Court File No.: CV-12-9667-00CL

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 COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE DEFENDANT, DAVID J. HORSLEY
(returnable July 24, 2014)

July 23, 2014

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TO: Attached Service List

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TAB 1

Case Name:

Robertson v. ProQuest Information and Learning Co.

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.
AND RE: Heather Robertson, Plaintiff, and ProQuest Information and Learning Company, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and Canwest Publishing Inc., Defendants

[2011] O.J. No. 1160

2011 ONSC 1647

Court File Nos. 03-CV-252945CP, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 15, 2011.

(34 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Settlements -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and

reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Application by Robertson and by the defendant Canwest Publishing Inc. for approval of a settlement. Robertson, who was a plaintiff in her own capacity and was also the representative plaintiff in a class proceeding, commenced this action in July 2003. The action was certified as a class proceeding in October 2008. Robertson claimed compensatory damages of $500 million and punitive and exemplary damages of $250 million against the defendants for copyright infringement. In January 2010 Canwest was granted an initial order pursuant to the Companies' Creditors Arrangement Act. In April 2010 Robertson filed a claim under the Arrangement Act for $500 million. The Monitor's opinion was that this claim was worth $0. The proposed settlement would resolve the class proceeding and the proceeding under the Arrangement Act. Court approval was not required for the claim under the Arrangement Act but it was required for the class proceeding. Under the settlement the claim under the Arrangement Act would be allowed in the amount of $7.5 million for voting and distribution purposes. Robertson undertook to vote in favour of the proposed Plan under the Arrangement Act. The action would be dismissed against Canwest, which did not admit liability. The action would not be dismissed against the other defendants. The Monitor was involved in the negotiation of the settlement and recommended approval for it concluded that the settlement agreement was a fair and reasonable resolution for Canwest.

HELD: Application allowed. The settlement agreement met the tests for approval under the Arrangement Act and under the Class Act. No one, including the non-settling defendants who received notice, opposed the settlement. Robertson was a very experienced and sophisticated litigant who previously resolved a similar class proceeding against other media companies. The settlement agreement was recommended by experienced counsel and it was entered into after serious negotiations between sophisticated parties. It would result in a fair and reasonable outcome, partly because Canwest was in an insolvency proceeding with all of its attendant risks and uncertainties.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 34

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

Counsel:

Kirk Baert, for the Plaintiff.

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

Alex Cobb, for the CCAA Applicants.

Ashley Taylor and *Maria Konyukhova*, for the Monitor.

REASONS FOR DECISION

S.E. PEPALL J.:--

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

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

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

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

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

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

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

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

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

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

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

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

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

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

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

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

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

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding

settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

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

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

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

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

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

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

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;
b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
c) the action would be dismissed as against CPI;
d) CPI did not admit liability; and
e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

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

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

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

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

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

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

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

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

Discussion

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

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

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

(a) Approval

(i) *CCAA* Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.,*[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]; *Re Air Canada*[4]; and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine.*[7]

(ii) Class Proceedings Settlement

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

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

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;
b) the recommendation and experience of class counsel; and
c) the terms of the settlement.

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

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

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

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

(iii) The Robertson Settlement

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

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

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

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

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

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

> communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

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

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

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

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

S.E. PEPALL J.

cp/e/qllxr/qlvxw/qlbdp

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

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

3 2007 ABQB 504 at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A.).

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

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

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, c. 6.

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

10 (1998), 40 O.R. (3d) 429 at para 30.

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

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

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

TAB 2

Case Name:

Sino-Forest Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

[2012] O.J. No. 5958

2012 ONSC 7050

Court File No. CV-12-9667-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: December 7, 2012.
Judgment: December 10, 2012.
Released: December 12, 2012.

(79 paras.)

Counsel:

Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation.

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders.

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs.

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited.

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation.

John Pirie and David Gadsden, for Poyry (Beijing).

James Doris, for the Plaintiff in the New York Class Action.

David Bish, for the Underwriters.

Simon Bieber and Erin Pleet, for David Horsley.

James Grout, for the Ontario Securities Commission.

Emily Cole and Joseph Marin, for Allen Chan.

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon.

Paul Emerson, for ACE/Chubb.

Sam Sasso, for Travelers.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

2 The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

3 With the exception of one party, SFC's position is either supported or is not opposed.

4 Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

5 The defined terms have been taken from the motion record.

6 SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision") (2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

7 Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

8 The Plan has the support of the following parties:

(a) the Monitor;
(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");
(c) Ernst & Young LLP ("E&Y");
(d) BDO Limited ("BDO"); and
(e) the Underwriters.

9 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

10 The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

11 Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

12 SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

13 SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

14 SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

15 On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

16 SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

17 Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

18 The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings, preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

19 SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

20 On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

21 On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

22 As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

23 After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action

lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

24 *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

25 The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

26 In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

27 Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

28 The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

29 The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

30 The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

31 SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

32 On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

33 In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims."

The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

34 On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

35 According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;
(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;
(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and
(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

36 Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

37 SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

38 SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

39 The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

40 Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

41 Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their

pro rata share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

42 With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

43 The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

44 The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

45 The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

46 The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	250	98.81%	$ 1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$ 414,087	0.03%
Total Claims Voting	253	100.00%	$ 1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

e. E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

47 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

48 Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

49 Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

50 To establish the court's approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;
(b) nothing has been done or purported to be done that is not authorized by the CCAA; and
(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

51 SFC submits that there has been strict compliance with all statutory requirements.

52 On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

53 The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

54 SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

55 Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation.*

56 Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc.* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* [2009] O.J.

No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

57 In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

58 I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

59 SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

60 In *Nelson Financial,* I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

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

61 The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

62 In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

63 I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

64 The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the

responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

65 In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

66 In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

67 As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

68 With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation,* (2005) 14 C.B.R. (5th) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

69 Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

70 The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

71 In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that

there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

72 Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

73 In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial, Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

74 With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

75 It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

76 I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

77 Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

78 Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;
(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and
(iii) the Plan is fair and reasonable.

79 Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

G.B. MORAWETZ J.

TAB 3

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,

Laskin, Cronk and Blair JJ.A.

August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that 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.

Held, the appeal should be dismissed.

On a proper interpretation, 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. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; 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 CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to in-

terpretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to 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.

While the principle 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 is an important one, 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.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion 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 was reasonable.

Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

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 [page517] 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 timetable -- 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 Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) 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. [page518]

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 [page519] 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 Montreal Protocol -- the parties committed [page520] 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 [page521] 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 art. 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 [page522] 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 co-operated 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 25. The vote was overwhelmingly in support of the Plan -- 96 per cent 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 per cent of those connected with the development of the Plan voted positively, as did 80 per cent 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 [page523] 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? [page524]

(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 [page525] 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 (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[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 [page526] -- 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), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 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, [2002] S.C.J. No. 43, 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. [page527]

[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 Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., 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, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

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

> [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 [page528] 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 [page529] 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 refer-

ences. 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. [page530]
>
> . . . . .
>
> 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: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[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.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (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] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[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. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing 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 [page532] 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 ex-

change for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] 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; [page534]
(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, 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:

> 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.
>
> 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 [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (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 (Re), however, the releases in those restructurings -- including Muscletech -- 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 (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 wellspring 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 Michaud v. Steinberg,[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). [page536]

[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 Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, 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 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. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes be-

tween 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 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:

> 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 p. 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.
>
> 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 [page538] 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 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 to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank 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 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 Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), 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 [page539] 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] O.J. No. 1996, 21 C.B.R. (5th) 157 (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 Michaud v. Steinberg, 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):

> 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.
>
> . . . . .
>
> 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.
>
> . . . . . [page540]
>
> 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, 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 [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg 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 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 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 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 com-

> pany 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. [page542]
>
> 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.

[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. 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 and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), 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 [page543] 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; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: 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. [page544]

[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: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p. 661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.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 [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[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 pro-

tected 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: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), 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, [page546] 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 usu-

al lively fashion, [page547] 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 per cent 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 [page548] 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.

Appeal dismissed.

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 [page549]

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 "C" -- 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 [page550]
(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, Sébastien 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.

Notes

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

2 Georgina R. Jackson and 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, B.C.: Carswell, 2007).

3 Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

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 was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 4

Case Name:

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant
Between
The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs, and
Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, P'Yry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by Merger to Banc of America Securities LLC), Defendants

[2013] O.J. No. 1339

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227 A.C.W.S. (3d) 930

37 C.P.C. (7th) 135

100 C.B.R. (5th) 30

2013 CarswellOnt 3361

Court File Nos. CV-12-9667-00CL and CV-11-431153-00CP

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: February 4, 2013.
Judgment: March 20, 2013.

(82 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by Securities Purchasers' Committee for approval of Ernst & Young Settlement and Release allowed -- Ernst & Young were former auditors of SFC and named as defendant in class proceeding commenced on behalf of SFC debt and equity investors alleging complex financial fraud -- Stay issued pursuant to CCAA -- Settlement and Release included in Plan of Compromise and Reorganization contemplated payment of $117 million and was approved by majority of creditors -- Settlement and Release was fair and reasonable -- Objectors' opposition based on lack of opt-out rights was not sustainable in CCAA or class proceeding context.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Motion by Securities Purchasers' Committee for approval of Ernst & Young Settlement and Release allowed -- Ernst & Young were former auditors of SFC and named as defendant in class proceeding commenced on behalf of SFC debt and equity investors alleging complex financial fraud -- Stay issued pursuant to CCAA -- Settlement and Release included in Plan of Compromise and Reorganization contemplated payment of $117 million and was approved by majority of creditors -- Settlement and Release was fair and reasonable -- Objectors' opposition based on lack of opt-out rights was not sustainable in CCAA or class proceeding context.

Motion by the Ad Hoc Securities Purchasers' Committee for approval of the Ernst & Young Settlement and Release. SFC was a publicly-traded forestry company with a registered office in Toronto and the majority of its operations located in China. SFC issued various debt and equity offerings to investors between 2007 and 2011. After the SFC share price collapsed, it was subsequently alleged that it had engaged in a complex fraudulent scheme misrepresenting its timber rights, misstating financial results, overstating the value of its assets, and concealing material information. The underwriters of the SFC debt and equity offerings were named as defendants in class action proceedings commenced on behalf of investors in both types of offerings. Ernst & Young and BDO acted as auditors for SFC during the relevant times and were named as defendants. Certification and leave motions had yet to be heard due to a stay granted to SFC under the Companies' Creditors Arrangement Act. The Committee filed a proof of claim on behalf of the putative class of debt and equity investors exceeding $9 billion. Ernst & Young filed a proof of claim for damages and indemnification. The ensuing $117 million settlement was approved by a majority of creditors and included in the Plan of Compromise and Reorganization in respect of SFC. The Committee moved for approval of the settlement. The Objectors were SFC shareholders who opposed the no opt-out and full-third

party release features of the Settlement. They moved for appointment of the Objectors to represent the interests of all those opposed to the Settlement.

HELD: Approval motion allowed and Objection motion dismissed. The Ernst & Young Release was justifiable as part of the Ernst & Young Settlement in order to effect any distribution of settlement proceeds. The claims to be released were necessarily and rationally related to the purpose of the Plan given the inextricability and circularity of Ernst & Young's claims against SFC, and those of the Objectors as against Ernst & Young. The Plan benefited claimants in the form of a significant and tangible distribution. The Release was fair and reasonable and not overly broad or offensive to public policy. It provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the CCAA. The Objectors' claim against Ernst & Young was not capable of consideration in isolation from the CCAA proceedings. Their opt-out argument could not be sustained, as the jurisprudence did not permit a dissenting stakeholder to opt out of a restructuring. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding. No right to conditionally opt out of a settlement existed under the Class Proceedings Act or the CCAA.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 9

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

Counsel:

Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, and Jonathan Ptak, for the Ad Hoc Committee of Purchasers including the Class Action Plaintiffs.

Peter Griffin, Peter Osborne, and Shara Roy, for Ernst & Young LLP.

John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.

Robert W. Staley, for Sino-Forest Corporation.

Won J. Kim, Michael C. Spencer, and Megan B. McPhee, for the Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

John Fabello and Rebecca Wise for the Underwriters.

Ken Dekker and Peter Greene, for BDO Limited.

Emily Cole and Joseph Marin, for Allen Chan.

James Doris, for the U.S. Class Action.

Brandon Barnes, for Kai Kit Poon.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders.

Derrick Tay and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Simon Bieber, for David Horsley.

James Grout, for the Ontario Securities Commission.

Miles D. O'Reilly, Q.C., for the Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

FACTS

Class Action Proceedings

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to opt-out was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Re Sino-Forest Corp.*, 2012 ONSC 4377], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Re Sino-Forest Corp.*, 2012 ONCA 816].

Ernst & Young Settlement

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
(b) the issuance of the Settlement Trust Order;
(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and
(e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

LAW AND ANALYSIS

Court's Jurisdiction to Grant Requested Approval

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is re-

> quired. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Re Nortel Networks Corp.*, 2010 ONSC 1708, paras. 66-70 ("*Re Nortel*"); *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99, para. 43 (Ont. C.J.)]

45 Further, as the Supreme Court of Canada explained in *Re Ted Leroy Trucking Ltd. [Century Services]*, 2010 SCC 60, para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ... When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ("*ATB Financial*"); *Re Nortel, supra*; *Robertson, supra*; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ontario S.C.J.)

("*Muscle Tech*"); *Re Grace Canada Inc.* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.); *Re Allen-Vanguard Corporation*, 2011 ONSC 5017].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 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 ...
>
> 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 ...
>
> 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.

...

78. ... 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.

...

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.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "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".

Relevant CCAA Factors

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;
(b) whether it provides substantial benefits to other stakeholders; and
(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the re-

structuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?
(b) Are the claims to be released necessary for the plan of arrangement?
(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and
(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.*, (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. C.J.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

(a) class members are not releasing their claims to a greater extent than necessary;

(b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
(d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial, supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Re Nortel*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly

delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Re Nortel, supra*, paras. 73 and 81; and *Muscle Tech, supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and opt-out rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial, supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Re Sammi Atlas Inc.,* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. (Commercial List)).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process,

the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice ... to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148, paras. 43-46 (Ont. S.C.J.); and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299.] *Miscellaneous*

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

DISPOSITION

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

G.B. MORAWETZ J.

TAB 5

Case Name:

Laidlaw Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF the Business Corporations Act (Ontario), R.S.O. 1990, c. B.16, as amended
Re: Laidlaw Inc. and Laidlaw Investments Ltd.

[2003] O.J. No. 1135

[2003] O.T.C. 228

46 C.C.L.I. (3d) 263

122 A.C.W.S. (3d) 244

Court File No. 01-CL-4178

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: December 6, 2002.
Judgment: March 11, 2003.

(19 paras.)

Insurance law -- The insurance contract -- Formation of the contract -- Place contract made -- Payment of insurance proceeds.

Application by the insurer for a declaration that certain insurance policies issued to the respondent Laidlaw Inc. were made in Ontario and were subject to Ontario law, a declaration that the insurer was entitled to pay defence costs, settlements and judgments on behalf of insured parties under the policies in the chronological order in which they were executed, a declaration that the payment by the insurer of those amounts constituted full and complete satisfaction of its obligations under the polices, and a declaration that all insured parties were bound by the previous declarations. The poli-

cies were issued and delivered to Laidlaw in Ontario. The respondent Safety-Kleen and its outside directors opposed the declarations that the policies were subject to Ontario law and that all insured parties were bound by the other declarations.

HELD: Application allowed. Pursuant to Ontario law, the policies were contracts deemed to have been made in Ontario, and were therefore to be construed according to Ontario law. No determination was made as to whether Safety-Kleen or its outside directors were included as insured parties under the policies. The first come, first served principle was appropriate and in the interests of overall fairness.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 97. Insurance Act, R.S.O. 1990, c. I.8, ss. 122, 123. Interpretation Act, R.S.O. 1990, c. I.11, s. 29(1).

Counsel:

Mary Margaret Fox and Keith Batten, for American Home Assurance Company, moving party.
Brian Empey, for Laidlaw Inc.
R.G. Slaght, Q.C. and Eleni Maroudas, for Safety-Kleen Outside Directors.
Adam Chamberlain, for Safety-Kleen Corp.
Kevin Zych, for Bondholders' Subcommittee.
W.E. Pepall, for PWC (Canada).
David Byers, for Bank Subcommittee.

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1 FARLEY J.:-- American Home Assurance Company ("Homeco") moved for relief as per its Notice of Motion dated October 16, 2002 as follows:

1. a declaration that certain policies of Directors, Officers and Corporate Liability insurance issued by American Home to Laidlaw Inc. ("LINC") and Subsidiaries of LINC, as listed in Schedule "A" hereto (collectively "the Policies"), are deemed to have been made in the Province of Ontario, Canada and are subject to the laws of Ontario, Canada;
2. a declaration that American Home is entitled to pay defence costs, settlements and judgments on behalf of Insureds under the Polices ("Defence Costs", "settlement amounts" and "judgement amounts", respectively), in the chronological order in which such Defence Costs, settlements and judgments are incurred, agreed to or obtained, without increasing American Home's obligations to make payments under any of the Policies beyond the limits of liability specified in such Policies;
3. a declaration that payment by American Home of any Defence Costs, settlement amounts or judgment amounts paid in accordance with the declaration sought in paragraph 2, above, shall constitute, to the extent of such payment, full and complete satisfaction of American Home's obligations

under the Policies, and shall serve to reduce the limits of the applicable Policy(ies) accordingly;

4. a declaration that all Insureds under the Policies listed in Schedule "A" hereto who are served with the Motion Record herein, all parties identified in Schedule "B" hereto who have commenced Claims against Insureds under the Policies, and any party identified in Schedule "C" hereto who may in the future institute a Claim or action against any Insured under the Policies, seeking relief which would have been, but for the exhaustion of the limits of the Policies, potentially recoverable under the Policies, shall be bound by the declarations sought in paragraphs 1-3 above, as such may be made by this Court; and
5. such further and other relief as counsel may advise and this Honourable Court permit.

2 As indicated at paragraphs 28-29 of the affidavit of Anthony Tatulli on behalf of Homeco:

The Laidlaw Bondholders Settlement

28. Commencing in approximately mid-2001, attorneys representing the parties to Action No. 1 as identified in Schedule "B" to the Notice of Motion, commenced negotiations with respect to possible settlement of that Action. Those negotiations continued over several months, culminating in the settlement of that Action (the "Laidlaw Bondholders' Settlement") evidenced by a preliminary agreement dated January 7, 2002 and the Stipulation of Settlement dated July 25, 2002. A true copy of the Stipulation of Settlement, without Exhibits, is attached hereto as Exhibit "N". American Home has agreed to contribute to the Laidlaw Bondholders' Settlement on behalf of its Insureds, subject to various conditions to that settlement being satisfied, one of which is found in Section 11(j) of the Stipulation of Settlement. Section 11(j) requires, as a condition of the Laidlaw Bondholders' Settlement, "... the entry by an Ontario Court of competent jurisdiction, of a final, non-appealable order in a form acceptable to American Home approving the right of American Home under Ontario law to pay defense costs, settlements and judgments in the chronological order in which such defense costs, settlements and judgments are incurred, agreed to or obtained without increasing American Home's obligations to make payments under any directors' and officers' liability policies issued by American Home or any of its affiliates beyond the limits of liability specified in such policies".
29. American Home has served the following persons and entities with the motion materials:

(a) LINC and Subsidiaries against which any actions or proceedings have been commenced;

(b) all persons who are Natural Person Insureds of LINC commencing with LINC's fiscal year ending August 31, 1997 and continuing to the present, all Natural Person Insureds of Laidlaw Environmental Services, Inc. for the fiscal year ending August 31, 1997 and continuing to May 15, 1998, and all Natural Person Insureds of those LINC Subsidiaries named as defendants in any of the Actions; this includes all Natural Person Insureds named as defendants, defendants by

Counterclaim, or Third-Parties in all of the Actions and proceedings identified in Schedule "B" to the Notice of Motion;

(c) the plaintiffs or, in some cases, defendants who have Counterclaimed or instituted Third-Party Claims against Insureds, in the Actions listed in Schedule "B" to the Notice of Motion; and

(d) the persons and entities identified in Schedule "C" to the Notice of Motion.

Where a party is or was an Insured in more than one capacity, American Home has only served that person once. Where to American Home's knowledge a party is represented by counsel, that counsel has been served, instead of the party. In the case of certain former directors of Laidlaw Environmental Services, Inc., the only address American Home was able to find was that of Laidlaw Environmental Services, Inc. Those former directors/officers will be served: c/o General Counsel, Safety-Kleen, with a request that the material be forwarded to the former directors/officers or returned.

3 The declarations sought in the Notice of Motion were opposed by only two parties: Safety-Kleen Corp. ("SK") and the SK Outside Directors - but only in respect of the declarations sought in paragraphs 1 and 4 of the Notice of Motion as to the law applicable to the Policies and the parties to be bound by the declarations requested. It was also suggested that there was some concern about Homeco being relieved of its obligation to act in good faith and in accordance with the terms and conditions of the subject Policies. With respect to this concern I see nothing in the material before me which would relieve Homeco of such obligation; I think that this is a red herring. In my view nothing in this motion relieves Homeco of such obligation which remains intact and extant.

4 The Insurance Act, R.S.O. 1990, c. I.8 provides in ss. 122-123 as follows:

s. 122 Except where otherwise provided and where not inconsistent with other provisions of this Act, this Part applies to every contract of insurance made in Ontario, other than contracts of,

(a) accident and sickness insurance;

(b) life insurance; and

(c) marine insurance.

s. 123 Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured, or the insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada.

5 The subject Policies were all issued in Ontario and delivered to Laidlaw Inc. ("LINC") (the named insured, a corporation incorporated under the laws of Canada with its head office located in Burlington, Ontario) via LINC's insurance broker and agent Robert Purves Ltd. in Toronto, Ontario. Thus it appears to me that pursuant to Ontario law, the subject Policies would be contracts deemed

to have been made in Ontario and, as such, to be construed according to the law of Ontario. See Hubert v. Compagnie Equitable d'Assurance Contre le Feu (1958), 12 D.L.R. (2d) 701 (Ont. H.C.); Cansulex Ltd. v. Reed Stenhouse Ltd. et al. (1986), 18 C.C.L.I. 24 (B.C.S.C.) at pp. 39-44; Jones v. Kansa General Insurance Co. (1992), 93 D.L.R. (4th) 481 (Ont. C.A.) at pp. 487-8. One should note that in Cansulex, the British Columbia equivalent provision to s. 123 merely stated "accordingly" as opposed to s. 123 specifying "according to the law thereof", as to which "thereof" must mean "Ontario" in my view. While the subject Policies do not stipulate that the Policies are subject to or governed by the law of Ontario, that is not necessary in light of the deeming provision of s. 123. Further the subject Policies do not appear to be excepted pursuant to s. 122. Of course the statutes and laws of other jurisdictions may similarly provide that because of some connection to that jurisdiction, the laws of that jurisdiction govern the subject Policies vis-à-vis someone who is within the reach of that jurisdiction (see, for example, South Carolina Code of Laws, Title 38, Chapter 61, Insurance Contracts General, Section 10).

6 As discussed in J.G. Castel and J. Walker, Canadian Conflict of Laws, 5th ed. looseleaf (Toronto: Butterworths, 2002) at pp. 31.38-39:

> b. Insurance Contracts
>
> The large volume of business done by foreign insurance companies in Canada has prompted the federal Parliament as well as the legislatures of the various provinces to regulate insurance contracts in order to prevent the status and rights of Canadian resident policy holders, insureds and beneficiaries, from being determined by some foreign law which could be applicable under ordinary conflict of laws rules, and to make certain that the insurance moneys will be payable locally. For instance, in a number of provinces the Insurance Act provides that [then citing a number of provincial Acts including the subject Ontario one]:
>
> > Where the subject matter of a contract of insurance is property in [the province] or an insurable interest of a person resident in [the province], the contract of insurance, if signed, countersigned, issued or delivered in [the province] or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured, his assign or agent in [the province] shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in [the province] of the insurer in lawful money of Canada.
>
> This section seems to indicate that the law of the province is the proper law of a contract of insurance made or deemed to be made in that province and that in such a case the parties are not free to oust the application of that law by an express choice of law clause. This is necessary to protect policyholders in their dealings with foreign insurance companies that have superior bargaining power. (emphasis added)

The authors then go on to distinguish the situation prevailing under the insurance legislation in British Columbia and Alberta concluding at p. 31.39 that: "These provisions do not, however, necessarily make the law of the province the proper law of the contract of insurance."

7 The Courts of Justice Act, R.S.O. 1990, c. C.43 provides: s. 97 ... the Superior Court of Justice ... may make binding declarations of right, whether or not any consequential relief is or could be claimed.

8 It appears to me that the provisions of Clauses 8 and 18 of the Primary Policy of the subject Policies (with application to the other subject Policies) as set out below:

> 8. Defence Costs, Settlements, Judgments (Including the Advancement of Defence Costs)
>
> ...
>
> In the event of Loss arising from a Claim or Claims for which payment is due under the provisions of this policy, then the Insurer shall:
>
> (a) first, pay such non-Indemnifiable Loss for which coverage is provided under Coverage A of this policy; and
> (b) then, with respect to whatever remaining amount of the Limit of Liability is available after payment of such non-Indemnifiable Loss, at the written request of the chief executive officer of the Named Corporation, either pay or withhold payment of such other Loss for which coverage is provided under this policy.
>
> In the event the Insurer withholds the payment pursuant to sub-paragraph (b) above, then the Insurer shall at such time and in such manner as shall be set forth in written instructions of the chief executive officer of the Named Corporation, remit such payment to the Company or directly to or on behalf of a Natural Person Insured.
>
> 18. Action Against Insurer
>
> Except as provided in Clause 17 of the policy, no action shall lie against the Insurer unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the Insureds' obligation to pay shall have been finally determined either by judgment against the Insureds after actual trial or by written agreement of the Insureds, the claimant and the Insurer.
>
> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any rights under this policy to join the Insurer as a party to any action against the Insureds or the Company to determine the Insureds' liability, nor shall the Insurer be impleaded

> by the Insureds or the Company or their legal representatives. Bankruptcy or insolvency of the Company or the Insureds or of their estates shall not relieve the Insurer of any of its obligations hereunder.

apply vis-à-vis any of the insureds which are resident in Ontario (which would include LINC as a person as the definition of "person" in the Interpretation Act, R.S.O. 1990, c. I.11 at s. 29(1) includes a corporation) and any of the individual directors and officers of LINC and its included subsidiaries (as such may be determined in other litigation). See American Home Insurance Co. v. Drake International Inc., [2002] O.J. No. 333 (S.C.J.) where Chapnick, J., reviewed the aspect of s. 123 at paragraphs 23-8, although this was ostensibly a forum selection case and should therefore be viewed in that context. It should be kept in mind that in that case Drake Personnel was the Australian subsidiary of Drake International. While Drake International appears to have had a presence in Ontario, it does not seem that Drake Personnel had any such presence such as to establish residence in Ontario; this appears to be the basis for Chapnick, J.'s, conclusion at paragraph 28. For ease of reference, I set out her views at paragraphs 23-8 but would note the omission of certain words as indicated from her quote of s. 123 in paragraph 27:

> 23. The umbrella policy is silent as to jurisdiction with respect to the governing law and place of trial where coverage is disputed. Where a contract is silent as to jurisdiction, the proper law of the contract is determined according to which system of law has "the closest and most real connection" with the transaction having regard to factors such as the place of contracting, the place of performance, the place of business of the parties and the nature and subject matter of the contract. Castel, Canadian Conflict of Laws, 4th ed., pp. 593, 598-601. See also Serpa v. Confederation Life Association (1974), 2 O.R. (2d) 484.
> 24. In my view, while the umbrella policy was contracted with Drake International in Ontario, Ontario is not the system of law that has "the closest and most real connection" to its application. It is after all a worldwide policy intended to respond to claims made worldwide. Moreover, American Home, the insurer, has a place of business in Australia and the policy is being relied on in Australia by an Australian company, Drake Personnel.
> 25. It is well settled that in a case such as this, the overall consideration is that of forum conveniens. Mr. Snowden, on behalf of American Home, points out that an umbrella policy is a hybrid policy, in effect, that combines aspects of both a primary and an excess policy; and an insurer is not obliged to defend claims which fall wholly outside the coverage provided by the policy. In that way, the exposure of an excess insurer is more remote.
> 26. American Home also argues that where a policy is negotiated, issued and financed or paid for and delivered in Ontario, the law of the province is deemed to apply to the contract. In that regard, American Home relies upon the Insurance Act, R.S.O. c. I.8, as amended, in particular s. 123 as well as the judgment of the Court of Appeal in Jones v. Kansa General Insurance Co. (1992), 10 O.R. (3d) 56 (C.A.).
> 27. Sections 123 and 124 of the Insurance Act read:
>
> > 123. Contracts deemed made in Ontario - Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person res-

> ident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the Insured, or the Insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, [note: there is missing from this quote the following words: "and the contract shall be construed according to the law thereof and all monies payable under"] the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada.
>
> 124.(1) Terms, etc., of contracts invalid unless set out in full - All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued, and, unless so set out, no term of contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary.

28. It is undisputed that the contract was "made" in Ontario. The conditions precedent for application of the constituent parts of s. 123 have, however, not been established within the context of these particular factual circumstances. Moreover, the alternative clause in s. 124 is for the benefit of the insured.

In passing I would think that if Drake International were determined to be resident of Ontario, then Ontario law would be employed to determine its claims, if any.

9 As I understand it the SK Outside Directors litigation is being tried in South Carolina. It will be up to the courts of that jurisdiction to determine coverage, if any, under the subject Policies. I certainly make no determination as to whether SK is included as an insured under the subject Policies, or similarly whether the SK Outside Directors are (or for that matter any SK directors).

10 Given that LINC is resident in Ontario, then in my view the law of Ontario applies to the subject Policies. The directors and officers of SK, if covered, as beneficiaries of the LINC subject Policies, are covered as a result of their connection with LINC. I do not understand that any of the relief sought is with respect to any Excess Policy, but rather just with respect to the Homeco subject Policies.

11 Notwithstanding my determination that Homeco is entitled to the declaration it is seeking in relief item 1, whether that declaration will be enforced in the sense of respected by the South Carolina Court in the SK Outside Directors Coverage Action ultimately will be a matter for the South Carolina Court to determine, by, I assume, the principles of private international law including the doctrine of comity. I note in any event that the condition clause 11(j) of the Settlement Stipulation (supported by SK and the SK Outside Directors) provides that the Ontario Court in this hearing is being asked to give an order "approving the right of [Homeco] under Ontario law to pay defence costs, settlements and judgments in ... chronological order ..." (emphasis added). This Court can only make an order "under Ontario law" if it is found, as I have, that Ontario law applies to the subject Policies. I note that I was advised on February 28, 2003 that by Order signed December 17, 2002, the United States District Court, District of South Carolina, approved the Stipulation of Settlement (see paragraph 9 of that Order).

12 It was submitted by Homeco in argument that condition clause 11(j) which stated "in a form acceptable to [Homeco]" gave Homeco the right to determine whether it was satisfied with this Court's conclusion and that impliedly I should be mindful of that. Firstly, I think it obvious that Homeco fully appreciates that in a declaration involving the interpretation of Ontario law, this Court is constrained to give a decision which is in accord with Ontario law and it matters not that Homeco may or may not be pleased with that result (subject of course to its appeal rights if it is in fact unhappy). Secondly and more importantly, it seems to me that that excerpt out of clause 11(j) must be construed in the overall context of clause 11(j) and in the ordinary and plain meaning that, in so far as Ontario law applies, the first past the post/first come first served principle will operate.

13 It appears to me that the provisions of Clauses 8 and 18 set out above demonstrate that the intent is to trigger Homeco's obligation to pay once a claim has been finally determined by judgment or settlement (and endorsed by Homeco) and to vest in the claimant at that time a deemed right to recover such judgment or settlement against Homeco. As well it appears clearly contemplated that finally determined claims under the subject Policies will be paid as presented on a first come, first served basis. I do not see that there is any provision in the subject Policies which would allow or require Homeco to consider claims or potential claims which have not been finally determined by judgment or settlement as opposed to its obligation to pay claims which have been finally determined. To impose a requirement on Homeco (and a restriction on a successful claimant's direct right) which would oblige Homeco to defer payment (and the claimant collection) until such time as all claims and potential claims under the subject Policies are known and finally determined would constitute an unwarranted rewriting of the subject Policies. See University of Saskatchewan v. Fireman's Fund Insurance of Canada, [1998] 5 W.W.R. 276 (Sask. C.A.) at p. 289; leave to appeal to the Supreme Court of Canada refused [1997] S.C.C.A. No. 641.

14 It seems to me that at common law as discussed in Cox v. Bankside Members Agency Ltd., [1995] 2 Lloyd's Law Reports 437 (C.A.) that the "first past the post" or "first come, first served" principle was determined to be appropriate and in the interests of overall fairness. See Sir Thomas Bingham M.R.'s view, especially at pp. 457-60. He stated at p. 457:

> It was inherent in the Judge's approach that he considered chronological priority to be the basic rule, from which any departure must be justified. This approach was not challenged, and is plainly correct. In the absence of a stay, a successful plaintiff may enforce his judgment against the defendant as soon as it is given, and if an insured defendant is insolvent he may seek to be indemnified (subject to the terms of the policy) directly by the insurer. There must be some good reason for departing from the basic rule that a successful plaintiff is entitled to the fruits of his judgment.

Saville, L.J., added at pp. 466-7:

> I can see no reason why equity should intervene to require that those first to call on the policy should have to share their recoveries with later claimants if and when the insurance became exhausted.

This was after the court considered and rejected arguments for rateable allocation based on equity, implied agreement between multiple insureds, the direct right of action, trust or some other form of fiduciary obligation. The exception as outlined by Peter Gibson, L.J., at p. 463 where "a group

judgment is obtained or where more than one is obtained at the same time" is not to my mind a true exception to the first past the post principle since conceptually all such claimants would be passing the post at the same time.

15 See also Harmon v. State Farm Mutual Automobile Insurance Company, 232 So. (2d) 206 (1970 Fla. App.) where Hobson, C.J., stated at p. 206 in referring to public policy supporting the first come, first served principle:

> ... we feel that to impose a duty upon insurers to ascertain all claimants under their uninsured motorist coverages before settling with any, and to require them to settle such claims at their peril is contrary to the policy of encouraging compromises and speedy settlements, and would do more harm than good. If such a duty is to be imposed under the uninsured motorist statute, it must be done by the legislature.

Thus this concept is not foreign to U.S. jurisprudence.

16 I have found nothing in the Ontario Insurance Act which would require a deviation from the first past the post principle.

17 With respect to the "binding" element of this proceeding, I was referred to the Cox case where Sir Thomas Bingham, M.R., stated at p. 456:

> In order to seek an authoritative ruling on this issue (and also other issues, of which one is considered below), E&O underwriters issued an originating summons joining as defendants all agents and Names whom they wished to bind by the decision of the Court. The underwriters' objective, obviously legitimate, was to protect themselves against the risk of being ordered to pay twice.

There is of course nothing the matter with such an applicant wishing to get as much certainty as is possible - but that must be legally possible. The question in the Cox case as to binding non-English parties was not discussed. It seems to me that their rights were probably affected both legally and practically by the Third Parties (Rights against Insurers) Act, 1930 (U.K).

18 At paragraph 29 of the Tatulli affidavit, he has sworn that Homeco has served the various parties as set out in relief item 4. None of those so served has come forward to contest that they were not properly served nor otherwise not subject to the jurisdiction of this court. Of course that relief will also be subject to enforcement in jurisdictions outside Ontario to the extent that the rights of parties outside this jurisdiction are affected. The SK Outside Directors raised the issue that the covering letter to the material given those served did not specify the other elements of relief asked for - namely relief items 1 and 4. However it seems to me that that relief was plainly and obviously set out in the Notice of Motion served on them, that that would be the proper and appropriate place for those served to carefully review (as opposed to an "overview" in a letter), that that would be obvious that the relief being sought would to some degree or other affect their rights as otherwise they would well ask why they were being served with the material and lastly it would not be prudent to merely look at the letter and ignore the legal documentation. However a foreign court may view this differently.

19 Thus subject to the caveats as to enforceability outside Ontario, Homeco is entitled to the declarations it has requested. Declarations subject to the caveats accordingly as to relief items 1, 2, 3 and 4. Given the circumstances of these proceedings, each is to bear its own costs.

FARLEY J.

cp/e/nc/qw/qlhcc/qlkjg

TAB 6

Case Name:

Hollinger International Inc. v. American Home Assurance Co.

Between
Hollinger International Inc., (applicant), and American Home Assurance Company, Chubb Insurance Company of Canada, ACE INA Insurance Company, Zurich Insurance Company, Royal & SunAlliance Insurance Company of Canada, Gerling Global Canada, Temple Insurance Company, Continental Casualty Company, Lloyd's Underwriters, AXA Corporate Solutions Assurance, The Ravelston Corporation Limited, Hollinger Inc., Conrad M. Black, Barbara Amiel-Black, John A. Boultbee, David Radler, Daniel W. Colson, Richard N. Perle, Mark Kipnis, Argus Corporation Limited, Ravelston Management Inc., 3396754 Canada Ltd., 504468 N.B. Inc., Hollis McCurdy, W. John McKeag, Ana Porter, Ronald Riley, Stephen Hastings and Mark Horning, (respondents)

[2006] O.J. No. 140

[2006] O.T.C. 35

34 C.C.L.I. (4th) 17

144 A.C.W.S. (3d) 1098

2006 CarswellOnt 188

Court File No. 05-CL-5951

Ontario Superior Court of Justice

C.L. Campbell J.

Heard: November 29-30 and December 1, 2005.
Judgment: January 13, 2006.

(129 paras.)

[Editor's note: Supplementary reasons for judgment were released May 11, 2006. See [2006] O.J. No. 1898.]

Civil procedure -- Judgments and orders -- Declaratory judgments -- The applications of American Home, Chubb and International successfully sought declaratory relief authorizing the funding of a settlement reached in a derivative action commenced in the State of Delaware in the sum of US$50 million.

Corporations and associations -- Corporations -- Actions -- By corporation -- Derivative actions -- The applications of American Home, Chubb and International successfully sought declaratory relief authorizing the funding of a settlement reached in a derivative action commenced in the State of Delaware in the sum of US$50 million.

International law and conflict of laws -- Conflict of laws -- Corporations -- The applications of American Home, Chubb and International successfully sought declaratory relief authorizing the funding of a settlement reached in a derivative action commenced in the State of Delaware in the sum of US$50 million.

The applications of American Home, Chubb and International sought declaratory relief authorizing the funding of a settlement reached in a derivative action commenced in the state of Delaware in the sum of US$50 million (subject to retention amounts) -- The settlement was on behalf of claims against directors of International -- The issue before the court was whether or not the process by which the settlement came about and was to be approved by the Delaware court was fair and in accordance with the obligations of the settling parties under the Policies of Insurance in accordance with the contractual rights and entitlements of the opposing directors and Excess Insurers -- The applicants submitted that neither the insured Inside Directors nor the Excess Insurers had raised concerns that would justify the Courts withholding approval when the Primary Insurers had a contractual obligation to International to not unreasonably refuse to consent to the proposed settlement -- HELD: The court found that the process of the settlement met the test of commercial reasonableness -- On the material before the court, it was satisfied that it was a reasonable exercise of judgment on the part of those directly involved in the settlement process to conclude, as they did, that given the risk that a summary judgment motion would not succeed, a settlement should proceed without that determination -- The court was satisfied that both American Home and Chubb clearly understood the nature of their duties to the Excess Insurers and had done their best to live up to them -- Based on review of the process leading to settlement and the risk related to a summary judgment motion not proceeding, the court held that in the circumstances of the process of the settlement, that it be authorized at this time and subject to certain conditions that the Primary Insurers American Home and Chubb had exhausted their contractual limits and were released from any other claims against them from events arising under their policies -- The conditions were that the Delaware Court approve the settlement as fair and reasonable, bearing in mind the issues raised by the inside directors and excess insurers, and that any remaining issues regarding the obligation of American Home, Chubb or International's responsibilities for defence costs incurred, submitted and payable prior to completion of the settlement, would be resolved or determined by the court -- Following determina-

tion by the Delaware Court of the propriety and approval of the settlement under Delaware law, the parties could make submissions on the issue of costs.

Counsel:

Eric R. Hoaken, Rory M. Barnable for Hollinger International Inc.

Richard H. Krempulec, Q.C. for American Home Assurance, Mary Margaret Fox for Chubb Insurance, Gary H. Luftspring for Royal & SunAlliance, Zurich and ACE INA, Steve Stieber for Encon/Axa, Christopher McKibbin for GCan (formerly Gerling), Peter F.C. Howard, Timothy M. Banks for Richard N. Perle, Jennifer S. Dent, for Richters, Receiver to Ravelston and Argus, Stephen Scholtz, Alison Kuntz for Lord Black and Lady Amiel-Black; Geoffrey Adair Q.C., Marcella Saitua for Hollinger Inc.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- This Application of Hollinger International Inc. ("International") and the companion Applications of its insurers, being court file numbers 05-CL-5951A through 05-CL-5951H, first came before the Court in late July 2005.

2 By an endorsement dated July 27, 2005, those applications were adjourned to permit a further evidentiary hearing to permit clarity on some of the issues raised by the Conditional Settlement reached between International and the first layers of its insurers in respect of a derivative shareholders' action brought on behalf of International against both its Inside (management) and Outside (independent) Directors of the "Cardinal" action commenced in the State of Delaware. The conditional Settlement will be referred to variously as the Cardinal Settlement and the Settlement.

3 The July 27, 2005, Endorsement is attached as Appendix A to these Reasons [Editor's note: See [2005] O.J. No. 3244.] to provide background while avoiding repetition in this decision.

4 When this matter was heard over three days in November and December 2005, two of the insured parties who had previously opposed approval of the Conditional Settlement withdrew their opposition.

5 Hollinger Inc. ("Inc"), subject to certain conditions (referred to below) advised the Court that it was withdrawing its claims for relief set out in its Application, being part of Court File 05-CV-289537 PD2 and now consents to a dismissal of its outstanding action against American Home, and supports the position of International, American Home and Chubb in respect of their request for approval of the Cardinal Settlement.

6 The Court was advised by counsel for RSM Richter Inc., that in its capacity as receiver, receiver manager and interim receiver of The Ravelston Corporation Limited, Ravelston Management Inc. and Argus Corporation, they supported the Cardinal Settlement in the Delaware action and withdrawing the claims for relief set out in court files 05-CV-289535 PD3 and 05-CL-5951F subject to conditions (referred to below.)

7 Four additional affidavits were filed for the November hearing, those of Professor Lawrence Hamermesh, James Van Horn, The Hon. Nicholas Politan and Joseph Smick. Cross-examination on the latter three affidavits was conducted before me as part of the hearing.

8 The policies of indemnity insurance issued by American Home and Chubb (the "Primary Insurers") under which the Cardinal Settlement to be approved in the Delaware Court of Chancery is to be funded are governed by Ontario law, hence the declaratory relief is sought in this Court.

9 Under the Cardinal Settlement, International is to receive US$50 million from American Home and Chubb in respect of damages attributable to the potential legal liability of non-management Outside Directors.

10 The July endorsement described the issue on the Applications before me as follows: "Did [the Applicants] reasonably and fairly conclude a Settlement taking in consideration the potential rights and entitlements of other insureds (the Inside Directors Inc., and related companies) as well as Excess Insurers?"

11 None of the parties before me has objected to the above description. The Excess Insurers under the following form policies submit that approval should not be given to the Cardinal Settlement, as American Home and Chubb have not fulfilled their contractual obligations to the Excess Insurers under the policies in issue.

12 The following quotation, from a letter from counsel for the third Excess Insurers to counsel for International, sets out the insurers' position. (For this purpose, there is no reason to distinguish between the third and fourth Excess Insurers):

> Based upon all the foregoing, if International and/or the Independent directors do enter into a settlement with American Home and Chubb whereby the entirety of the proceeds from the underlying insurers' policies are used to fund a settlement of the Derivative Action, such a settlement would appear to constitute a voluntary payment by the Insureds; and the Third Excess Insurers would not recognize such a settlement as exhausting the underlying policy limits.

13 The directors who oppose the Cardinal Settlement (with the exception of Richard Perle) are all "Inside Directors," being part of management of International at the relevant time: their opposition is based on the premise that they were not involved in the Settlement process, as they were entitled to be in discharge of the insurer's policy obligation.

14 The base of the opposition of both the Excess Insurers and the Inside Directors has to do with defence costs. It is the position of the Applicant Primary Insurers that the Cardinal Settlement payment will discharge their obligation under their policies. The result will be that monies that would otherwise be paid to International in respect of the Settlement will be unavailable to be used for the defence of the Inside Directors in other actions to which they are exposed. The obligation for payment of defence costs would then pass to the Excess Insurers, the result being that less money would be available from the Excess Insurers for liability payments.

15 The material before the Court leads to the conclusion that if the Settlement is not approved before this Court, the policy limits of the Applicant Primary Insurers would be entirely paid out in defence costs of either the derivative action in Delaware or other litigation in which all the directors, both Inside and Outside, as well as Inc. and other related entities, are at risk.

16 The Excess Insurers would rather see funds proposed for the Settlement used to reduce the obligation they would otherwise have in respect of defence costs.

Policy Provisions

17 The "Executive and Organization Liability Policy" issued by American Home Assurance Company is what is known as a policy of indemnity and provides that the named corporate entities, including International, are entitled to be indemnified in respect of what is defined as an "indemnifiable loss."

18 An "Indemnifiable Loss" occurs when a corporate insured has indemnified or is permitted or required to indemnify an "Insured Person" pursuant to law or contract or by-law or operating agreement of the Company.

19 "Insured Persons" include in effect officers and directors of insured corporations. "Loss" as a defined term under the Policy includes settlements, judgments and Defence Costs, which is defined under the Policy as follows:

> "Defence Costs" means reasonable and necessary fees, costs and expenses consented to by the Insurer (including premiums for any appeal bond, attachment bond or similar bond arising out of a covered judgment, but without any obligation to apply for or furnish any such bond) resulting solely from the investigation, adjustment, defence and/or appeal of a Claim against an Insured, but excluding any compensation of any Insured Person or any Employee of an Organization.

20 The Policy further provides that amounts incurred for legal defence shall reduce the limit of liability available to pay judgments or settlements. The provision relating to retention amounts is not relevant for the purpose of this decision.

21 The Primary Policy of American Home affords an aggregate limit of liability of US$20 million. An Excess Policy issued by Chubb affords US$25 million of coverage and an American Home Excess Policy affords a further US$5 million coverage. These three policies afford a total limit of US$50 million and for the purpose of these Reasons are referred to as the Primary Insurers.

22 A further US$80 million coverage is provided by Policies issued by what are referred to here as the Third and Fourth Excess Insurers. For the purposes of these Reasons, it is not necessary to distinguish between them.

23 General Condition "A" under the Excess Policies reads as follows:

> A. Company/Claims Participation
>
> The Insurer shall at all times have the right, but not the duty, to participate in the investigation, settlement or defence of any Claim covered by this Policy which appears to the Insurer to be likely to involve the Insurer, even if the Underlying Limit has not been exhausted. The Parent Company and the Insureds shall give the Insurer full co-operation and such information as it may require.

> Notwithstanding anything contained in this Policy or any of the Underlying Policies, the Insurer shall not have, and does not assume, any duty to defend any Claim under this Policy.

24 It is to be noted that in addition to the claims arising in the action to which the Cardinal Settlement applies, the Insurers were notified of a number of other claims. In respect of some of the additional claims, the Excess Insurers have denied coverage but have neither accepted nor denied coverage in respect of the claims involved in the Cardinal Settlement.

The Cardinal Action Settlement

25 The nature of the Cardinal Action and Settlement is described in the factum of International, as follows:

> The Cardinal Action seeks redress for significant injury inflicted upon International by Conrad Black and his confederates, facilitated and abetted through use of companies under Black's control. The derivative claims in the Cardinal Action against the Black Group, although technically still pending, have been effectively superseded by International's direct claims against the same parties in separate litigation in Illinois. However, the Cardinal Action derivative claims alleging a total lack of oversight of the Black Group's impugned transactions by International's independent or outside directors have not been superseded by any direct International action. Those claims were conditionally settled in the matter currently before this Court.

26 The Cardinal Settlement contains a term that this Court approve in terms of the relief contained in paragraphs 1(a) and (b) of the International application, as follows:

> (a) an order declaring that American Home Assurance Company ("American Home") and Chubb Insurance Company of Canada ("Chubb") are authorized and/or required to fund, to a total of U.S. $50 million, the settlement of claims made against certain individual defendants in an action commenced by Cardinal Value Equity Partners, LP ("Cardinal") in the Court of Chancery for the State of Delaware (the "Delaware Court"), bearing Civil Action No. 105-N (the "Cardinal Settlement"), and that such funding occur following approval by the Delaware Court that the settlement is fair and reasonable and in the best interests of International's shareholders;
>
> (b) an order declaring that payment by American Home and Chubb of the limits of their respective policies to fund the Cardinal Settlement, or of any limits remaining after other payments for covered loss ranking in priority to the Cardinal Settlement have been made, does not violate the interests of any party before the Court, shall exhaust the limits of the American Home and Chubb policies, and shall discharge American Home and Chubb from any remaining obligations under their respective policies;

27 The Settlement Agreement and other requested relief sought to be approved before this Court contemplate that the Delaware Court conduct a hearing in accordance with Delaware law that will determine fairness of the Settlement to International's shareholders.

28 In essence, the issue before this Court is whether or not the process by which the Settlement came about and is to be approved by the Delaware Court is fair and in accordance with the obligations of the settling parties under the Policies of Insurance in accordance with the contractual rights and entitlements of the opposing directors and Excess Insurers.

The Evidence

29 The evidence reveals that the Cardinal derivative litigation was commenced in Delaware on December 9, 2003, against International and all its directors at the time of the events complained of.

30 In January 2004, Cardinal agreed to stay its action pending completion of an investigation by the Special Committee of the Board of Directors of International.

31 In addition, a consolidated class action complaint was commenced in Illinois by purchasers of International securities against the Company and related entities and all its directors, both Inside and Outside (the "Illinois Securities Litigation" or "Class Action.")

32 Michael Mitrovic, president of Worldwide Financial Claims, American International Group, attested at paragraph 22 of his affidavit dated June 23, 2005, that "The Cardinal litigation and the Illinois securities litigation are afforded coverage [by his company] subject to the terms and conditions of the Primary Policy."

33 There was another action in Illinois that had been commenced by International through the Special Committee against the Inside Directors, which included Richard Perle. This claim was not covered by the primary policy because of the insured vs. insured exclusion in the policy.

34 Apparently as a result of discussions sometime in late spring or early summer of 2004 among International, its counsel and brokers, various counsel on behalf of Outside Directors, and as well American Home, it was agreed that there should be a mediation of the issues involved in both the Cardinal and Class Actions.

35 The Hon. Nicholas H. Politan, a retired judge for the United States District Court for the District of New Jersey, was chosen and agreed to act as mediator. Following a preliminary session before him, the first formal session was held in New York on August 6, 2004. Those invited to that initial session included those thought by James Van Horn (general counsel of International) to be most relevant. They included International, counsel for its Outside Directors, all insurers, the plaintiffs in the Class Action and the Cardinal Action. Some Excess Insurers were aware of the mediation but were not specifically invited to attend.

36 Mr. Van Horn was of the view that with respect to the Cardinal Action, given the Company's claim against the Inside Directors, the Settlement of the derivative claim against them would not be possible.

37 As to the defendants in the Class Action, Mr. Van Horn was of the view that any settlement would be driven by the Company and as a result representatives of other defendants would not be necessary, at least at the first session.

38 Judge Politan affirmed in his affidavit, filed and in evidence before me, that at the August 6, 2004, mediation, he determined that if progress were to be made, the number of individuals involved in the process had to be pared down.

39 Judge Politan was aware that the position taken by International as against Inside Directors would make settlement of those claims impossible, that "to the extent that if such settlement was to

be funded with insurance proceeds, a condition of any settlement would be that claims against all settling insured defendants would have to be released."

40 Judge Politan further concluded that based on his "understanding that coverage was not being denied to the Outside Directors by any of the Insurers involved and based on the total amount of available coverage, that counsel for the Outside Directors did not need to be in attendance at any of the further mediation sessions." He understood that if settlement were to take place, it would likely be within the US$50 million of the Primary Insurers.

41 Prior to convening the initial session on August 6, 2004, Judge Politan had available to him the pleadings in both the Cardinal and Illinois Class actions, the decision of Judge Strine of the Delaware Court (the only proceeding in which Lord Black has testified) and had consultation with Mr. Breeden of the International Special Committee.

42 Later in August and for the remaining sessions over which he presided, Judge Politan had a copy of the 500-page Special Committee Report, which provided many specific details of allegations of wrongdoing by Lord Black and of lack of oversight by other directors, both Inside and Outside.

43 The mediation before Judge Politan ultimately did not succeed and took place in circumstances where the particulars of discussions before him, including those he had with Mr. Breeden, were subject to mediation privilege over the several sessions.

44 Judge Politan testified before me and I accept his evidence that

(a) he was satisfied when it became apparent that the Illinois Class Action would not settle, that he had before him all the relevant parties and their counsel if settlement of the Cardinal Action were to be successful;
(b) as he was aware of the "tower of insurance," (i.e., the limits of all policies) and he was satisfied that there was sufficient insurance to deal with all the plaintiffs' claims;
(c) he accepted and acted in the mediation on the premise that there was significant risk to the Outside Directors that the claims against them would survive a summary judgment motion and if so, would give rise to a significant damage claim and potential risk of liability and the incurrence of very significant defence costs;
(d) from his involvement in the process, Judge Politan is of the opinion that given the risk and potential exposure, the proposed Settlement by American Home and Chubb of US$50 million (subject to retention of $2.5 million) is a "fair and reasonable amount reflecting a compromise of the parties' positions;"
(e) that the Settlement was preceded by lengthy negotiations among highly experienced counsel who were well-prepared, extremely knowledgeable about the facts and the law, who advocated vigorously for their clients.

45 James Van Horn, general counsel of International, confirmed, and I accept, that the Cardinal Settlement was effected through a process of arm's length negotiations between sophisticated parties, each of whom was fully informed with the pertinent facts, and that US$50 million was consid-

ered a reasonable figure, particularly as the total damages of International would exceed US$400 million with costs to date in the US$10-20 million range and mounting.

46 The third witness whose affidavit was the subject of cross-examination before me was Joseph M. Smick, a coverage attorney retained by the respondent Zurich but filed on behalf of all the Excess Insurers.

47 Mr. Smick's affidavit detailed the involvement he had on behalf of his client and the Excess Insurers in the settlement process. I accept his evidence that the Excess Insurers were aware of, and not directly involved in, the mediation/settlement process.

48 I also accept that in March and April of 2005, the Excess Insurers advised International of their position that:

(a) the Excess Insurers were entitled to participate in settlement discussions;
(b) they had little information about the settlement process; and
(c) they expressed concern that a summary judgment motion might result in the dismissal of the Cardinal claims against the Outside Directors.

49 In essence the position of the Excess Insurers is that they are entitled to oppose the Settlement based on their lack of involvement in the process both now being satisfied that a summary judgement motion should have been brought as it had a more than reasonable chance of success and that they have not had a satisfactory explanation at to why US$50 million is a reasonable amount when all it really does for the Primary Insurers is resolve some defence costs and has no direct relationship to any damages claimed.

The Inside Directors

50 The position of the Inside Directors was advanced primarily by counsel on behalf of Lord and Lady Black. It is their position that in agreeing to the Cardinal Settlement, American Home has breached an entitlement they have as insureds to advance to the Blacks all fees, costs and expenses incurred by them in defence of both the International Illinois action and the U.S. consolidated Class Action, as well as those incurred in the Cardinal action and in other proceedings.

51 The basis of the position of the Blacks is that they were owed a duty by the Primary Insurers:

(i) to advise them of the mediation;
(ii) not to preclude them from participating in the mediation; and
(iii) to provide them with details of the Cardinal Settlement, which was refused until after it was executed.

52 In addition, it is urged that the effect of the Settlement results in an improper preference choice as between insureds and is improvident in the sense that US$50 million is excessive for the release of only the Outside Directors in an otherwise dormant and stayed proceeding.

Position of Richard Perle

53 Mr. Perle is in a unique position as a director of International. It is his position that the Primary Insurers are in breach of their contractual obligations to him, since he was not included in the Cardinal Settlement as an Outside Director.

54 While Mr. Perle served on the Executive Committee of International from 1996 to 2003, he has never been a member of management or an officer of International. He was, however, CEO of Hollinger Digital LLC, a subsidiary of International.

55 Mr. Perle's complaint is that his individual rights were not considered during the settlement process and that he was entitled to have them addressed prior to completion of the Settlement. I accept the evidence that Mr. Perle was characterized by Mr. Mitrovic of American Home as a "grey hat." This was largely because Mr. Perle was added as a defendant in the Special Committee Illinois action commenced by the Company on the basis of his participation in receiving certain compensation payments.

56 In essence, Mr. Perle claims that both the Primary Insurers and International failed to adequately take into account his particular situation in conducting settlement negotiations and in reaching settlement, without giving him detailed reasons why he was not so included. In so doing he says, they are in breach of their respective contractual obligations to him.

Analysis and Law

57 The basic position of International and its Primary Insurers is that the conditional Settlement that is before this Court and the court in Delaware for approval should be found to be reasonable within the applicable legal test in each jurisdiction.

58 The applicants submit that neither the insured Inside Directors nor the Excess Insurers have raised concerns that would justify the Courts withholding approval when the Primary Insurers have a contractual obligation to International to not unreasonably refuse to consent to the proposed settlement.

59 Under the Cardinal Settlement, the insured Inside Directors are not deprived of the ability to object to the Settlement in the Delaware Court. The effect of the Settlement is to resolve the derivative action as against all directors, not just the Outside Directors. What it does not do is release the Inside Directors from further claims against them by International that will continue in the action in Illinois. The Outside Directors do obtain the benefit of that release.

60 International and the Primary Insurers urge that the task before this Court is not to make a definitive finding as to whether the proposed settlement is reasonable. Rather, they suggest, and I agree, that the task of this Court is to determine whether the process by which the Settlement was concluded, taking into consideration the contractual rights and entitlements of all parties including International, the Primary Insurers, the Excess Insurers and all of those who claimed to be insured was reasonable.

61 The test in my view is, was there a reasonable basis for the Settlement, taking into account the competing interests of the various constituents? I accept that correctness of the Settlement itself is not the test; rather, was the Settlement, in all the circumstances, within the range of reasonableness, recognizing that it was a compromise?

62 In Ontario New Home Warranty v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, Winkler J. of this Court commented on the approval process of a Class Proceeding. I am of the view that his comments in the following paragraphs are appropriate to the considerations before me:

[88] Finally, I turn to the settlement. For a settlement to be approved it must be fair, reasonable and in the best interests of the class and, as stated in Dabbs, will generally take into account factors such as:

1. likelihood of recovery or likelihood of success;
2. amount and nature of discovery, evidence or investigation;
3. settlement terms and conditions;
4. recommendation and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendation of neutral parties, if any;
7. number of objectors and nature of objections; and
8. the presence of arm's length bargaining and the absence of collusion.

[89] The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described by Sharpe J. in Dabbs v. Sun Life Assurance Co. (No. 2) (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Gen. Div.) as follows at p. 440:

> ... all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.

[93] ... Further, the terms of the settlement were arrived at as a result of intensive mediation conducted by an experienced arbitrator with specific knowledge of the factual background. The settlement benefits to the plaintiff class are well within the range of reasonableness.

[94] In conclusion, I find that the settlement is fair and reasonable and in the best interests of the class as a whole.

63 Having heard the additional evidence by way of affidavit and cross-examination before me, particularly that of Judge Politan and Mr. Van Horn, I make the following findings in response to the questions raised at paragraph 16 of the previous endorsement:

a) I am satisfied that given his mandate and his preliminary considerations of issues and amounts, it was neither inappropriate nor necessary to involve counsel for any of the directors or Excess Insurers in the process before Judge Politan. He quickly became aware that the Class Action would not be included in the settlement process and that in his view, given the costs of the various actions and the remaining amount of insurance available, the Primary Insurers at least in the first instance, could represent the interests of the Outside Directors. There was no party before him suggesting settlement on behalf of the Inside Directors.

b) I am satisfied on the evidence that, given the complexities of the Class Action in Illinois, the claim of the Special Committee in Illinois and the mounting costs associated with continuance of the derivative action, that it was neither reasonable nor practical to attempt to resolve all claims involving the Outside Directors in all actions.

c) The issue of approval of the Delaware settlement will be addressed separately.

d) There was some evidence before me relating to the amount of the Settlement. The issue of mediation privilege will be addressed separately. There are several factors on which I rely to conclude that at least for the purposes of approval by this Court, the figure of US$50 million is not unreasonable:

   i. The Settlement did not take place during the mediation conducted over several sessions between August and October 2004. The parties were engaged for several more months in negotiation before it was completed.
   ii. Judge Politan was satisfied that based on the mediation process before him, the figure was within a reasonable range.

   Given the costs being absorbed by International in respect of itself and Outside Directors rising to the millions of US dollars exposure must include costs as well as risk.

e) I am satisfied that the Excess Insurers (although aware of the discussions) were not directly consulted on the issue of reasonableness, since the negotiations did not include (subject to the issue of defence costs to be addressed below) exposure to the Excess Insurers for liability indemnity.

   Concern was expressed on behalf of the Excess Insurers that the Delaware Court would only be interested at the Settlement approval hearing that the US$50 million figure provided was enough for the plaintiffs, not that in the circumstances it was too much.

   I accept that the Excess Insurers are not automatically parties with standing in respect of the Settlement approval before the Delaware Court. To the extent that any leave or approval is appropriate from this Court to allow the insurers to present their views to the Delaware Court, it is granted. I would expect that if the Delaware Court would conclude that the facts could not support liability on Outside Directors, that the Settlement would not be approved. I am supported in this approach by reference to the decision of the Court of Appeal for Ontario in Re Ravelston Corporation and Ravelston Management, [2005] O.J. No. 5351, Docket M33075 (November 10, 2005), where in reference to an issue as to whether Ravelston could be summonsed criminally in Illinois, the Court upheld Farley J.'s conclusion that it was not necessary to answer a question of foreign law but rather did the Receiver act reasonably in deciding what to do. I am satisfied that in

making the Settlement subject to approval of Courts both in Ontario and in Delaware, the applicants have acted appropriately.

I note that in any event, the opposing directors are parties with standing and take the position before this Court that they are entitled to take before the Court in Delaware: that the applicants have not established that the amount of the Settlement in respect of the Outside Directors is reasonable or prudent.

f) I have been advised and accept that privilege was claimed in respect of the details of the mediation process, since that was the basis on which both the mediation was conducted and the Settlement was concluded. I have heard sufficient evidence of process that I see no basis on which it would be necessary or appropriate to violate a process into which the parties entered on the basis of confidentiality.

64 I am satisfied that the process of the Settlement meets the test of procedural reasonableness. International saw the opportunity to recover from proceeds of insurance a sum of money in partial recompense for wrongs committed against the Company.

65 The Primary Insurers who had not established a basis for denying coverage in respect of the Outside Directors legitimately felt obligated to respond to the request of its insureds being International and Outside Directors.

66 Mediation was an appropriate step to undertake. An experienced and highly qualified mediator in Judge Politan was in the best position to determine the issues of who should be involved, what could be accomplished and how the process should be carried out.

67 Judge Politan had the benefit initially through information provided by the Chairman of the Special Committee and later from the Report of that Committee itself to allow determination that a settlement of the Class Action was not possible, nor was it possible to resolve International's claims against management directors.

Summary Judgment in Delaware

68 I accept the conclusion reached by American Home, Chubb and International as being reasonable, that there was at least risk that a summary judgment motion brought in the Delaware Court on behalf of the Outside Directors might not succeed.

69 Counsel for the Excess Insurers as well as the Inside Directors submitted that this Court should find that under recent appellate authority in the appellate division of the Delaware Court of Chancery, a motion for summary judgment brought on behalf of the Outside Directors would likely succeed, thereby rendering the payment of US$50 million on their behalf under the Settlement in effect improvident.

70 This Court is not in a position to determine what would or might have been a conclusion from a summary judgment motion under Delaware law had it been brought at a time before the Settlement.

71 Suffice to say I accept that the conclusion reached by the parties to the mediation and Judge Politan the mediator, that there was risk that the summary judgment motion would not succeed, to be a reasonable one.

72 Without in any way wishing to be seen to opine on Delaware law, the recent decision in Re The Walt Disney Company Derivative Litigation, 2005 W.L. 2056651 dated August 9, 2005, illustrates the evolving nature of director and officer legal responsibilities. The decision is a successful appeal from a lower court judgment that it is urged restores the business judgment rule in Delaware.

73 Whether under statute or the common law in many jurisdictions across states and borders, the standard to be applied to particular facts illustrates an evolving area of law that makes prediction of result in any given case of director and officer negligence difficult.

74 As well, most jurisdictions (like Ontario) that have a summary judgment procedure apply their test in favour of trial where there are facts significantly contested, particularly when credibility is in issue.

75 On the material before me, I am satisfied that it was a reasonable exercise of judgment on the part of those directly involved in the settlement process to conclude, as they did, that given the risk that a summary judgment motion would not succeed, a settlement should proceed without that determination.

76 I accept the proposition that a mediation and settlement conducted under terms of confidentiality should be honoured. Indeed, it is a hallmark of most mediative processes that they are conducted in a without prejudice confidential atmosphere.

The Settlement Process

77 I am satisfied, having read and heard the evidence of the witnesses, that for the purpose of determining the reasonableness of the process (including their view on the amount of the Settlement), it is not necessary for this Court's determination to go further into the details of the determination of the quantum.

78 Issues of the quantum of the Settlement and consideration of the exposure of the Outside Directors as opposed to Inside Directors is in my view a matter for the Court in Delaware.

79 The result of the Cardinal Settlement is to reduce in complexity a significant amount of litigation as well as the associated defence costs. Among other cases that are substantially resolved is the claim by Inc in the Superior Court of Ontario restraining or preventing American Home and Chubb from completing the Settlement.

80 The claims in the Special Committee of International against the Outside Directors, as well as the claims against the Inside Directors in the Cardinal action are to be dismissed. Those against the Inside Directors are without prejudice to International's continuance of the claims against Inside Directors in the Special Committee action.

81 Unlike the cases relied on by the Excess Insurers, this is not a case of an improvident settlement. The proposed settlement is conditional on approval by two Courts in two jurisdictions. I recognize that the Outside Directors will still be involved in the Class Action but their removal from two actions will substantially reduce defence costs.

82 In the Delaware Court, an argument will be advanced by at least the Inside Directors that the Settlement should not be approved by that Court, since the proposed amount does not realistically

deal with the risk faced by the Primary Insurers on behalf of the Outside Directors. I have granted leave, to the extent that this Court can, to the Excess Insurers to join in advancing those submissions in Delaware.

83 In addition, any approval of the Settlement in this Court will be conditional upon a determination by this Court of the amount (if any) of defence costs for which the Primary Insurers or International should bear responsibility. That determination will depend on what defence costs submitted in accord with the policy terms were payable to any of the insured up to the date of the Settlement Agreement.

84 As I am satisfied with respect to the process of the Settlement, taking into consideration the rights of Excess Insurers and insureds, the onus rests on them to establish it is not fair and reasonable to all insureds and insurers.

85 In Transit Casualty Co. v. Spink Corp. (1979), 94 Cal. App. 3d 124, an excess insurer successfully recovered damages against both a primary insurer and the insured when it was called upon to contribute to a judgment exceeding the primary limits on the basis that it had not been notified by either the insured or the primary insurer of an offer of settlement that, if accepted, would have eliminated exposure on the part of the Excess Insurer.

86 As the Court noted at p. 8 of its judgment:

> The parties [being insured, primary and excess insurers] occupy a three-way relationship, which regardless of privity gap may engender reciprocal duties of care in the conduct of settlement negotiations; when a damage claim threatens to exceed the primary coverage, the reasonable foreseeability of impingement on the excess policy creates a three-way duty of care ..."

87 I accept the statement as a general proposition.

88 A number of authorities from United States Courts, among them Hartford Accident and Indemnity Co. v. Michigan Mutual Insurance Co. (1983), 93 A.D. (2d) 337 (Sup. Ct. of N.Y. App. Div.); American Centennial Insurance Co. v. Warner-Lamber Co. (1995), 681 A. 3d 1241 (Sup. Ct. of N.J.); and Schal Bovis, Inc. v. Casualty Insurance Co. 732 N.E. 2d 1082 (Ill. App. 1 Dist. 1999), emphasize the nature of the duty of good faith and in circumstances fiduciary duty that exists between insurers. The American Centennial decision refers to "The Guiding Principles for Primary and Excess Insurance Companies" as supporting and elaborating the good faith duties.

89 A similar "Agreement of Guiding Principles Between Primary and Excess Liability Insurers Respecting Claims" has been promulgated on behalf of the insurance industry by the Insurance Bureau of Canada and elaborates good faith principles.

90 In addition to these references, at least two Canadian decisions at the appellate level have recognized that the relationship and duties as between primary and excess insurers may extend beyond contract. In Broadhurst & Ball v. American Home Assurance Co. (1990), 1 O.R. (3d) 225 (C.A.), the Court of Appeal for Ontario, after noting that there was no contract term between the insurers regarding the defence, said at p. 241:

> Nonetheless, their obligations should be subject to and governed by principles of equity and good conscience, which, in my opinion, dictate that the costs of litigation should be equitably distributed between them.

91 In Aetna Insurance Co. et al. v. Canadian Surety (1994), 149 A.R. 321 (C.A.), the Alberta Court of Appeal, in the absence of contract between insurers and dealing with a complicated factual situation, said at paragraph 131:

> Understanding these relationships is important because duties may flow from a primary insurer to an excess insurer under certain circumstances.

92 I am satisfied that both American Home and Chubb clearly understood the nature of their duties to the Excess Insurers and have done their best to live up to them. The following factors support the conclusion I have reached:

1. The Excess Insurers were aware that settlement discussions were undertaken by International and the Primary Insurers.
2. The Primary Insurers advised the Excess Insurers of the position of International, that a settlement of the Cardinal action would benefit the plaintiffs in that action, the insured Outside Directors and International.
3. The Primary Insurers proceeded in good faith in the belief that settlement could be achieved without risk to the excess layers.
4. The Settlement Agreement itself required Court approval, both in the jurisdiction of the action (Delaware) and in the jurisdiction for determination of policy rights (Ontario) giving an opportunity for Excess Insurers and other insureds to voice their opposition in both forums.
5. The Settlement was made in circumstances where, given the number of claims to which they were exposed in multiple jurisdictions, there could be little doubt that the limits of the primary layers would be exhausted for indemnity for judgment and/or defence costs, with the costs of the insurers themselves adding to the their expenses.

93 The sole complaint that the Excess Insurers could have is that they were not notified of the settlement negotiations before they were conditionally concluded. I am satisfied that on the material before me, the actions of the Primary Insurers in proceeding as they did were not in breach of the duty of good faith to the Excess Insurers. Since the Excess Insurers had not agreed to coverage of the Cardinal action and had denied coverage to Inside Directors, there was little point in having the Excess Insurers at the negotiating table and they did not ask to be present.

94 I do accept that had the effect of the Settlement been to allow the Primary Insurers to avoid the payment of defence costs that had already been submitted to them and for which they were obligated to pay, that would raise a question regarding the issue of good faith.

95 It is not clear on the material that that has been the case. I am satisfied that in negotiating and finalizing the Settlement, all of Cardinal, American Home, Chubb and International believed that the claims were being resolved within the limits of the primary policies.

96 I am also satisfied that taking into account the Report of the Special Committee, American Home and Chubb reasonably concluded that the claims against Outside Directors could exceed pol-

icy limits as a matter of Delaware law. It is not for this Court to decide as between the legal opinions in Delaware law that have been filed by either side by expert opinion. Rather, I conclude based on the evidence filed on behalf of International and the Primary Insurers that there is at least a reasonable arguable opinion. The necessary approval by the Delaware Court gives the opportunity for the other side of the case to be fully argued.

Duty of the Primary Insurers

97 The Cardinal Settlement raises the question of the duty of an insurer to other insurers and insureds when a settlement occurs between primary layers the effect of which is to limit the pool available for other claims by other insureds who will look to Excess Insurers for coverage, defence costs and indemnity.

98 There is no suggestion before me that the initiation, negotiation and finalization of the Settlement as between the Cardinal plaintiffs, International and Outside Directors (including the Primary Insurers) imposed a duty on those insurers not to fund that settlement if it could be made within limits. The Primary Insurers had accepted coverage and the insured were calling on them to honour indemnity obligations.

99 The obligation on an insurer to indemnify and hold the insured harmless arises when liability of an insured to a third party is established and quantified by judgment, arbitration award or settlement [emphasis added]. See Cox v. Bankside, [1955] 2 Lloyd's Rep. 437 at 442 (G.B. Div. Comm. List.)

> When a claim is made under a first party policy the insurer must deal fairly and in good faith with the insured. This requires the insurer to make an objective analysis of the claim and to pay the claim, promptly and in full, when the criteria for payment have been met. It bears emphasis, for the point is often overlooked, that this aspect of the insurance relationship is not adversarial in nature.

Gordon Hilliker, Insurance, Bad Faith (Markham: LexisNexis Canada Inc., 2004) at p. 21.

703535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London (2000), 184 D.L.R. (4th) 687 (Ont. C.A.) at p. 694.

100 I am satisfied that had the Primary Insurers failed to participate in the negotiations and to promptly deal with the subsequent settlement proposal, it would have exposed the Outside Directors to greater risk and put them in breach of their duty to their insured.

101 I am also satisfied that as a matter of Ontario law, without a justifiable basis, any refusal to participate in the negotiations and to respond to the proposed settlement would constitute a breach of the duties the Primary Insurers owed to the Outside Directors. The fact that there were other insureds under the policies and the fact that the potential existed for claims for indemnity to be made at some later point, did not provide a justifiable basis for the Primary Insurers to refuse to participate in the negotiations or to refuse to respond to the proposed settlement in a fair and prompt manner. See 703535 Ontario Inc., supra, at p. 695; Shea v. Manitoba Public Insurance Corp. (1991), 55 B.C.L.R. (2d) 15 (B.C.S.C.) at p. 85; Dillon v. Guardian Insurance Co. (1983), 2 C.C.L.I. 227 (Ont. H.C.) at p. 230.

102 The case of Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, has been given wide attention in the legal profession in Canada and among other matters, stands for the proposition that con-

sent on the part of the insurer cannot be unreasonably withheld and failure to consent to a reasonable resettlement can constitute an independent bad faith action, exposing the insurer to punitive damages in certain circumstances (see p. 639).

103 I accept that the Primary Insurers acted reasonably in determining that the claims of the Outside Directors fell within coverage in the Cardinal action. It was suggested in argument that since the Special Committee action when initiated, initially included the Outside Directors, the effect of which would have been to trigger the "insured vs. insured" exclusion.

104 I conclude that the Special Committee was reasonable in reaching its decision that recovery of US$48 million in the Cardinal action as against the Outside Directors was reasonable and in the best interests of the Corporation.

105 Had the Special Committee let the Cardinal action proceed without taking it over on the Company's behalf as against the Inside Directors (which is the effect of the Settlement), there would have been continued exposure for the Outside Directors without eliminating all the insurers' indemnification obligations.

First Past the Post

106 The Inside Directors object to the Cardinal Settlement on the basis that it does not include them and there may be insufficient funds in the "tower of insurance" to satisfy the defence costs and Settlement amounts to which they should be entitled.

107 In the first place, there is no suggestion in the material before me that any other insureds under the Policies have negotiated, attempted to negotiate or settled any claims against them or that any of the insurers have been requested to participate in or consent to any such resolution.

108 The recent criminal proceedings in the United States, which involve among others Lord Black, David Radler, Jack Boultbee and Peter Atkinson, all of whom were Inside Directors, would suggest that it will be some time, if ever, before the insurers accept coverage for those Inside Directors.

109 Mr. Perle now finds himself in a rather unique position among the directors. I accept that once the Special Committee included him as a defendant and kept him in as a defendant, the Primary Insurers were not presented with a settlement for which they were bound to cover on his behalf. Should he be successful in a summary judgment motion in the Special Committee action, he may well have a claim for indemnity as against International. Such claim may or may not be covered under the remaining policies. At this stage I am unable to conclude that there is any claim for bad faith on the part of the Primary Insurers or International for a failure to secure a settlement on behalf of Richard Perle.

110 There are few cases in this jurisdiction that deal with the rights as between insureds when one insured is indemnified by an insurer and the effect of the indemnity is to substantially reduce or eliminate the amount available for indemnity of another.

111 The analysis starts with the English Court of Appeal decision of Cox v. Bankside, supra. It stands among other things for the proposition that the rights of the respective parties are several rather than joint rights, thereby permitting respective insureds the ability to address, and resolve, claims independent of one another:

> Each contractual right of indemnity is in theory a separate right. When it accrues it gives rise to a new cause of action in its own right. It does not merge with the right previously accrued, so as to create a new cause of action for the joint amount of the two indemnities ...
>
> The true position is that individual third party liabilities give rise to no more than inchoate or contingent rights ... They are several, not joint rights. Each right will prove of value only if quantified liability is established before the limit of cover is reached.

112 There simply is no basis for an insurer to refuse to pay a valid and determined claim that falls within coverage without the risk of exposure to a claim for bad faith. See 703535 Ontario Inc., supra, at p. 694-5.

113 This principle was adopted by Farley J. of this Court in Re Laidlaw Inc. (2003), 46 C.C.L.I. (3d) 263 (S.C.J.) at p. 272 to the effect that the mere fact that other insureds have, or may have, claims that are not finally determined, cannot operate to prevent those otherwise entitled to indemnity from receiving it.

114 Farley J. went on to say, in respect of policy language similar to that in issue here:

> [I]t appears clearly contemplated that finally determined claims under the subject Policies will be paid as presented on a first come, first served basis. I do not see that there is any provision in the subject Policies which would allow or require Homeco to consider claims or potential claims which have not been finally determined by judgment or settlement as opposed to its obligation to pay claims which have been finally determined. To impose a requirement on Homeco (and a restriction on a successful claimant's direct right) which would oblige Homeco to defer payment (and the claimant collection) until such time as all claims and potential claims under the subject Policies are known and finally determined would constitute an unwarranted rewriting of the subject Policies.

115 The fact that a judgment or settlement may deplete or even extinguish proceeds available to other insureds does not detract from the principle: see Solway v. Lloyds Underwriters, [2005] O.J. No. 1331 (S.C.J.) at paragraphs 65, 69.

116 I was referred to several U.S. decisions that questioned the 'first past the post' principle. In my view, the facts can be distinguished from this case and they are not in accord with authorities in or adopted in Canada, which I conclude are compelling.

117 There are several United States decisions that are in accord with the principles set out above in Cox v. Bankside and Re Laidlaw. While each of those decisions turns on its individual facts, the most significant of these for present purposes is In Re Rite Aid Corporation Securities Litigation, 146 F. Supp. 2d 706 (E.D. Penn 2001). Rite Aid dealt with a securities class action against certain officers by which the corporation and its insurers assigned certain claims to its shareholders and settled with some but not all the defendants.

118 The non-settling defendants were held not to have standing to object to that part of the Settlement that did not affect them but did have standing to object to settlement terms that would eliminate their claims to indemnity.

119 In concluding that the insurer was not in breach of any duty of good faith, the Court rejected the proposition that an insurer may never settle claims against their policies unless the settlement involves all insureds under the policy. In relying for support on the decision in Re Anglo-American 670 A. 2d 194 (Pa. Cmwlth 1995), the Court in Rite Aid quoted the following from p. 199, adding the "caution that, in order for the insurer to accept the settlement offers, they must be reasonable" lest the insurer breach its duty of good faith. Travellers Indemnity Co. v. Citgo Petroleum Corp 166 F. 3d 761 (5th Cir. 1999) is to the same effect at p. 768. I accept the above proposition as being in accord with Ontario decisions.

Defence Costs

120 I noted at the beginning of these reasons that the major concern of both the Inside Directors and the Excess Insurers was that the US$50 million Settlement would eliminate those funds being available for defence costs.

121 I also noted the concern that since this was a settlement of a derivative action, it might be said that the insurers, the plaintiffs in the Cardinal action and International itself might not have the incentive to reach an arm's length settlement that would occur in other circumstances.

122 The withdrawal by both Inc. and the Ravelston entities of their opposition to approval of the Cardinal Settlement was made conditional. Those entities seek to be relieved from exposure to costs and to preserve their claims for defence costs that may relate to this and other proceedings if the Cardinal Settlement does not stand in priority as a claim under the policies.

123 It was submitted on behalf of one or more of the Excess Insurers that the time for determination of whether or not the proposed settlement was reasonable would be after at least a trial of issue, which would look at all aspects of the timing, the amount and the degree of communication as well as the merits of the defence on the part of the Outside Directors.

124 I have concluded, based on the extended procedure before me, including the evidence adduced, that the process by which the Settlement was reached was fair and reasonable and in accordance with the obligation of good faith by American Home and Chubb to all its insureds and to the Excess Insurers.

125 I have concluded that the relief sought by the Applicants (being American Home, Chubb and International) should be granted subject to the following conditions:

1. That the Cardinal Settlement itself is approved both as to quantum and the legal principles involved by the Delaware Court.
2. To the extent that there are defence costs, which were submitted to and payable by the Primary Insurers prior to the date the Settlement was completed, those defence costs shall be determined by this Court and form part of the US$50 million whether payable by the insurers or by International.

Conclusion

126 The applications of American Home, Chubb and International seek declaratory relief authorizing the funding of a settlement reached in a derivative action commenced in the State of Delaware in the sum of US$50 million (subject to retention amounts). The Settlement is on behalf of claims against directors of International.

127 Based on review of the process leading to settlement, and the risk related to a summary judgment motion not proceeding, I find that in the circumstances of the process of this Settlement, that it be authorized at this time and subject to the conditions below that the Primary Insurers American Home and Chubb have exhausted their contractual limits and are released from any other claims against them from events arising under their policies.

128 The two conditions to which the relief granted is subject are:

(a) that the Delaware Court approve the Settlement as fair and reasonable, bearing in mind the issues raised by the Inside Directors and Excess Insurers.

(b) That any remaining issues regarding the obligation of American Home, Chubb or International's responsibilities for defence costs incurred, submitted and payable prior to completion of the Settlement, are resolved or determined by this Court.

129 Following determination by the Delaware Court of the propriety and approval of the Settlement under Delaware law, the parties may make written submissions on the issue of costs. If other issues arise from this decision, I may be spoken to.

C.L. CAMPBELL J.

TAB 7

Case Name:

Sun-Times Media Group, Inc. v. Royal & Sunalliance Insurance Co. of Canada

Between
Sun-Times Media Group, Inc. and Hollinger Inc., (Applicants), and
Royal & Sunalliance Insurance Company of Canada, ACE INA Insurance Company, Zurich Insurance Company, AXA Corporate Solutions Assurance, GCAN Insurance Company, Temple Insurance Company, Continental Casualty Company, and Lloyd's Underwriting, (Respondents), and
Ralph M. Barford, (Intervenor)

[2007] O.J. No. 4544

161 A.C.W.S. (3d) 878

Court File No. 07-CL-7140

Ontario Superior Court of Justice

C.L. Campbell J.

Heard: October 22, 2007.
Judgment: November 19, 2007.

(74 paras.)

Civil procedure -- Settlements -- Approval -- Application by excess insurers for approval of settlement in actions against them by insured Sun Times Media and Hollinger Inc. -- Excess insurers challenged coverage -- Settlement agreement was to make funds available to the insureds to settle pending class actions against them and to obtain coverage for some of the claims submitted by insureds -- Officer and director of one insured opposed settlement -- Application allowed -- Settlement agreement was reasonable -- Settlement did not impair rights of opposing party to have his claim for defence costs in pending action against him adjudicated which was only claim he presented.

Insurance law -- Co-insurance -- Primary or excess insurance -- Application by excess insurers for approval of settlement in actions against them by insured Sun Times Media and Hollinger Inc. --

Excess insurers challenged coverage -- Settlement agreement was to make funds available to the insureds to settle pending class actions against them and to obtain coverage for some of the claims submitted by insureds -- Officer and director of one insured opposed settlement -- Application allowed -- Settlement agreement was reasonable -- Settlement did not impair rights of opposing party to have his claim for defence costs in pending action against him adjudicated which was only claim he presented.

Application by excess insurers for approval of settlement in actions against them by insured Sun Times Media and Hollinger Inc. -- Excess insurers challenged coverage -- Insured commenced actions for coverage against excess insurers -- Various class actions pending against insureds -- General effect of settlement agreement in present action was to make funds available to the insureds to settle class actions and to obtain coverage for some of the claims submitted by insureds, while at the same time concluding coverage actions and extinguishing all of the excess insurers' potential for future liability under their respective policies -- Barford, a former director and officer of Hollinger Inc. opposed settlement on ground that settlement precluded Barford from seeking insurance coverage in respect of his defence costs in action brought against him -- HELD: Application allowed -- Settlement agreement was reasonable and should be approved in declaratory terms sought by the applicants -- Settlement was conducted with bona fides on part of all parties and in good faith -- Interest of Barford as an insured party was not violated -- No judgment in settlement made that would require insurers to make payments on behalf of Barford -- Possible that insured vs. insured exclusion in policies might operate to deny coverage to Barford -- Settlement did not impair rights of Barford to have his claim for defence costs adjudicated which was only claim Barford presented.

Counsel:

Eric R. Hoaken, Kirsten A. Thoreson for the Applicant Sun-Times Media Group, Inc.

Geoffrey D.E. Adair for the Applicant Hollinger Inc.

Chris Reain for GCAN Insurance.

Gary Luftspring, for Royal & Sunalliance et al.

Bonnie A. Tough, Jennifer Lynch for the Intervenor.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- An Application is made by two entities essentially for Court approval of a settlement reached between various insured parties and insurer entities known as Excess Insurers.

2 This is not the first time that Sun-Times Media Group Inc. (formerly Hollinger International) (and referred to hereafter as "STMG") and Hollinger Inc. ("Inc.") have sought approval and declaratory orders in respect of settlement reached with insurers of directors, officers and related entitles of the two corporations.

3 The relief sought in this Application is opposed by Ralph Barford, a former director of Inc. The basis of his opposition is that the effect of the settlement would deprive him of access to a portion of the insurance pool to fund his defence costs and any liability he may face in defending the civil action in Ontario brought against him by Inc.

Background Facts

4 In 2002, a U.S.$130,000,000 program of executive and organization liability insurance (the "Program") was issued to STMG, Inc. and The Ravelston Corporation Limited ("Ravelston"), with a policy period of July 1, 2002 to July 1, 2003. The Program included the following insurance policies or layers: (a) a U.S.$20,000,000 primary layer issued by American Home Assurance Company ("American Home"); (b) a U.S.$25,000,000 first excess layer issued by Chubb Insurance Company of Canada ("Chubb"); (c) a U.S.$5,000,000 second excess layer issued by American Home; (d) a U.S.$40,000,000 third excess layer issued by the Third Layer Insurers (the "Third Layer Policy"); and (e) a U.S.$40,000,000 fourth excess layer issued by the Fourth Layer Insurers (the "Fourth Layer Policies.")

5 The policy issued by American Home provides that the named corporate entities, including STMG and Inc., are entitled to be indemnified in respect of what is defined as an "Indemnifiable Loss." An "Indemnifiable Loss" occurs when a corporate insured has indemnified or is permitted or required to indemnify an "Insured Person" pursuant to law or contract or by-law or operating agreement. "Insured Persons" include officers and directors of the insured corporations. "Loss" is a defined term under the policy that includes settlements, judgments and Defence Costs, which is also a defined term under the policy. The other policies in the Program follow form to the primary American Home policy and/or other underlying policies.

6 The policy in question was the subject matter of a decision by this Court as it related to the approval of a proposed settlement of a derivative action brought against the predecessor to STMG, which was described as the Cardinal Settlement. The effect of the approval of the settlement was to grant declaratory relief that exhausted the layers referred to in paragraph 4 above (a), (b) and (c) and released American Home and Chubb from further liability. (See *Hollinger International Inc. v. American Home Assurance Co.*, [2006] O.J. No. 140 (S.C.J.)

7 Following declarations by this Court by order dated November 13, 2006, the Delaware Court subsequently approved the Cardinal Settlement as being fair, reasonable and in the best interests of STMG's shareholders. American Home and Chubb subsequently made the payments that had been authorized by the Cardinal Order. Following the exhaustion of the limits of the American Home and Chubb policies, two more layers of insurance, with a total of U.S.$80,000,000 coverage, remained available through the policies issued by the Excess Insurers.

8 There has been outstanding since early 2004 various purported class actions against STMG and its former officers and directors, alleging violation of securities laws in the United States, misrepresentations and other misdeeds. These actions in the United States were subsequently consolidated for pre-trial purposes, becoming *In re Hollinger International Inc. Securities Litigation*, Cons. Civil Action No. 04-C-0834 (the "Illinois Class Action"), in the United States District Court for the Northern District of Illinois, which remains pending.

9 There have as well been purported class actions commenced in Saskatchewan, Ontario and Quebec against officers and directors of STMG and Inc. mirroring the allegations in the Illinois Class Action. Both the Illinois Class Action and the Canadian Class Actions are the subject of the

settlement for which approval will be sought are part of the overall settlement but not part of the relief sought at this time in this Court.

10 Following the exhaustion of the limits of the American Home and Chubb policies, STMG and Inc. sought payment by the Excess Insurers of claims that had been submitted to the Excess Insurers. The Excess Insurers took coverage positions that called into question the availability of coverage under their policies.

11 Specifically, the coverage positions raised by the Excess Insurers following the Cardinal Order included (a) the allegation that various insureds involved in the Cardinal Settlement had breached the terms and conditions of the Third Layer Policy; (b) the allegation that STMG had intentionally withheld the submission of at least U.S.$20,000,000 in defence costs and fees in order to circumvent certain of its alleged obligations under the excess policies; (c) the allegation that Hollinger International/STMG and the outside directors on whose behalf the Cardinal Settlement was concluded were in breach of certain provisions of the Third Layer Policy; (d) the assertion that a plea agreement entered into by F. David Radler with the United States Attorney for the Northern District of Illinois triggered certain exclusions under the policies which would have the effect of depriving STMG and other insureds of coverage; and (e) the contention that a "Cooperation Agreement" reached between Inc. and the United States Attorney General's office for the Northern District of Illinois triggered certain exclusions in the policies which would deprive Inc. of coverage.

12 The Excess Insurers declined to pay certain claims made by Inc., which resulted in another application that I heard resulting in a judgment that the coverage issues in question were premature at this time (see decision in Court file number 05-CL-5951C dated March 22, 2007.)

13 Coverage actions were commenced by STMG and its former insured directors both in Ontario and in Delaware. An Order was made on June 20, 2007 against the Excess Insurers.

14 The Excess Insurers then sought, among other things, to dismiss or stay the Delaware Action on the basis that the Ontario Action was filed first and was pending. While the Excess Insurers proceeded with this motion, the insureds made a motion for partial summary judgment in relation to certain claims for defence costs. The motions were briefed and argued before the Honourable Judge Richard R. Cooch of the Delaware Court on April 9, 2007.

15 On June 20, 2007, Judge Cooch issued a memorandum opinion denying the Excess Insurers' motion to stay or dismiss the Delaware Action in favour of the pending Canadian proceedings. Delaware was held to be an appropriate forum for resolution of the insurance coverage issues. Judge Cooch also issued a second memorandum granting the insureds' motion for partial summary judgment. As a result of this decision, the Excess Insurers were obligated to advance the defence costs and fees of the insureds.

16 Since the time that the coverage defences were first raised by the Excess Insurers, there have also been criminal convictions of three STMG officers, Black, Boultbee and Atkinson which could lead to further and more vigorously asserted coverage defences not only against the convicted individuals, but also against the companies in which they were senior officers, in accordance with the imputation clause of the policies in the Program.

17 Starting in late 2006, settlement discussions commenced between counsel to STMG and counsel for plaintiffs in the Illinois Class Action. Discussions evolved into a mediation process in-

volving the Hon. Nicholas H. Politan who had previously successfully mediated the Cardinal Settlement.

18 As a result of the mediation process conducted by Judge Politan, and through subsequent communications among and between counsel, two settlements were achieved, those being (a) an insurance settlement, as reflected in the "Settlement Agreement;" and (b) a settlement of the Class Actions, as reflected in a document styled as "Stipulation and Agreement of Settlement of U.S. and Canadian Class Actions" (the "Class Action Settlement.")

19 The parties to the Settlement Agreement are 24 insureds under the applicable policies, namely: STMG, Inc., Argus Corporation Ltd., The Ravelston Corporation Ltd., Ravelston Management Inc., Conrad M. Black, Dwayne O. Andreas, Peter Y. Atkinson, Barbara Amiel Black, John A. Boultbee, Richard R. Burt, Raymond G. Chambers, Daniel W. Colson, Mark S. Kipnis, Henry A. Kissinger, Marie Josée Kravis, Shmuel Meitar, Richard N. Perle, F. David Radler, Robert S. Strauss, A. Alfred Taubman, James R. Thompson, Lord Weidenfeld of Chelsea, and Leslie H. Wexner (collectively, the "Settling Insured Defendants"); and the Excess Insurers.

20 I accept that the Settlement Agreement was the result of extensive consideration of the pending coverage issues, including but not limited to those asserted in the Coverage Actions.

21 The general effect of the Settlement Agreement is to 1) make funds available to the insureds to settle the Class Actions; and 2) obtain coverage for some of the claims submitted by insureds, while at the same time concluding the Coverage Actions and extinguishing all of the Excess Insurers' potential for future liability under their respective policies.

22 The parties submit that for the Excess Insurers, it was a fundamental term of the Settlement Agreement that the limits of their respective policies be deemed to be exhausted. This is because the principal reason that the Excess Insurers entered into the Settlement Agreement was to reach a complete, total and final resolution of the various coverage issues with respect to *all* insureds under their respective policies, and with respect to *all* matters that had been or *might be* presented for coverage.

23 Specifically, the Settlement Agreement involves the payment of U.S.$30,000,000 by the Third Layer Insurers on behalf of the insured defendants in the Class Actions, thus permitting the resolution of the Class Actions and thereby terminating four separate actions. The Settlement Agreement also involves a payment of U.S.$24,500,000 by the Fourth Layer Insurers to make funds available for the payment of claims made under the Program. In addition, the Settlement Agreement involves the dismissal of the ongoing Coverage Actions, which involve complex and highly-contentious coverage issues under the policies in question.

24 The Settlement Agreement is expressly conditioned and contingent on the Class Action Settlement becoming final and effective and is further conditioned on this Court issuing an order containing the relief that is requested herein and, if the Excess Insurers consider such an order to be necessary, on the Delaware Superior Court issuing a similar order.

25 STMG urges that if the Settlement Agreement is not approved by this Court, the Class Actions will continue and substantial defence costs, expenses and fees (likely exceeding several millions of U.S. dollars) will be incurred. In addition, if the Settlement Agreement is not approved, the Coverage Actions will continue, with the respective parties incurring substantial costs, expenses and fees.

26 The condition of this Court's approval was demanded by the Excess Insurers because, *inter alia*, other insured parties have, at various points in the past, suggested that coverage exists, or might exist, for other claims that are listed in Exhibit A to the Settlement Agreement; and the policies of insurance issued under the Program have, since the appointment of the Special Committee at STMG in 2003, been the subject of much dispute. Intervention by courts in two jurisdictions has been required on a number of occasions to resolve these disputes and to grant declaratory relief in relation to the interests, or potential interests, of those who are insured, or potentially insured, under the subject policies.

27 Pursuant to the terms of the Settlement Agreement, within five business days of full execution of the Settlement Agreement, letters (the "Letters") were required to be sent along with copies of the mutual release attached as Exhibit B to the Settlement Agreement (the "Mutual Release") to all 70 persons and entities who are listed on the document attached as Exhibit A to the Settlement Agreement (the "Exhibit A Persons and Entities"). The Exhibit A Persons and Entities include all of the potential insureds under the Excess Insurers' respective policies.

28 Though all Exhibit A Persons and Entities were served with the above described materials, Mr. Ralph M. Barford is the only party from the Exhibit A Persons and Entities list that has sought intervenor status in the within application.

29 The Letters advise the Exhibit A Persons and Entities of the execution of the Settlement Agreement and of the fact that, pursuant to the Settlement Agreement, the Excess Insurers will be released from further claims under their respective policies in exchange for specific payments.

30 As of August 7, 2007, Mutual Releases had been sent to all of the Exhibit A Persons and Entities by U.S. Mail. As of September 12, 2007, ten (10) executed Mutual Releases had been returned to counsel for STMG by the following Exhibit A Persons and Entities: Lawrence Green, Boni Fine, Mark Hornburg, Theodore R. Rilea, Horizon Publications, Inc., Hollinger Canadian Publishing Holdings Inc., The Sun-Times Company, Chicago Sun-Times LLC, Graham W. Savage and Paul B. Healy.

31 Service of the documents associated with this Application has been made in accordance with this Court's Order of August 22, 2007 for the purpose of the present hearing.

Position of Ralph Barford

32 Counsel for Barford submits that the Applicants cannot meet the test for the declaration sought, namely that the proposed settlement does not violate the "interests ... of any insured party" and that the terms and conditions of the settlement are a "good faith reasonable resolution of the coverage issues in dispute." On the basis of those declarations, the Applicants seek an exhaustion order in respect of the third and fourth layer policies.

33 It is Barford's position that the proposed arrangement with the insurers violates his interests as an insured under the policies, and from his perspective, is not a good faith reasonable resolution of the coverage issues. Accordingly, Barford objects to the declarations sought.

34 Counsel submits that Barford has incurred costs and is at significant risk of incurring further costs which, but for the orders requested by the Applicant, would be covered by the insurance policies. Ms. Tough submits on his behalf that the effect of the declarations sought, if granted, will be to deprive Barford of recovery for the costs he has incurred and his right to seek indemnity for future expenses.

35 It should be noted that Barford is not named as a Defendant in any of the underlying litigation referred to in the Applicants' material. Barford is named as a Defendant in Action No. 07-CV-327315-PD2 in the Ontario Superior Court - Toronto brought by Inc. against Barford by Notice of Action dated February 7, 2007 and Statement of Claim dated March 9, 2007 (the "Barford Action.")

36 Barford has submitted $51,151.00 in legal costs incurred in the confidential proceedings are claimable by him from the insurer upon non-payment by Hollinger Inc. Other costs incurred by Barford have been paid by Inc. as submitted by Barford.

Relief Requested

37 STMG submits that the principal issues on this application are whether (a) the terms and conditions of the Settlement Agreement reflect a reasonable resolution of the Excess Insurers' obligations under their policies having regard to the claims being made against their policies and having regard to the coverage defences being raised; (b) the process by which the resolution reflected in the Settlement Agreement was reached was a reasonable and good faith process reflecting principled negotiation and compromise; and (c) this Court should approve the Settlement Agreement, thereby discharging and releasing the Excess Insurers from further obligations in connection with their policies, and thereby permitting the resolution of a multiplicity of outstanding litigation.

38 On behalf of Barford it is submitted that the declaration sought, if ordered, will preclude Barford from seeking insurance coverage in respect of the Barford Action and accordingly the Application should be dismissed.

39 From the submissions made, I would expect that the resistance of Barford would be resolved if outstanding costs he has incurred were paid and the action against him by Inc. were dismissed. This has not taken place.

40 The Applicants respond to the position put forward by Barford by urging that in the particular circumstances, the settlement reached did fully discharge the Excess Insurers' duty of good faith and fair dealing owed to all insured based on a fair and objective analysis of the claims and their obligations.

41 In specific response to objections of Barford, the Applicants urge that the fact that Barford may be another insured under the Excess Insurers' policies, and the fact that the potential exists for him to make claims for indemnity at some future point, does not provide a justifiable basis for the Excess Insurers to refuse to respond to the proposed Class Action Settlement in a fair and prompt manner, or for this Court to decline to grant the relief requested herein. No claim has been presented for payment by Barford to the Excess Insurers and there is no evidence, it is submitted, to establish that any such claim, if submitted, would be covered.

42 Further, it is submitted that if Barford does subsequently have a claim that falls within coverage, the way in which the Settlement Agreement has been structured will permit him to seek payment of the claim in the context of the "Allocation Proceeding" that is expressly provided for in the Settlement Agreement. Accordingly, approval by the Court of the Settlement Agreement and the granting of the relief being requested causes no prejudice to Barford or any other potentially insured party.

43 The "Allocation Proceeding" refers to a process by which any insureds who would otherwise have claims to which they would be entitled to look to insurers for reimbursement may seek payment.

44 The material filed as well as previous proceedings involving these policies of insurance satisfy me that absent the settlement, the issues involving coverage as well as the claims involved in the Class Actions would in and of themselves on a balance of probabilities exhaust the insurance limits.

45 Indeed, it was the potential for exhaustion of policy limits in defence costs that caused the dispute that resulted in this Court's decision in April 2006.[1]

46 Counsel for Barford does not, as I understand it, take issue with the above conclusion, but rather submits that the "first past the post" principle entitles her client at this stage to the assurance that the costs of defence and any payment that may have to be made by her client will have recourse to the full policy limits. In her view, approval of the settlement cannot provide this assurance.

Law & Analysis

47 There would appear to be a difference of opinion on the test for Court approval of the Settlement Agreement, namely whether there is a reasonable basis for the settlement taking into account the competing interests of the various constituents. As was noted in the April 2006 decision[2] at paragraph 61, the test is "Was the settlement in all the circumstances within the range of reasonableness, recognizing that it was a compromise?"

48 The following factors, found at paragraph 62 of that decision, were adopted relying on the decision of Winkler J. (as he then was) in *Ontario New Home Warranty Program v. Chevron Chemical* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.):

1. likelihood of recovery or likelihood of success;
2. amount and nature of discovery, evidence or investigation;
3. settlement terms and conditions;
4. recommendation and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendation of neutral parties, if any;
7. number of objectors and nature of objections; and
8. the presence of arm's length bargaining and the absence of collusion.

49 Counsel for Barford forcefully submits that a compromise with some but not all insureds should not be protected by the Court in respect of an insured who would otherwise have claims against insurers.

50 It is submitted that Barford is an insured under the policies and, as such, has the right to make claims against the policies (up to the limits) and not be prejudiced by arrangements made by other insureds with the insurers.

"First Past the Post"

51 Both sides accept what has come to be known as the "first past the post" principle. I dealt with the history of this principle in Ontario in the previous Hollinger decision at paragraphs 110 to 119, and in particular at paragraph 113 referred to the leading decision in Ontario:

> [113] This principle was adopted by Farley J. of this Court in *Re Laidlaw Inc.* (2003), 46 C.C.L.I. (3d) 263 (S.C.J.) at p. 272 to the effect that the mere fact that other insureds have, or may have, claims that are not finally determined, cannot operate to prevent those otherwise entitled to indemnity from receiving it.

52 Ms Tough does not take issue with the general principle of "first past the post." She submits, however, that it is only applicable when the insurer has exhausted its limits in the settlement.

53 Put another way, it is urged that there is no case in Ontario or elsewhere that stands for the proposition that an insurer can deprive an insured from access to the limits of insurance available when the insurer has compromised those limits in settlement with other insureds.

54 It is suggested that a settlement that compromises access by a non-settling insured to claim against the full limits of the policy is evidence of bad faith on the part of the insurer, and cannot be condoned.

55 As noted above, I am satisfied that absent the issue raised by the Barford intervenor, the settlement would meet the test of reasonableness. There is little doubt that if the Class Actions and coverage issues were all to go forward to conclusion, the Excess Insurers policy limits would be more than exceeded by the claims made against them.

56 In such circumstances, it would make sense that the insured, the insurers and the plaintiffs in the Class Actions would seek to avoid the policy limits being expended essentially in legal fees in dealing with coverage and defence issues.

57 I can readily understand that the only incentive that would make sense to the Excess Insurers in participating in settlement discussions is the prospect of not having to pay out the entirety of their limits.

58 I am satisfied, knowing of the issues, the parties and the process, that the settlement was conducted with bona fides on the part of all of the parties and in good faith. The mediation process that was undertaken underscores that conclusion.

59 The question put forward by the Barford intervention is: does settlement as between some insureds and insurers that "exhausts limits" in the sense of no available funds for other insureds violate the contract of insurance with respect to those other insureds who have not had their claims to insurance made or adjudicated.

60 Farley J. said the following at p. 272 of *Laidlaw supra* in respect of non-matured claims

> [I]t appears clearly contemplated that finally determined claims under the subject Policies will be paid as presented on a first come, first served basis. I do not see that there is any provision in the subject Policies which would allow or require Homeco to consider claims or potential claims which have not been finally determined by judgment or settlement as opposed to its obligation to pay claims which have been finally determined. To impose a requirement on Homeco (and a restriction on a successful claimant's direct right) which would oblige Homeco to defer payment (and the claimant collection) until such time as all claims and potential claims under the subject Policies are known and finally determined would constitute an unwarranted rewriting of the subject Policies.

61 The fact that a judgment or settlement may deplete or even extinguish proceeds available to other insureds does not detract from the principle: see *Solway v. Lloyds Underwriters*, [2005] O.J. No. 1331 (S.C.J.) at paragraphs 65, 69.

62 I have reached the conclusion that the Settlement Agreement is reasonable and should be approved in the declaratory terms sought by the Applicants, including the deemed exhaustion of the Third and Fourth Layer Policy Limits.

63 In reaching this above conclusion, I am satisfied that the interest of Barford as an insured party is not violated for the following reasons:

1. There has been no judgment in settlement made that would require the insurers to make payments on behalf of Barford.
2. There is at the very least a viable argument that the "insured vs. insured" exclusion in the Policies might operate to deny coverage to Barford. (I make no finding on this issue.)
3. This Court is in a position to intervene either in the present proceedings enabling Inc. under the *Companies Creditors Arrangement Act* or, if it should occur, the *Bankruptcy & Insolvency Act*, to protect any rights Barford may have as a potential creditor of Inc. in the event that he is entitled to indemnity under the policy of insurance prior to completion of the Settlement Agreement.
4. The concept of "first past the post" is based on the premise that the rights of respective insureds are several rather than joint rights, which permits the claims of individual insureds to resolve claims independent of one another. As noted in *Cox v. Bankside*[3]:

> Each right will prove of value only if quantified liability is established before the limit of cover is reached.

Further, the same Court said at p. 467:

> A group cover against E&O liability of the kind I have to consider is not a joint policy. It is a policy which provides cover to each of the assured severally. In contradistinction to the position of co-insurers, the co-assured are not exposed in relation to the same interest and the same perils. Rights to claim under the cover will almost inevitably arise sequentially. I can see no basis for implying agreement between the co-assured that if E&O liabilities are established one by one which result in the limit of cover being exceeded, those who have recovered under the policy will be obliged to share their recoveries pro rata with those whose liability is established only after the cover has been exhausted.
>
> When co-assured enter into a contract of insurance that gives them several rights, subject to an overall limit, it seems to me that each

simply takes the risk that cover may become exhausted, leaving all thereafter exposed to third party claims.

Ms. Tough for Barford submits that exhaustion declarations have only been granted where there is risk of an insurer paying over the policy limits. The cases relied on in support of the above proposition, however, do not, except for the previous decision in Hollinger, involve serious consideration of coverage issues.

As noted above, I regard the Settlement Agreement in this case as reasonable for among other reasons taking into account "coverage issues." There was a risk that there may be limited or no recovery by insureds, most likely exhaustion of limits that could well take place long before resolution of the claim against Barford.

5. There is provision in the Settlement Agreement that allows for determination in the Courts of the State of Delaware regarding the proper allocation of funds in the Fourth Layer Escrow Account. It would appear that Barford is entitled to take advantage of that process.

64 The structure of the overall settlement involves settlement of the various Class Actions from the amounts set aside in the Third Layer Settlement Agreement.

65 As set out in s. 3 of the Insurance Settlement Agreement, the Fourth Layer Settlement Amount is "to be used to resolve Claims of the Settling Insured Defendants and those of any other claimants to coverage ..." under the Fourth Layer Policies.

66 Following the oral submissions on this matter, the Court requested and received from counsel for STMG and Inc. confirmation that the operation of s. 3 noted above, together with s. 10 of the Insurance Settlement Agreement requires STMG or Inc. to initiate a procedural mechanism for an insured such as Barford (who is other than a settling insured) to have determined the extent to which he has a claim and entitlement to be paid out of the Fourth Layer Escrow Agreement.

67 In her written submissions, Ms Tough on behalf of Barford notes that the Insurance Settlement Agreement does not address jurisdictional or procedural issues and that Barford has a relationship with Inc. only, not with STMG.

68 The concern is that matters might proceed quickly to absorb the funds set aside until the Fourth Layer Allocation is exhausted before Barford has an opportunity to present his claim.

69 The various claims that are in the overall settlement are without doubt complex. There is little question that the coverage issues are real and genuine. Taken together, those in my view would more than exhaust all insurance limits. One of the major premises behind "first past the post" is to encourage settlement as a matter of public policy.

70 I conclude that the Insurance Settlement Agreement does not impair the rights of Barford and that he is entitled to have his claim for defence costs in the sum of $51,000 adjudicated under the above procedure. That is the only claim that Barford has presented. There is no other claim or request for coverage that has been made to the insurers.

71 I am satisfied that despite the able submissions on his behalf, Barford's rights are not impaired. The action against him is brought by Inc. Not only Inc., but as well the action against Barford itself is subject to further Order of this Court, which is in a position to take into consideration the state of access to insurance proceeds on the part of Barford.

Conclusion

72 I have concluded that the Settlement Agreement is reasonable in the circumstances of the outstanding coverage issues, claims and defence costs. Given the issues regarding coverage and the risk to both insureds and insurers, exhaustion of the policy limits in the manner contemplated by the Settlement Agreement is reasonable, in the public interest, and is in the circumstances within the meaning of the "first past the post" concept.

73 With the exception of the defence costs claimed by Barford, he does not presently have a claim for indemnity under the policies in issue.

74 A declaration will issue in the terms sought by the Applicants. Since Court approval was necessary in any event, there may be no further issue of costs. If it is necessary for the Court to deal with the issue of costs, the parties may make written submissions.

C.L. CAMPBELL J.

cp/e/qlrxc/qlmxt

1 [2006] O.J. No. 140 (S.C.J.)

2 [2006] O.J. No. 140 (S.C.J.)

3 *Cox v. Bankside Members Agency Ltd*, [1995] 2 Lloyd's Rep. 437 (O.B. Div. Com. List) at p. 446

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 COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No: CV-12-9667-00CL

The Trustees of the Labourer's Pension Fund of Central and Eastern Canada et al -and- Sino-Forest Corporation et al

Court File No. CV-11-431153-00CP

Plaintiffs

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES OF THE DEFENDANT, DAVID HORSLEY
(RETURNABLE JULY 24, 2014)

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