. The directors, officers and employees;

3. The former directors, officers and employees of the debtor companies and its subsidiaries; or

4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

49 Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

50 In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

51 In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

52 In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

Footnotes

[*] Leave to appeal refused 2000 ABCA 149, 80 Alta L.R. (3d) 213, 19 C.B.R. (4th) 33 (Alta C.A. [In Chambers]).

2000 CarswellAlta 623, [2000] A.W.L.D. 642, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12

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Tab 9

2009 ABQB 490
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2009 CarswellAlta 1269, 2009 ABQB 490, [2009] A.W.L.D. 3785, 180 A.C.W.S. (3d) 374, 479 A.R. 318, 57 C.B.R. (5th) 205

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

B.E. Romaine J.

Heard: August 5, 2009
Judgment: August 24, 2009
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Rupert Chartrand, Michael De Lellis, Cynthia L. Spry, Douglas Schweitzer for Applicants
David R. Byers, for Bank of America
Patrick T. McCarthy, Josef A. Krüger for Monitor
Douglas S. Nishimura for ARC Resources Ltd., City of Medicine Hat, Black Rider Resources Inc. Wolf Coulee Resources Inc., Orleans Energy Ltd., Crew Energy Inc., Trilogy Energy LP
Brendan O'Neill, Jason Wadden for Fortis Capital Corp.
Sean Fitzgerald for Tri-Ocean Engineering Ltd.
Dean Hutchison for Crescent Point Energy Trust, Enbridge Pipelines Inc.
Caireen Hanert for Bellamount Exploration Ltd., Enersul Limited Partnership
Bryce McLean for DPH Focus Corporation
Aubrey Kauffman for BNP Paribas

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

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

Headnote

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

S brought application for various relief related to holding of meetings of creditors to consider three plans to restructure and distribute assets of Companies' Creditors Arrangement Act ("CCAA") applicants, including applications for orders authorizing establishment of single class of creditors for each plan for purpose of considering and voting on plan — Applications granted — There was no good reason to exclude secured lenders and noteholders from single classification of voters in proposed plans, nor to create separate class for their votes — There were no material distinctions between claims of these two creditors and claims of remaining unsecured creditors that were not more properly subject of sanction hearing, apart from deferred issue of whether secured lenders were entitled to vote their entire guarantee claim — No rights of remaining unsecured creditors were being confiscated by proposed classification, and no injustice arose, particularly given separate tabulation of votes which enabled voice of remaining unsecured creditors to be heard and measured at sanction hearing — There were no conflicts of interest so over-riding as to make consultation impossible — While there were differences of interest and treatment among affected creditors in class, these were issues that would be addressed at sanction hearing — Approval of proposed classification in context of integrated plans was in accordance with spirit and purpose of CCAA.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — considered

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

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

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, 1988 CarswellAlta 319 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — referred to

San Francisco Gifts Ltd., Re (2004), 2004 ABCA 386, 2004 CarswellAlta 1607, 5 C.B.R. (5th) 300, 42 Alta. L.R. (4th) 371, 361 A.R. 220, 339 W.A.C. 220 (Alta. C.A.) — considered

SemCanada Crude Co., Re (2009), 2009 CarswellAlta 167, 2009 ABQB 90, 52 C.B.R. (5th) 131 (Alta. Q.B.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 1991 CarswellOnt 220, 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

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

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.
s. 503(b)(9) — referred to

Chapter 7 — referred to

Chapter 11 — referred to

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

s. 6 — referred to

s. 11(1) — referred to

s. 22(2) [rep. & sub. 2007, c. 36, s. 71] — referred to

APPLICATION for orders authorizing establishment of single class of creditors for three plans to restructure and distribute assets for purpose of considering and voting on plans.

***B.E. Romaine J.*:**

Introduction

1 The SemCanada Group applied for various relief related to the holding of meetings of creditors to consider three plans to restructure and distribute assets of the CCAA applicants, including applications for orders authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans. I granted the applications, and

these are my reasons.

Relevant Facts

2 On July 22, 2008, SemCanada Crude Company (”SemCanada Crude”) and SemCAMS ULC (”SemCAMS”) were granted initial Orders pursuant to s. 11(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the “CCAA”).

3 On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada Crude and the bankruptcy proceedings of SemCanada Energy Company (”SemCanada Energy”) A.E. Sharp Ltd. (”AES”) and CEG Energy Options, Inc. (”CEG”) which had been commenced on July 24, 2008 were procedurally consolidated for the purpose of administrative convenience.

4 In addition, CCAA protection was granted to two affiliated companies, 3191278 Nova Scotia Company (A319”) and 1380331 Alberta ULC (”138”). SemCanada Energy, AES, CEG, 319 and 138 are collectively referred to as the “SemCanada Energy Companies”. The CCAA applicants are collectively referred to as the “SemCanada Group”.

5 On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the “U.S. Debtors”) filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

6 According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup’s credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

7 The SemCanada Group are indirect, wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

> (a) SemCanada Crude, a crude oil marketing and blending operation;
>
> (b) the SemCanada Energy Companies, whose business was gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS; and
>
> (c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

8 SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the “Secured Lenders”) entered into a credit agreement in 2005 (the “Credit Agreement”). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.9 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

9 Five of the SemCanada Group, including SemCanada Crude, SemCanada Energy and SemCAMS, have provided a guarantee of all obligations under the Credit Agreement to the Secured Lenders, who rank as senior secured lenders, and under a US $600 million bond indenture issued by SemGroup. The guarantee is secured by a security and pledge agreement (the “Security Agreement”) signed by the five members of the SemCanada Group.

10 The SemCanada Energy Companies were liquidated or have ceased operations and no longer have significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, the SemCanada Energy Companies hold approximately $113 million in cash. An application to distribute that cash to the Secured Lenders was adjourned *sine die* on January 19, 2009: *SemCanada Crude Co., Re*, 2009 ABQB 90 (Alta. Q.B.).

11 Originally, SemCAMS and SemCanada Crude proposed to restructure their businesses as stand-alone operations without further affiliation with the U.S. Debtors and accordingly sought bids in a solicitation process undertaken in early 2009. Unfortunately, no acceptable bids were received. It also became apparent that, as SemCanada Crude's business was closely integrated with certain North Dakota transportation rights and assets owned by the U.S. Debtors, restructuring SemCanada Crude's operations on a stand alone basis would be problematic. The SemCanada Group turned to the alternative of joining in the restructuring of the entire SemGroup through concurrent and integrated plans of arrangement in both Canada and the United States.

Summary of the U.S. and Canadian Plans

12 The U.S. and Canadian plans are complex and need not be described in their entirety in these reasons. For the purpose of these reasons, the relevant aspects of the plans are as follows:

1. The disclosure statement relating to a joint plan of affiliated U.S. Debtors was approved for distribution to creditors by the U.S. Bankruptcy Court on July 21, 2009. Under the Chapter 11 process, meetings of creditors are not necessary. Voting takes place through a notice and balloting mechanism that has been approved by the U.S. Court and September 3, 2009 has been set as the voting deadline for acceptance or rejection of the U.S. plan.

2. The total distributable value of the SemGroup for the purpose of the plans is expected to be US $2.3 billion, consisting of US $965 million in cash, US $300 million in second lien term loan interests and US $1.035 billion in new common stock and warrants of the U.S. Debtors.

3. The SemCanada Group will contribute approximately US $161 million in available cash to the U.S. plan and US $54 million is expected to be received from SemCanada Crude relating to crude oil settlements that will occur after the effective date of the plans, being cash received from prepayments that are outstanding on the implementation date which will be replaced with letters of credit or other post-plan financing.

4. Approximately US $50 million will be retained by the corporate group for working capital and general corporate purposes, including for the post plan cash needs of SemCAMS and SemCanada Crude.

5. Certain U.S. causes of action will be contributed to a "litigation trust" and will be distributed through the U.S. Plan, including to the Secured Lenders on their deficiency claims. No value has been placed on the litigation trust by the U.S. Debtors. The Monitor reports that it is unable to make an informed assessment of the value of the litigation trust assets as the trust is a complicated legal mechanism that will likely require the expenditure of significant time and professional fees before there will be any recovery.

6. The U.S. plan contains a condition precedent that, on the effective date of the plan, the restructured corporate group will enter into a US $500 million exit financing facility, which will apply to all post-restructuring affiliates, including SemCAMS and SemCanada Crude, and which will allow the corporate group to re-enter the crude marketing business in the United States and to continue operations in Canada.

7. It is expected that the Secured Lenders will receive cash, second lien term loan interests and equity in priority to unsecured creditors on their secured guarantee claims of US $2.9 billion, which will leave them with a deficiency of approximately US $1.07 billion on the secured loans. The Secured Lenders are entitled under the U.S. Plan to a share in the litigation trust on their deficiency claim. If certain other classes of creditors do not vote to approve the U.S. plan, the Secured Lenders may also receive equity of a value up to 4.53% of their deficiency, subject to other contingencies. The Monitor reports that the Secured Lenders are thus estimated to recover approximately 57.1% of their estimated claims of US $2.1 billion on secured working capital claims and 73.3% of their estimated claims of US $811 million on secured revolver/term claims. The Monitor estimates that the Secured Lenders will recover no value on their deficiency claims, assuming no reallocation of equity from other categories of debtors and no value for the litigation trust.

8. The holders of the US $600 million bonds (the "Noteholders") are entitled to receive common shares and warrants in the restructured corporate group, plus an interest in the litigation trust and certain trustee fees, for an estimated recovery of 8.34% on their claims of US $610 million under the U.S. plan, assuming all classes of Noteholders approve the plan and no value is given to the litigation trust. Depending on certain contingencies, the range of recovery is 0.44$ to 11.02% of their claim. Noteholders are treated more advantageously under the plans than general unsecured creditors in recognition that the Senior Notes are jointly and severally guaranteed by 23 U.S. debtors and the Canadian debtors, while in most instances only one SemGroup debtor is liable with respect to each ordinary unsecured creditor. In addition, the Noteholders have waived their right to receive distributions under the Canadian plans.

9. Under the U.S. Plan, general unsecured creditors will receive common shares, warrants and an interest in the litigation trust. Depending on the level of approval, recovery levels will range from 0.08% to 8.03% on claims of US $811 million. The Monitor reports that it expects recovery to general unsecured creditors under the U.S. Plan to be 2.09% of their claim.

10. Pursuant to section 503(b)(9) of the U.S. Bankruptcy Code, entities that provided goods to the U.S. Debtors in the ordinary course of business that were received within 20 days of the filing of Chapter 11 proceedings are entitled to a priority claim that ranks above the claims of the Secured Lenders.

11. There are 3 Canadian plans. As the Secured Lenders will be entitled to some recovery in respect of their deficiency claim and the Noteholders will be entitled to some recovery on their unsecured claim under the U.S. Plan, the Secured Lenders and the Noteholders are deemed to have waived their rights to any additional recovery under the Canadian plans for the most part. However, the votes of the Secured Lenders and the Noteholders entitled to vote on the U.S. Plan are deemed to be votes for the purpose of the Canadian plans, both with respect to numbers of parties and value of claims, and are to be included in the single class of "Affected Creditors" entitled to vote on the Canadian plans. Originally, the Canadian plans provided that the value attributable to the Secured Lenders' votes would be based on the full amount of their guarantee claim, approximately US $2.9 billion, and not only on their deficiency claim of approximately US $1.07 billion. Thus, the aggregate value of the Secured Lenders' voting claims would be:

a) US $2.939 billion for the SemCAMS plan;

b) US $2.939 billion less C $145 million for the SemCanada Crude plan, recognizing that the Secured Lenders would be entitled to receive C $145 million in respect of a negotiated Lenders' Secured Claim under the SemCanada Crude plan; and

c) US $2.939 billion less C $108 million for the SemCanada Energy plan, recognizing that the Secured Lenders will receive that amount in respect of a negotiated Lenders' Secured Claim under the SemCanada Energy plan.

At the conclusion of the classification hearing, the CCAA applicants proposed a revision to the proposed orders which stipulates that, if the approval of a plan by the creditors would be determined by the portion of the votes cast by the Secured Lenders that represents an amount of indebtedness that is greater than their estimated aggregate deficiency after taking into consideration the payments they are to receive under the U.S. plan and the Canadian plans, the Court shall determine whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim.

12. Only "Ordinary Creditors" receive any distribution under the Canadian Plans. Ordinary Creditors are defined as creditors holding "Affected Claims" other than the Secured Lenders, Noteholders, CCAA applicants and U.S. Debtors. Each plan provides that the Affected Creditors of the CCAA applicant will vote at the Creditors' Meeting as a single class.

13. The SemCAMS plan will be funded by a cash advance from SemCanada Crude and establishes two pools of cash. One pool will fund the full amount of secured claims which have not been paid prior to the implementation

date of the plan up to the realizable value of the property secured, and the other pool will fund distributions to ordinary unsecured creditors. Ordinary unsecured creditors will receive cash subject to a maximum total payment of 4% of their proven claims. The Monitor estimates that the distribution will equal 4% of claims unless claims in excess of the current highest estimate are established.

14. The SemCanada Crude plan also establishes two pools of cash, one for secured claims and one for ordinary unsecured creditors. Again, the distribution to ordinary unsecured creditors is estimated to be 4% of claims unless claims in excess of the current highest estimate against SemCanada Crude are established.

15. Any cash remaining in SemCanada Crude after deducting amounts necessary to fund the above-noted payments to secured and unsecured ordinary creditors of SemCAMS and SemCanada Crude, unaffected claims and administrative costs, less a reserve for disputed claims, will be paid to the Secured Lenders through the U.S. plan as part of the payment on secured debt.

16. The SemCanada Energy distribution plan is funded from the cash received from the liquidation of the assets of the companies. It also establishes two pools of cash, one of which will be used to pay secured ordinary creditors and a one of which will be used to pay cash distributions to ordinary unsecured creditors. The Monitor estimates that the distribution to ordinary unsecured creditors will be in the range of 2.16% to 2.27% of their claims, unless claims in excess of the current maximum estimate are established. Any amounts outstanding after payment of these claims, unaffected claims and administration costs will be paid to the Secured Lenders. The proposed lower amount of recovery is stated to be in recognition of the fact that the SemCanada Energy Companies have been liquidated and have no going concern value.

17. As this summary indicates, the U.S. Plan and the Canadian plans are closely integrated and economically interdependent. Each of the plans requires that the other plans be approved by the requisite number of creditors and implemented on the same date in order to become effective. The receipt of at least $160 million from the SemCanada Group is a condition precedent to the implementation of the U.S. Plan.

18. The Monitor reports that the SemCanada Group has indicated that there is no viable option to the proposed plans and that a formal liquidation under bankruptcy legislation would provide a lower recovery to creditors. The Monitor notes that the rationale for the treatment of the Secured Lenders and the ordinary unsecured creditors under the plans is that the Secured Lenders have valid and enforceable secured claims, and that, in the event of the liquidation of the Canadian companies, the Secured Lenders would be entitled to all proceeds, resulting in no recovery to ordinary creditors. Therefore, reports the Monitor, the CCAA plans are considered to be better than the alternative of a liquidation. The Secured Lenders derive some benefit from the plans through the preservation of the going concern value of SemCAMS and SemCanada Crude and by having a prompt distribution of funds held by the SemCanada Energy Companies.

19. The Monitor notes that the distribution to the SemGroup unsecured creditors under the U.S. plan is viewed as better than a liquidation, and that, therefore, given the effect of the U.S. Bankruptcy Code's "cram-down" provisions, it is likely that the U.S. plan will be confirmed. The Monitor comments that the proposed distribution to ordinary unsecured creditors under the CCAA plans is considered to be fair as it is comparable to and potentially slightly more favourable than the distributions being made to the U.S. ordinary unsecured creditors.

Positions of Various Parties

13 The SemCanada Group applied for orders

a) accepting the filing of, in the case of SemCAMS and SemCanada Crude, proposed plans of arrangement and compromise, and in the case of SemCanada Energy, a proposed plan of distribution;

b) authorizing the calling and holding of meetings of the Canadian creditors of these three CCAA applicants;

c) authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans;

d) approving procedures with respect to the calling and conduct of such meetings; and

e) other non-contentious enabling relief.

14 Certain unsecured creditors of the applicants objected to the proposed classification of creditors, submitting that the Secured Lenders should not be allowed a vote in the same class as the unsecured creditors either with respect to the secured portion of their overall claim or any deficiency in their claims that would remain unpaid, and that the Noteholders should not be allowed a vote in the same class as the rest of the unsecured creditors.

15 As noted previously, the CCAA applicants proposed a revision to the proposed orders at the conclusion of the classification hearing which would allow the Court to consider whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim. The objecting creditors continued to object to the proposed classification, even if eligible votes were limited to the deficiency claim of the Secured Lenders.

Analysis

16 Section 6 of the CCAA provides that, where a majority in number representing two-thirds in value of "the creditors or class of creditors, as the case may be" vote in favour of a plan of arrangement or compromise at a meeting or meetings, the plan of arrangement may be sanctioned by the Court. There is little by way of specific statutory guidance on the issue of classification of claims, leaving the development of this issue in the CCAA process to case law. Prior decisions have recognized that the starting point in determining classification is the statute itself and the primary purpose of the statute is to facilitate the reorganization of insolvent companies: Paperny, J. in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), affirmed [2001] 4 W.W.R. 1 (Alta. C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 60 (S.C.C.) at para. 14. As first noted by Forsyth, J. in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566 (Alta. Q.B.) at page 28, and often repeated in classification decisions since, "this factor must be given due consideration at every stage of the process, including the classification of creditors..."

17 Classification is a key issue in CCAA proceedings, as a proposed plan must achieve the requisite level of creditor support in order to proceed to the stage of a sanction hearing. The CCAA debtor seeks to frame a class or classes in order to ensure that the plan receives the maximum level of support. Creditors have an interest in classifications that would allow them enhanced bargaining power in the negotiation of the plan, and creditors aggrieved by the process may seek to ensure that classification will give them an effective veto (see *Rescue: The Companies' Creditors Arrangement Act*, Janis P. Sarra, 2007 ed. Thomson Carswell at page 234). Case law has developed from the comments of the British Columbia Court in *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.) warning against the danger of fragmenting the voting process unnecessarily, through the identification of principles applicable to the concept of "commonality of interest" articulated in *Canadian Airlines Corp., Re* and elaborated further in Alberta in *San Francisco Gifts Ltd., Re*, 2004 CarswellAlta 1241, [2004] A.J. No. 1062 (Alta. Q.B.), leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.).

18 The parties in this case agree that "commonality of interest" is the key consideration in determining whether the proposed classification is appropriate, but disagree on whether the plans as proposed with their single class of voters meet that requirement. It is clear that classification is a fact-driven inquiry, and that the principles set out in the case law, while useful in considering whether commonality of interest has been achieved by the proposed classification, should not be applied rigidly: *Canadian Airlines Corp., Re* at para. 18; *San Francisco Gifts Ltd., Re* at para. 12; *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.) at para. 22.

19 Although there are no fixed rules, the principles set out by Paperny, J. in para. 31 of *Canadian Airlines Corp., Re*

provide a useful structure for discussion of whether to the proposed classification is appropriate:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on the identity of interest test.

20 Under the now-rejected "identity of interest" test, all members of the class had to have identical interests. Under the non-fragmentation test, interests need not be identical. The interests of the creditors in the class need only be sufficiently similar to allow them to vote with a common interest: *Woodward's Ltd., Re* at para. 8.

21 The objecting creditors submit that the creation of two classes rather than one cannot be considered to be fragmentation. The issue, however, is not the number of classes, but the effect that fragmentation of classes may have on the ability to achieve a viable reorganization. As noted by Farley, J. in para. 13 of his reasons relating to the classification of creditors in *Stelco Inc., Re*, as endorsed by the Ontario Court of Appeal:

> ...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

22 The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other: *Woodward's Ltd., Re* at para. 27, 29; *Stelco Inc., Re* at para. 30. In the proposed single classification, the rights of the creditors in the class against the debtor companies are unsecured (other than the proposed votes attributable to the secured portion of the debt of the Secured Lenders, which will be discussed separately).

23 With respect to the Secured Lenders' deficiency claim, there is a clear precedent for permitting a secured creditor to vote a substantial deficiency claim as part of the unsecured class: *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.); *Canadian Airlines Corp., Re*, supra.

24 The classification issues in the *Campeau Corp., Re* restructuring were similar to the present issues. In *Campeau Corp., Re*, a secured creditor, Olympia & York, was included in the class of unsecured creditors for the deficiency in its secured claim, which represented approximately 88% of the value of the unsecured class. The Court rejected the submission that the legal interests of Olympia & York were different from other unsecured creditors in the class. Montgomery, J. noted at para. 16 that Olympic & York's involvement in the negotiation of the plan was necessary and appropriate given that the size of its claims would allow it a veto no matter how the classes were constituted and that its co-operation was necessary for the success of both the U.S. and Canadian plans.

25 In the same way, the size and scope of the Secured Lenders claim makes their participation in the negotiation and endorsement of the proposed plans essential. That participation does not disqualify them from a vote in the process, nor necessitate their isolation in a special class. While under the integrated plans, the Secured Lenders will receive a different kind of distribution on their unsecured deficiency claim (a share of the litigation trust), that is an issue of fairness for the sanction hearing and does not warrant the establishment of a separate class.

26 The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors. That difference, while it may be subject to submissions at the sanction hearing, is an issue of fairness, and not a difference material enough to warrant a separate class for the Noteholders in this case. A separate class for the Noteholders would only be necessary if, after considering all the relevant factors, it appeared that this difference

would preclude reasonable consultation among the creditors of the class: *San Francisco Gifts Ltd., Re* at para. 24.

27 The question arises whether the fact that the Secured Lenders and the Noteholders have waived their rights to recover under the Canadian plans should result in either the requirement of separate classes or the forfeiture of their right to vote on the Canadian plans at all.

28 This is a unique case: a cross-border restructuring with separate but integrated and interdependent plans that are designed to comply with the restructuring legislation of two jurisdictions. As the applicants point out, the co-ordinated structure of the plans is designed to ensure that the Secured Lenders and the Noteholders receive sufficient recoveries under the U.S. plan to justify the sacrifices in recovery that result from their waiver of distributions under the Canadian plans. In considering the context of the proposed classification, it would be unrealistic and artificial to consider the Canadian plans in isolation, without regard to the commercial outcome to the creditors resulting from the implementation of the plans in both jurisdictions. Thus, the fact that the distributions to Secured Lenders and Noteholders will take place through the operation of the U.S. plan, and that the effective working of the plans require them to waive their rights to receive distributions under the Canadian plans does not deprive them of the right to an effective voice in the consideration of the Canadian plans through a meaningful vote.

29 It is not sufficient to say that the Secured Lenders and the Noteholders have a vote in the U.S. plans. The "cram down" power which exists under Chapter 11 of the U.S. Bankruptcy Code includes a "best interests test" that requires that if a class of holders of impaired claims rejects the plan, they can be "crammed down" and their claims will be satisfied if they receive property of a value that is not less than the value that the class would receive or retain if the debtor were liquidated under Chapter 7 of the U.S. Bankruptcy Code. Thus, the votes available to the Secured Lenders and the Noteholders with respect to their claims under the U.S. Plan do not give them the right available to creditors under Canadian restructuring law to vote on whether a proposed plan should proceed to the next step of a sanction hearing There is no reason to deprive the Secured Lenders and the Noteholders of that right as creditors of the Canadian debtors, even if the distributions they would be entitled to flow through the U.S. plan. The question becomes, then, whether that right should be exercised in a class with other unsecured creditors as proposed or in a separate class.

30 It is noteworthy that the proposed single classification does not have the effect of confiscating the legal rights of any of the unsecured creditors, or adversely affecting any existing security position. It is in fact arguable that seeking to exclude the Secured Lenders and the Noteholders from the class prejudices these similarly-placed creditors by denying them a meaningful voice in the approval or rejection of the plans in Canada.

31 A number of cases suggest that the Court should also consider the rights of the parties in liquidation in determining whether a proposed classification is appropriate: *Woodward's Ltd., Re* at para. 14; *San Francisco Gifts Ltd., Re* at para. 12.

32 Under a liquidation scenario, the Secured Lenders would be entitled to nearly all of the proceeds of the liquidated corporate group, other than the relatively few secured claims that have priority. This suggests that the Secured Lenders are entitled to a meaningful vote with respect to both the U.S. plan and the Canadian plans.

3. The commonality of interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate organizations if possible.

4. In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable plans.

33 The Ontario Court of Appeal in *Stelco Inc., Re* cautioned that, in addition to considering commonality of interest issues, the court in a classification application should be alert to concerns about the confiscation of legal rights and should avoid "a tyranny of the minority", citing the comments of Borins, J. in *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), where he warned against creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power": *Stelco Inc., Re* at para 28.

34 Excluding of the Secured Lenders and the Noteholders from the proposed single class would allow the objecting

creditors to influence the voting process to a degree not warranted by their status. It is true that if the Secured Lenders and the Noteholders are not excluded from the class, even if only the votes related to the Secured Lenders' deficiency claim are tabulated, the positive vote will likely be enough to allow the proposed plans to proceed to a sanction hearing. It is also true that the Secured Lenders and the Noteholders may have been part of the negotiations that led to the proposed plans. Neither of those factors standing alone is sufficient to warrant a separate class unless rights are being confiscated or the classification creates an injustice.

35 The structure of the classification as proposed creates in effect what was imposed by the Court in *Canadian Airlines Corp., Re*, a method of allowing the "voice" of ordinary unsecured creditors to be heard without the necessity of a separate classification, thus permitting rather than ruling out the possibility that the plans might proceed to a sanction hearing. Given that the votes of the Secured Lenders and the Noteholders on the U.S. plan will be deemed to be votes of those creditors on the Canadian plans, there will be perforce a separate tabulation of those votes from the votes of the remaining unsecured creditors. In accordance with the revision to the plans made at the end of the classification hearing, there will be a separate tabulation of the votes of the Secured Lenders relating to the secured portion of their claims and the votes relating to the unsecured deficiency.

36 The situation in this classification dispute is essentially the same as that which faced Paperny, J. in *Canadian Airlines Corp., Re*. Fragmenting the classification prior to the vote raises the possibility that the plans may not reach the stage of a sanction hearing where fairness issues can be fully canvassed. This would be contrary to the purpose of the CCAA. This is particularly an issue recognizing that the U.S. plan and the Canadian plans must all be approved in order for any one of them to be implemented. Conrad, J.A. in denying leave to appeal in *San Francisco Gifts Ltd., Re*, 2004 ABCA 386 (Alta. C.A.) at para. 9 noted that the right to vote in a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors, and thus must be determined reasonably at the classification stage. However, she also noted that "it is important to carefully examine classes with a view of protecting against injustice": para. 10. In this case, the goals of preventing confiscation of rights and protecting against injustice favour the proposed single classification.

37 This is the "pragmatic" factor referred to in *Campeau Corp., Re* at para. 21.The CCAA judge must keep in mind the interests of all stakeholders in reviewing the proposed classification, as in any step in the process. If a classification prevents the danger of a veto of a plan that promises some better return to creditors than the alternative of a liquidating insolvency, it should not be interfered with absent good reason. The classification hearing is not the only avenue of relief for aggrieved creditors. If a plan received the minimum required level of approval by vote of creditors, it must still be approved at a hearing where issues of fairness must be addressed.

5. Absent bad faith, the motivations of the creditors to approve or disapprove [of the Plan] are irrelevant.

38 As noted in *Canadian Airlines Corp., Re* at para. 35, fragmenting a class because of an alleged conflict of interest not based on legal rights is an error. The issue of the motivation of a party to vote for or against a plan is an issue for the fairness hearing. There is no doubt that the various affected creditors in the proposed single class may have differing financial or strategic interests. To recognize such differences at the classification stage, unless the proposed classification confiscates rights, results in an injustice or creates a situation where meaningful consultation is impossible, would lead to the type of fragmentation that may jeopardize the CCAA process and be counter-productive to the legislative intent to facilitate viable reorganizations.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

39 The issue of meaningful consultation was addressed by both the supervising justice and the Court of Appeal in *San Francisco Gifts Ltd., Re*. In that case, Topolniski, J. noted that two corporate insiders that the proposed plan had included in the classification of affected creditors held claims that were uncompromised by the plan, that they gave up nothing, and that it "stretches the imagination to think other creditors in the class could have meaningful consultation [with them] about the Plan": para. 49. Her decision to place these parties in a separate class was confirmed by the Court of Appeal, which commented that Topolniski, J. was "absolutely correct" to find no ability to consult "between shareholders whose debts

would not be cancelled and other unsecured creditors whose debts would be": para. 14.

40 That is not the situation here. The deficiency claims of the Secured Lenders and the unsecured claims of the Noteholders are being compromised in the U.S. plan, and there is nothing to block consultations among affected creditors on the basis of dissimilarity of legal interests. While there are differences in the proposed distributions on the unsecured claims, they are not so major that they would preclude consultation.

41 The objecting creditors point to statements made by counsel for the Secured Lenders during the classification application about the alternatives to approval of the plans, which they submit indicates the impossibility of consultation. These comments were made in the context of advocacy on behalf of the proposed classification, and I do not take them as a clear statement by the Secured Lenders that they would refuse to consult with the other creditors.

Secured Portion of Secured Lenders' Claim

42 The CCAA applicants and the Secured Lenders submit that it would be unfair and inappropriate to limit the votes of the Secured Lenders in the Canadian plans to the amount of the deficiency in their secured claim, rather than the entire amount owing under the guarantee. They argue that, by endorsing the plans, the Secured Lenders have in effect elected to treat their entire claim under the guarantee as unsecured with respect to the Canadian plans, except for relatively small negotiated secured claims under the SemCanada Crude plan and the SemCanada Energy plan. They also submit that the fact that under bankruptcy law, a creditor of a bankrupt debtor is entitled to prove for the full amount of its debt in the estates of both the debtor and a bankrupt guarantor of the debt justifies granting the Secured Lenders the right to vote the full amount of the guarantee claim, even if part of the claim is to be recovered through the U.S. plan, as long as they do not actually recover more than 100 cents on the dollar.

43 It became apparent during the course of the classification hearing that it may not matter whether the plans are approved by the requisite number of creditors and value of their claims if the Secured Lenders are only entitled to vote the deficiency portion of their claims or the full amount of their claims. It was this that led to the revision in the language of the voting provisions of the plans. I defer a decision on the question of whether or not the Secured Lenders are entitled to vote the entire amount of their guarantee claims until after the vote has been conducted and the votes separately tabulated as directed. As noted by the Court of Appeal in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 39, such a deferral of a voting issue is not an error of law and is in fact consistent with the purpose of the CCAA.

Recent Amendments

44 The following amendment to the CCAA that has been proclaimed in effect from September 18, 2009 sets out certain factors that may be considered in approving a classification for voting purposes:

> 22.2 (2)**Factors** - For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account:
>
> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. (R.S.C. 2005, c. 47, s. 131, amended R.S.C. 2007, Bill C -12, c.36, s.71)

45 These factors do not change in any material way the factors that have been identified in the case law and discussed in these reasons nor would they have a material effect on the consideration of the proposed classification in this case.

Creditors with Claims in Process

46 Two creditors advised that, because their claims of secured status had not yet been resolved with the applicants and the Monitor, they were not in a position to evaluate whether or not to object to the proposed classification. The plans were revised to ensure that the votes of creditors whose status as secured creditors remains unresolved until after the meetings of creditors be recorded with votes of creditors with disputed claims and reported to the Court by the Monitor if these votes affect the approval or non-approval of the plan in question.

Conclusion

47 In summary, I have concluded that there is no good reason to exclude the Secured Lenders and the Noteholders from the single classification of voters in the proposed plans, nor to create a separate class for their votes. There are no material distinctions between the claims of these two creditors and the claims of the remaining unsecured creditors that are not more properly the subject of the sanction hearing, apart from the deferred issue of whether the Secured Lenders are entitled to vote their entire guarantee claim. No rights of the remaining unsecured creditors are being confiscated by the proposed classification, and no injustice arises, particularly given the separate tabulation of votes which enables the voice of the remaining unsecured creditors to be heard and measured at the sanction hearing. There are no conflicts of interest so over-riding as to make consultation impossible. While there are differences of interests and treatment among the affected creditors in the class, these are issues that will be addressed at the sanction hearing. Approval of the proposed classification in the context of the integrated plans is in accordance with the spirit and purpose of the CCAA.

Applications granted.

Tab 10

2016 ABQB 419
Alberta Court of Queen's Bench

Lutheran Church - Canada, Re

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

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

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

B.E. Romaine J.

Heard: July 15, 2016
Judgment: August 2, 2016
Docket: Calgary 1501-00955

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

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.g Monitor

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.d Monitors and consultants

Headnote

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

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

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

Table of Authorities

Cases considered by *B.E. Romaine J.*:

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

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 390 N.R. 393 (note), *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 257 O.A.C. 400 (note) (S.C.C.) — referred to

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

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

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

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

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

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139, 1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List]) — referred to

Contech Enterprises Inc., Re (2015), 2015 BCSC 129, 2015 CarswellBC 170, 21 C.B.R. (6th) 107, 3 P.P.S.A.C. (4th) 180 (B.C. S.C.) — referred to

Gold Texas Resources Ltd., Re (1989), 1989 CarswellBC 1397 (B.C. S.C. [In Chambers]) — considered

Moffat v. Wetstein (1996), 135 D.L.R. (4th) 298, 29 O.R. (3d) 371, 5 C.P.C. (4th) 128, 4 O.T.C. 364, 1996 CarswellOnt 2148 (Ont. Gen. Div.) — considered

Muscletech Research & Development Inc., Re (2007), 2007 CarswellOnt 1029, 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]) — considered

Nelson Financial Group Ltd., Re (2011), 2011 ONSC 2750, 2011 CarswellOnt 3100, 79 C.B.R. (5th) 307 (Ont. S.C.J.) — referred to

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

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171, 59 O.T.C. 153 (Ont. Gen. Div. [Commercial List]) — followed

Target Canada Co., Re (2016), 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 38 — considered

Class Proceedings Act, S.A. 2003, c. C-16.5
Generally — referred to

Class Proceedings Act, R.S.B.C. 1996, c. 50
Generally — referred to

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

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 6(1) — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

s. 23(1) — considered

Financial Institutions Act, R.S.B.C. 1996, c. 141
Generally — referred to

Securities Act, R.S.A. 2000, c. S-4
Generally — referred to

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

***B.E. Romaine J.*:**

I. Introduction

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

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

II. Factual Overview

A. Background

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

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

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

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

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

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

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

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

11 On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church — Canada, Lutheran Church — Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP,

John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

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

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

B. The District Plan

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

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

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

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

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

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

19 Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and

b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

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

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

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

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;

b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;

c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;

d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and

e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

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

a) claims related to a contractual right of one or more of the District Depositors;

b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;

c) claims for breach of any legal, equitable, contractual or other duty;

d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and

e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

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

25 The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, the estimated amount of the Representative Action Holdback, the commencement date of the representative action, the deadline for opting out of the Representative Action and instructions on how to opt out of the Representative Action should they choose to do so.

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

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

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;

b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;

c) remaining in place throughout the Representative Action with its mandate to include:

(i) assisting in maximizing the amount available for distribution;

(ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;

(iii) replacing counsel;

(iv) serving in a fiduciary capacity on behalf of the participating District Depositors;

(v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and

(vi) bringing any matter before the Court by way of an application for advice and direction.

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

29 The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and

b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

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

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

b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;

c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and

d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

C. The District Meeting

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

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

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

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

35 Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately

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

D. The DIL Plan

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

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

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

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

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

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

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

E. The DIL Meeting

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

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

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

III. The Applications

A. Application to Remove the Monitor

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

a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively

b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;

c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and

d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under a second Administration Charge to rank *pari passu* with the current Administration Charge.

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

1. Overview

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

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

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

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

2. Conflict of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

59 The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that

the District commence legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

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

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

62 The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be, and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

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

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

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

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

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

68 In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit

relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

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

70 The documents at issue are:

> a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and
>
> b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

86 The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but

I note that the QFA provides a telephone numbers and email address for any inquiries.

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

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

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

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

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

91 The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

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

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

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

95 The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes

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

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

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

98 The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

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

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

4. Cost and Delay

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

102 It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative

as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffat v. Wetstein*, [1996] O.J. No. 1966 (Ont. Gen. Div.) at para 131.

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

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

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

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

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

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

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

5. Conclusion

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

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

112 I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

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

approval is to bind the debtor company and its creditors.

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

> (a) there must be strict compliance with all statutory requirements;
>
> (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done that is not authorized by the *CCAA;* and
>
> (c) the plan must be fair and reasonable.

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

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

116 They submit:

> (a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;
>
> (b) the plans compromise third party claims;
>
> (c) the plans provide no benefit to Depositors within the purpose of the CCAA;
>
> (d) the plans contravene section 5.1(2) of the *CCAA*;
>
> (e) the plans have not been advanced in good faith, with due diligence and full disclosure; and
>
> (f) the plans are not fair and reasonable.

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

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

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

119 The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who

choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

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

121 The opposing Depositors cite *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 240 O.A.C. 245, 2008 ONCA 587 (Ont. C.A.) (CanLii); leave dismissed [2008] SCC No. 32765 [2008 CarswellOnt 5432 (S.C.C.)] for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

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

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

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

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

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

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

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

127 The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that

a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

128 The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

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

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

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

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

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

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

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

134 The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This

does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

135 The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

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

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

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

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

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

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

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

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

6. Are the Plans Fair and Reasonable?

a. Overview

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

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

In an earlier case, he commented:

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

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

b. Deference to the Majority

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

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

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

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

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

148 The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that

accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

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

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

c. The Convenience Payments

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

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

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

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

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

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

d. The NewCo provisions

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

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

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

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

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

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

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

e. The Representative Action provisions

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

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

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

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

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

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

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

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

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

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

7. Conclusion

172 As noted at para 18 of *Metcalfe*:

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

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

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

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

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

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

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

Application dismissed.

End of Document

Tab 11

2005 CarswellOnt 6483
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2005 CarswellOnt 6483, [2005] O.J. No. 4814, 143 A.C.W.S. (3d) 623, 15 C.B.R. (5th) 297

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

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

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

Farley J.

Heard: November 9, 2005
Judgment: November 10, 2005*
Docket: 04-CL-5306

Proceedings: affirmed *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510 (Ont. C.A.)

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
Kyla Mahar for Monitor
Robert Staley for Senior Debenture Holders
Ashley John Taylor (Agent) to Secured Creditors for CIT
Paul MacDonald, Andy Kent, Hilary Clarke for Converts Committee
Aubrey Kauffman for Tricap
Ken Rosenberg, Jeff Larry for USW
H. Whitely for CIBC
Steven Bosnick for USW Locals 8782, 8328
Murray Gold, Andrew Hatney for Salaried Retirees
Gale Rubenstein for Superintendent

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — General principles

Designation of creditor class — Steel manufacturer was under protection of Companies' Creditors Arrangement Act — Committee of senior debenture holders and informal independent converts' committee were creditors — Informal independent converts' committee brought motion for order that proposed plan be amended regarding rights of bondholders to bring action against bankrupt, and for designation regarding classes of creditors — Committee of senior debenture holders brought contingent cross-motion for order that it be constituted as separate class of creditor — Motions dismissed — Separate classes for senior debenture holders and/or informal independent converts' committee inappropriate — All debt in question was unsecured debt — No confiscation of rights occurred by placing creditors in same class — No conflict of interest existed — Questions of tyranny by minority or minority were not appropriate.

Bankruptcy and insolvency --- Proposal — Effect of proposal — General principles

Steel manufacturer was under protection of Companies' Creditors Arrangement Act — Committee of senior debenture holders and informal independent ionverts' committee were creditors — Informal independent converts' committee brought motion for order that proposed plan be amended regarding rights of bondholders to bring action against bankrupt, and for designation regarding classes of creditors — Committee of senior debenture holders brought contingent cross-motion for order that it be constituted as separate class of creditor — Motions dismissed — Bankrupt undertook to amend plan to clarify intent regarding rights of bondholders — Plan was not intended to affect rights of certain creditors as against other creditors.

Table of Authorities

Cases considered by *Farley J.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — referred to

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 623, 19 C.B.R. (4th) 12 (Alta. Q.B.) — followed

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

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

Royal Bank v. Gentra Canada Investments Inc. (2000), 2000 CarswellOnt 248, 1 B.L.R. (3d) 170, 1 C.L.R. (3d) 260 (Ont. S.C.J. [Commercial List]) — referred to

Royal Bank v. Gentra Canada Investments Inc. (2001), 2001 CarswellOnt 2232, 15 B.L.R. (3d) 25, 147 O.A.C. 96 (Ont. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — referred to

San Francisco Gifts Ltd., Re (2004), 42 Alta. L.R. (4th) 352, 5 C.B.R. (5th) 92, 359 A.R. 71, 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.) — followed

San Francisco Gifts Ltd., Re (2004), 42 Alta. L.R. (4th) 371, 5 C.B.R. (5th) 300, 361 A.R. 220, 339 W.A.C. 220, 2004 ABCA 386, 2004 CarswellAlta 1607 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — referred to

843504 Alberta Ltd., Re (2003), 2003 ABQB 1015, 2003 CarswellAlta 1786, 4 C.B.R. (5th) 306, 30 Alta. L.R. (4th) 91, 351 A.R. 222 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 8 — referred to

MOTION by creditors relating to terms of proposal in bankruptcy.

***Farley J.*:**

1 Fortunately time cleared so that the motion of the Informal Independent Converts' Committee ("ConCom") which surfaced late last week — and the responding cross motion of the Informal Committee of Senior Debenture Holders ("BondCom") — could be accommodated today, less than week before the scheduled vote on Stelco Inc.'s Plan of Arrangement under the CCAA set for November 15, 2005.

2 The motion of ConCom was for an order:

> (i) directing the Applicants to amend page 39 of the Notice of Proceedings and Meetings and Information Circular (the "Information Circular") with respect to the Applicants' Proposed Plan of Arrangement or Compromise (the "Proposed Plan") in the manner set out in the Draft Order to confirm that the right (if any) of the Bondholders (as hereinafter defined) to assert claims or other remedies against other creditors of Stelco Inc. ("Stelco") will be subject to the effect of the Proposed Plan (the "Bondholders Claims Statement") and that the right (if any) of the Bondholders to assert claims (the "Anti-Convert Claims") pursuant to Article 6 (the "Inter-Trustee Provisions") of the First Supplemental Trust Indenture dated January 21, 2002 between Stelco and CIBC Mellon Trust Company (the "Supplemental Trust Indenture") will be extinguished effective upon the implementation of the Proposed Plan;
>
> (ii) declaring that, if the Proposed Plan is approved by the requisite majority of the creditors of Stelco and sanctioned by this Court, the Inter-Trustee Provisions shall, from and after the effective date of the Proposed Plan, be of no force or effect;

(iii) in the alternative, directing the Applicants to amend the Proposed Plan to provide that the Noteholders (as hereinafter defined) shall constitute a separate class of Stelco creditors for the purposes of voting on the Proposed Plan or any amended version thereof; and

(iv) such further and other relief as counsel may request and this Honourable Court may permit.

3 The cross motion of BondCom was for an Order:

2. for a declaration that, if any or all of the relief sought by the Convertible Noteholders as set out in its notice of motion dated November 4, 2005 is granted, that the Senior Debenture Holders shall constitute a separate class of Stelco Inc. ("Stelco") creditors for the purposes of voting on the Proposed Plan of Arrangement or Compromise (the "Proposed Plan") or any amended version thereof; and

3. such further and other relief as to this Honourable Court seems just.

4 No one present at this hearing disputed the proposition that it was appropriate to have the creditors vote on the Plan with the necessary benefit of clear statements of what was involved in such a vote and to eliminate therefore any ambiguities to the extent possible so that an objective creditor could make a reasoned decision. In that respect it would appear to me that the language of the Information Circular at p.39 thereof should be clarified to track that of the Meeting Order of October 4, 2005 at para. 34 thereof as to the operative element. Further it was acknowledged by everyone that the Plan itself provided that it may be amended before the vote. In that respect there would be no impediment for Stelco to adjust the language of the Plan in the sense of clarifying what its intent has been and continues to be in respect of matters affecting the debt in question and as held by those represented by the ConCom and by the BondCom. (Note: Subsequent to release of these reasons in handwritten form, I was advised on November 10, 2005 that Stelco has undertaken to make the aforesaid clarifications.)

5 I wish to emphasize that nothing in my reasons should be taken as being determinative of or affecting the relationship of the ConCom holders of debt vis-à-vis the BondCom holders of debt (that would as well encompass the holders of all Senior Debt as that term is defined in the Supplemental Trust Indenture). If those two sides are not able to work out an agreement between themselves, then they are at liberty to come to court to have that adjudicated.

6 ConCom points out that the Supplemental Trust Indenture was an agreement between Stelco and the holders of the ConCom debt, but it was not an agreement signed by the holders of the BondCom debt. While true, that would not preclude a claim of the BondCom holders based on the concept of third party beneficiary.

7 The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at paras. 24-25; *Royal Bank v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (Ont. S.C.J. [Commercial List]) at para. 41, appeal dismissed (Ont. C.A.); *843504 Alberta Ltd., Re*, [2003] A.J. No. 1549 (Alta. Q.B.) at para. 13; *Royal Oak Mines Inc., Re*, [1999] O.J. No. 709 (Ont. Gen. Div. [Commercial List]) at para. 24; *Royal Oak Mines Inc., Re*, [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 1.

8 ConCom points out the language of article 4.01 of the Plan:

4.01 Cancellation of Certificates

At the Effective Time, all debentures, certificates, agreements, invoices and other instruments evidencing Affected Claims against Stelco or Existing Common Shares will not entitle any holder thereof to any compensation or participation other than as expressly provided for in this Plan or in the Articles or Reorganization, respectively, and will be cancelled and null and void, and all debentures, certificates, agreements, invoices and other instruments evidencing

> Affected Claims against any Subsidiary Applicant will not entitle any holder thereof (other than Stelco or its successors and assignees) to any compensation or participation other than as expressly provided for in this Plan and, if in the possession or control of any Person must, at the request of Stelco, be delivered to Stelco. (emphasis added)

However this must be carefully analyzed in context. This deals with "Affected Claims against Stelco." See also in this respect articles 6.01, 6.02 and 6.05.

> **6.01 Effect of Plan Generally**
>
> At the Effective Time, the treatment of Affected Claims will be final and binding on the Applicants, the Affected Creditors and the trustees under the trust indentures for the Bonds (and their respective heirs, executors, administrators and other legal representatives, successors and assigns), and this Plan will constitute: (a) full, final and absolute settlement of all rights of the Affected Creditors; (b) an absolute release and discharge of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Stelco, including any interest and costs accruing thereon; (c) an absolute assignment to Stelco of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Subsidiary Applicants, including any interest and costs accruing thereon, and an absolute release and discharge of any rights of Affected Creditors in respect thereof (excluding, for greater certainty, any rights assigned to Stelco); and (d) a reorganization of the capital and change in the minimum and maximum number of directors of Stelco in accordance with the provisions of Article 3 and the Articles of Reorganization. (emphasis added)
>
> **6.02 Prosecution of Judgments**
>
> At the Effective Time, no step or proceeding may be taken in respect of any suit, judgement, execution, cause of action or similar proceeding in connection with any Affected Claim (other than by Stelco in respect of Affected Claims assigned to it pursuant to this Plan) and any such proceedings will be deemed to have no further effect against any Applicant or any of its assets and will be released, discharged, dismissed or vacated without cost to the Applicants. Any Applicant may apply to Court to obtain a discharge or dismissal, if necessary, of any such proceedings without notice to the Affected Creditor. (emphasis added)
>
> **6.05 Consents, Waivers and Agreements**
>
> At the Effective Time, each Affected Creditor will be deemed to have consented and agreed to all of the provisions of the Plan, as an entirety. Without limitation to the foregoing, each Affected Creditor (but for greater certainty, excluding Stelco in respect of Affected Claims assigned to it pursuant to this Plan) will be deemed:
>
> (a) to have executed and delivered to the Applicants all consents, assignments, releases and waivers, statutory or otherwise, required to implement and carry out this Plan as an entirety;
>
> (b) to have waived any default by or rescinded any demand for payment against any Applicant that has occurred on or prior to the Plan Implementation Date pursuant to, based on or as a result of any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Affected Creditor and such Applicant with respect to an Affected Claim; and
>
> (c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and any Applicant with respect to an Affected Claim as at the Plan Implementation Date and the provisions of this Plan, then the provisions of this Plan take precedence and priority and the provisions of such agreement or other arrangement are amended accordingly.
>
> (emphasis added)

This is not language which purports to, nor in my opinion does, affect relationships between creditors vis-à-vis themselves. With respect, I do not see s. 8 of the CCAA as coming into play here, nor is it necessary to have it come into play in this inter-creditor dispute which does not directly involve Stelco. No doubt it would be helpful to have Stelco clarify that aspect

which ConCom has sincerely felt was ambiguous in article 4.01 of the Plan to reflect that these instruments are cancelled and null and void only as to the future (ie. that is after the Effective Time) vis-à-vis Stelco, but not as to the inter-creditor dispute or relationship. (See note above re: undertaking of Stelco.)

9 I would only note in passing that the holders of the ConCom debt freely bought into a situation governed by s. 6.2 of the Supplemental Trust Indenture which contemplated their relationship with the BondCom debt (Senior Debt) in the event of insolvency proceedings or a reorganization. Give the caveats in s. 6.3 it would not appear to me that this clause advances the argument pressed by the ConCom.

10 Therefore as to the relief request by ConCom in (i) and (ii) above, I would dismiss that part of the motion. That dismissal in no way affects the clarification of language mentioned above which would be of assistance to all concerned.

11 Secondly, I would note that while apparently Stelco had not specifically advised as to its position, at the time of the hearing, its counsel was quite straight forward in his opening comments when he stated that Stelco had intended and always intended that its Plan (as distributed) was only to affect rights between Stelco and its Affected Creditors, and specifically Stelco had no intent to alter the relationship between its creditors in the sense of one group of creditors vis-à-vis another group (i.e. the ConCom debt vis-à-vis BondCom debt (Senior Debt)). In this latter regard he indicated that Stelco was not intending to affect whatever subordination rights there may be between these two groups. This would be in the sense that what was the situation between these two groups as a result of the Supplemental Trust Indenture, especially at s. 6, would continue to be the relationship after the Effective Time.

12 The next question is whether or not there should be separate classes for the ConCom debt and/or the BondCom debt/Senior Debt. I am of the view that the law in regard to classification is correctly set out in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal denied (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]), cited in the Alberta Court of Appeal subsequent decision *Canadian Airlines Corp., Re* (2000), 261 A.R. 120 (Alta. C.A. [In Chambers]), at para. 27. See also *San Francisco Gifts Ltd., Re* (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para. 11, leave to appeal denied 2004 ABCA 386 (Alta. C.A.). As noted by Toplinski J. at para. 11 of San Francisco:

> (11) The commonality of interest test has evolved over time and now involves application of the following guidelines that were neatly summarized by Paperny J. (as she then was) in *Resurgence Asset Management LLS v. Canadian Airlines Corp.* (”Canadian Airlines”)
>
> 1. Community of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor prior to and under the Plan as well as on liquidation.
>
> 3. The commonality of interests should be viewed purposively, bearing in mind that the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the Plan in a similar manner. (emphasis added)

13 I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that

fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

14 Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of ComCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible (subject to the practical caution that whatever is achieved must be compatible with Stelco being able to continue in a competitive industry so that the burden of this consideration cannot be so great as to swamp the newly renovated boat which had previously been sinking). That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the valuation of the consideration obtained.

15 Counsel for BondCom and Stelco raised generally the question of there possibly being a tyranny of the minority if the ConCom debt was a separate class; counsel for ConCom raised the issue of tyranny of the majority if there was not a separate class for the ConCom debt. To my mind that questions of tyranny of the majority is something which may be addressed in the sanction hearing, if one takes place, as to the fairness, reasonableness and equitableness of the Plan. See item 4 of the Paperny list in *Canadian Airlines Corp.*; see also *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 318 and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) at p. 103.

16 Therefore I do not see that ConCom has made out a case for a separate class. That aspect of its motion is also dismissed.

17 Given the dismissal of the ConCom motion, the BondCom motion for a separate class for its debt becomes moot.

Motions dismissed.

Footnotes

[*] Affirmed *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.)

End of Document

Tab 12

claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2007, c. 36, s. 71

N§149 — Classification of Creditors

The *CCAA* contemplates that the plan will be approved by the various classes of secured or unsecured creditors affected by it. Section 22(1) specifies that a debtor company may divide its creditors into classes for the purpose of a meeting to be held to vote on a proposed plan of compromise or arrangement relating to the company and, if the debtor company does so, it is to apply to the court for approval of the division before the meeting is held. Under s. 22(2), the court is to consider the following factors: creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account (a) the nature of the debts, liabilities or obligations giving rise to their claims; (b) the nature and rank of any security in respect of their claims; (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. These criteria are essentially a codification of previous caselaw and thus the cases below continue to be relevant in terms of the courts' reasoning.

The primary responsibility for making the classification is on the debtor company: *Re Hellenic Trust Ltd.*, [1975] 3 All E.R. 382, 119 Sol. Jo. 845, [1976] 1 W.L.R. 123 (S.C.).

Classification of creditors must be crafted with the underlying purpose of the *CCAA* in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. In addition to commonality of interest concerns, the Ontario Court of Appeal held that a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". The classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other: *Re Stelco Inc.* (2005), 2005 CarswellOnt 6818, 15 C.B.R. (5th) 307 (C.A.).

The reason for dividing creditors into different classes is that creditors have different interests, and they should only be permitted to bind other creditors who have the same interest; however, the classification must not be so fine that it renders it impossible to get a plan approved. Class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests": *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573, 41 W.R. 4, 36 Sol. Jo. 644, 4 R 17 (C.A.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, 59 Alta. L.R. (2d) 260, 40 B.L.R. 188, 87 A.R. 321 (C.A.); leave to apeal to S.C.C. refused (1988), 70 C.B.R. (N.S.) xxxii (note).

In making the classification, the court is concerned with what the claimant holds, not with who holds the claim. However, the court ordered that the vote of the creditor should be separately recorded and tabulated so that the court could, if the creditors voted to accept the plan, consider the matter on the application to sanction the plan in deciding whether the plan was fair and reasonable: *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.); application for leave to appeal dismissed (2000), 2000 CarswellAlta 503, 19 C.B.R. (4th) 33 (C.A. [In Chambers.]).

In *Re Oblats de Marie Immaculée du Manitoba* (2004), 2004 CarswellMan 104, 1 C.B.R. (5th) 279 (Man. Q.B.), the Federal Crown was a creditor in a *CCAA* plan proposal and also a co-defendant in a class action commenced by former residents of a First Nations residential school. The plan provided that the plaintiffs in the class action and the Federal Crown be grouped in the same class. The court found that there was no commonality of interest and that this attempt at classification was "a blatant effort to compromise" the Crown's claim as the single largest creditor, without allowing the Crown an appropriate say in the vote.

A creditor that claimed a common lien over tapes prepared with respect to the production of a television series was not entitled to be classified with the senior secured creditor banks on the basis that the property on which the lien was asserted was not that valuable, and it was not unfair or unreasonable to exclude the creditor from the senior secured creditor category: *Minds Eye Entertainment Ltd. v. Royal Bank* (2003), 2003 CarswellSask 921, 1 C.B.R. (5th) 85 (Sask. Q.B.).

The classification of classes of secured creditors must take into account variations tailored to the situations of various creditors within a particular class. Equality of treatment, as opposed to equitable treatment, is not a necessary, nor even a desirable goal: *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, 90 D.L.R. (4th) 175, 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4)*) 299 A.P.R. 246 (C.A.).

In *Re Steinberg Inc.* (1993), 23 C.B.R. (3d) 243, 1993 CarswellQue 39 (C.S. Qué.), the plan classified unsecured creditors into six sub-classes. One sub-class, those under $1,000, was to be paid in full; the court found nothing improper in this arrangement, finding that the sub-classification was not unreasonable or inequitable. It also held that it was unnecessary to obtain a majority vote of each sub-class, but a majority vote of the entire class was sufficient.

Where the term lenders, both Crown corporations, objected to the classification of the operating lender in a separate class, arguing that two classes of secured creditors would create fragmentation and was contrary to the "commonality of interest" principle, the court observed that if the debtor were liquidated, the operating lender would recover the full amount of its operating loan, while there would be a substantial shortfall in respect to the term lenders, and there was also a very real difference in the nature of the assets on which they were secured: *Re Federal Gypsum Co.* (2007), 2007 CarswellNS 630, 40 C.B.R. (5th) 39 (N.S. S.C.) (December 14, 2007).

The Ontario Superior Court held that it was appropriate that all creditors be placed in a single class as the plan was, in essence, an offer to all investors that must be accepted by or made binding on all investors. The plan treated all asset backed commercial paper (ABCP) holders equitably, and while the risks differed among traditional assets, ineligible assets, and synthetic assets, the calculation of the differing risks and corresponding interests had been taken into account consistently across all of the ABCP in the plan. Campbell J. was also satisfied that fragmentation of classes would have rendered it excessively difficult to have obtained approval of a *CCAA* plan, which was contrary to the purpose of the *CCAA*. He also took into account the commonality of interest approach in deciding that the proposed classification was, at this stage, appropriate: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]).

Justice Romaine of the Alberta Court of Queen's Bench noted that classification is a key issue in *CCAA* proceedings as the debtor seeks to frame a class or classes in order to ensure that the plan receives the maximum level of support; creditors have an interest in classifications that would allow them enhanced bargaining power in the negotiation of the plan; and creditors aggrieved by the process may seek to ensure that classification will give them an effective veto. The starting point in determining classification is the statute; the primary pur-

pose of the *CCAA* is to facilitate the reorganization of the insolvent debtor. Romaine J. referenced the principles set out in *Re Canadian Airlines Corp.* and amendments to the *CCAA* proclaimed in force September 18, 2009 that set out factors to consider in approving a classification for voting purposes. Creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account: (a) the nature of the debts, liabilities or obligations giving rise to their claims; (b) the nature and rank of any security in respect of their claims; (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. Justice Romaine held that these factors did not change in any material way the factors that have been identified in case law, nor would they have had a material effect on consideration of the proposed classification in this case. Romaine J. concluded that there was no good reason to exclude the secured lenders and noteholders from the single classification of voters. There were no material distinctions between the claims of the two creditors and the claims of the remaining unsecured creditors that were not more properly the subject of the sanction hearing, apart from the deferred issue of whether the secured lenders were entitled to vote their entire guarantee claim: *Re SemCanada Crude Co.* (2009), 2009 CarswellAlta 1269, 57 C.B.R. (5th) 205 (Alta. Q.B.).

The British Columbia Supreme Court sanctioned a plan of arrangement over the objections of a major unsecured creditor. The objecting unsecured creditor contended that the major secured creditor should not have been permitted to vote its deficiency claim and assigned claims in the general creditor class. Masuhara J. noted that the objecting creditor had not objected to the secured creditor voting its assigned votes earlier in the proceedings. The court had not been provided with any evidence to establish that the secured creditor somehow controlled shares of the debtor and there was no evidence that the creditor's arrangement with the debtor was anything but an arm's-length debt financing. It was an arm's-length creditor, and although it had initiated the *CCAA* proceedings, the CRO and the monitor, both court officers, had been appointed to oversee the debtor and provide the appropriate level of independence: *HSBC Bank Canada v. Bear Mountain Master Partnership* (2010), 2010 CarswellBC 2962, 72 C.B.R. (5th) 276 (B.C. S.C. [In Chambers]).

N§150 — Criteria for Determining Class

Section 22(2) sets out the factors that must be consider in dividing creditors into classes, including the nature of the debts, liabilities or obligations giving rise to their claims; the nature and rank of any security in respect of the claims; the remedies available to the creditors in the absence of the compromise being sanctioned and the extent to which the creditors would recover their claims by exercising those remedies, and any further criteria consistent with these criteria that may be prescribed.

Commonality of interest should be viewed based on the non-fragmentation test; the interests to be considered are the legal interest that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan; the commonality of interests are to be viewed purposively, bearing in mind the object of the *CCAA*; in placing a purposive interpretation on the *CCAA*, the court should be careful to resist classification approaches that would potentially jeopardize viable plans; absent bad faith, the motivations of creditors to approve or disapprove of the plan are irrelevant; the requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors; since the *CCAA* is to be given a liberal interpretation, classification hearings should be dealt with on a fact specific basis and the court should avoid rigid rules of general application; and finally, in determin-

Court File No. CV-16-11452-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF H.B. WHITE CANADA CORP.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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