

TAB 10

Case Name:
Ravelston 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 the Ravelston Corporation Limited and
Ravelston Management Inc.
AND IN THE MATTER OF the Bankruptcy and Insolvency
Act, R.S.O. 1985, c. B-3, as amended, and the Courts
of Justice Act, R.S.O. 1990, c. C.43, as amended**

[2007] O.J. No. 1389

2007 ONCA 268

31 C.B.R. (5th) 233

156 A.C.W.S. (3d) 824

159 A.C.W.S. (3d) 541

2007 CarswellOnt 2114

Docket: M34868 (C46730)

Ontario Court of Appeal
Toronto, Ontario

S. Borins J.A.
(In Chambers)

Heard: March 22, 2007.
Judgment: April 13, 2007.

(22 paras.)

*Civil evidence -- Appeals -- Leave to appeal -- Application by Black for leave to appeal from order
allowing the receiver to issue payments report and to file it in court dismissed -- Proposed appeal*

had no realistic chance of success if leave to appeal were granted as it raised no apparent error in law or palpable and overriding factual error.

Insolvency law -- Practice -- Application by Black for leave to appeal from order allowing the receiver to issue payments report and to file it in court dismissed -- Proposed appeal had no realistic chance of success if leave to appeal were granted as it raised no apparent error in law or palpable and overriding factual error.

Application by Black for leave to appeal from an order allowing the receiver to issue a payments report and to file it in court. The receiver was the receiver for Ravelston, a company partly owned by Black, who faced criminal charges in United States. The receiver sought to finalize the report and analysis of money paid and distributed by the company, including money paid to Black. The company entered into a plea agreement with prosecutor in United States in exchange for cooperating in the investigation and preparing the payments report. Black sought deferral of the report until completion of the criminal trial. He claimed the report was prejudicial to his defence. The motion judge held that in the normal course of events the payments report would have been filed with the court by the receiver when it was completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. He found that Black had not provided any evidence that the filing of the payments report would be to his prejudice as a financial stakeholder having an economic interest in the Ravelston estate. He further stated that the possible use by the prosecution of any information contained in the report as evidence against Black was a consideration for the US District Court. He held that the receiver's decision to provide the payments report and to file it with the court as relevant information for the benefit of the stakeholders was reasonable. Black argued that the motion judge erred in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner, and in his understanding of the principle of comity and failed to consider the prejudice to Black, a Canadian resident, arising from the use of the payments report in the American criminal proceedings.

HELD: Application dismissed. Neither of the proposed grounds of appeal was prima facie meritorious. The motion judge was correct in finding that Black's interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Black's alleged interest was not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the payments report was in his capacity as defendant in the American criminal proceedings. Black presented no evidence that the filing of the payments report would be prejudicial to him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. The motion judge made no error in principle in his comments on the principle of comity. The proposed appeal had no realistic chance of success if leave to appeal were granted as it raised no apparent error in law or

palpable and overriding factual error.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193(e)

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

Appeal From:

On appeal from the order of Justice Peter A. Cumming of the Superior Court of Justice dated February 15, 2007.

Counsel:

George S. Glezos and Bryce Rudyk, for the applicant Conrad Black.

Alex L. MacFarlane and Tushara Weerasooriya, for the respondent, RSM Richter Inc. Interim Receiver for Ravelston Corporation Limited and Ravelston Management Inc.

Matthew P. Gottlieb and Davit D. Akman, for the respondent, Hollinger Inc.

Robyn M. Ryan Bell, for the respondent, Sun-Times Media Group, Inc.

S. BORINS J.A.:--

I

1 Pursuant to the orders of Farley J. of April 20, 2005 and May 18, 2005, RSM Richter Inc. ("Richter") was appointed receiver and manager and interim receiver of the property, assets and undertaking of what is referred to in these proceedings as the Ravelston Companies, including the Ravelston Corporation Limited ("RCL"), Ravelston Management Inc. ("RMI") and Argus Corporation Limited ("Argus"). On April 20, 2005 the court also issued an order granting RCL and RMI protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and appointing Richter as the monitor.

2 Initially, Farley J. was the supervisory judge in this complex and long-term insolvency. The current supervisory judge is Cumming J. From the outset of its appointment as receiver, Richter has regularly filed reports with the court detailing the steps that it has taken in fulfilling its mandate, asking that the court approve each report and the recommendations contained in it and, frequently, asking the court's approval to take a particular step or to follow a particular course of action.

3 The motion before Cumming J., giving rise to this motion for leave to appeal, emanated from Richter's Nineteenth Report recommending the preparation of a report (the "Payments Report") setting out a factual account of the monies received by, and the distributions made by, RCL, RMI and Angus during the respective periods January 3, 1997 to April 20, 2005, July 3, 2002 to April 20, 2005, and January 1, 1999 to April 30, 2005. Pursuant to Richter's motion for authorization to complete and file the Payments Report with the Superior Court of Justice, on January 12, 2007 Cumming J. ordered Richter to complete the Payments Report, provided that it would not be filed or disseminated to any party until further order of the Superior Court. Pursuant to a further motion brought by Richter, on February 15, 2007, Cumming J. ordered Richter to file the Payments Report with the Superior Court. The Payments Report contains data as to payments made by RCL, RMI and Argus to corporate officers of these companies, including Conrad Black, who is a defendant in ongoing criminal proceedings in the United States District Court in Chicago. Before Cumming J., only Lord Black opposed the filing of the Payments Report.

4 Lord Black subsequently moved under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") for leave to appeal Cumming J.'s order of February 15, 2007 to the Court of Appeal. On March 22, 2007 I dismissed Black's motion with reasons to follow. These are my reasons.

II

5 In its Nineteenth Report, Richter indicated that on December 14, 2006 the United States Attorney's Office ("USAO") asked it to prepare and provide a schedule of payments, including salaries, bonuses and dividends, made by the Ravelston Companies to Lord Black and others between January, 1998 and January, 2004. The USAO is a stakeholder in the Ravelston estate, as is Lord Black. A number of other stakeholders have also requested similar information from Richter. Before Cumming J., and before this court, Lord Black contended that because on its filing the Payments Report would become a public document and available to all stakeholders, including the USAO, the information contained in the Report may assist the prosecution in the ongoing criminal proceedings. He contended that there may be unfairness in the use of the information revealed by the Payments Report. Lord Black, therefore, submitted that the Report should not be filed until the conclusion of the criminal proceedings against him.

6 In his reasons, reported at [2007] O.J. No. 536 (S.C.J.), Cumming J. pointed out at para. 26 that in the normal course of events the Payments Report would be filed with the court by the receiver when it is completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. At para. 27, Cumming J. stated that Lord Black had not provided any evidence that the filing of the Payments Report would be to his prejudice as a financial stakeholder having an economic interest in the Ravelston estate. To this I would add that Lord Black has also failed to provide any evidence that the filing of the Payments Report would prejudice the fairness of his criminal trial. As Cumming J. correctly observed, the possible use by the prosecution of any information contained in the Report

as evidence against Black is a consideration for the United States District Court in Chicago.

7 In rejecting Black's attempt to seal the Report, at para. 33 Cumming J. stated:

It is the personal interest of Lord Black at stake in the criminal proceedings which results in his request to delay the release of the Payments Report. The Receiver submits that such a personal interest, as opposed to an economic interest, is beyond the Receiver's area of proper consideration in the administration of the estate. The Receiver is not obliged to protect the interests of stakeholders which are unrelated to the administration of a debtor's estate, such as the interest of a stakeholder to avoid alleged prejudice in criminal proceedings. The Receiver's role is to make business decisions in the best interests of the estate after a careful cost/benefit analysis and the weighing of competing interests. *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.).

8 In the opinion of Cumming J., the receiver's decision to provide the Payments Report and to file it with the court as relevant information for the benefit of the stakeholders was "within the bounds of reasonableness". At para. 47, he added:

[A]n Order sealing the Payment Report until the close of Lord Black's criminal trial would be inappropriate. There is not any social value established on evidence by Lord Black which is of superordinate importance to the rights of the public to open access to court records and the interest of the estate's stakeholders to proceed unimpeded with the receivership. There is a strong presumption against any order that restricts public access to court proceedings or records that must be met by an applicant before a sealing order may properly issue. *R. v. Toronto Star Newspapers Ltd.*, [2005] 2 S.C.R. 188.

III

9 In his motion for leave to appeal, Lord Black submits that Cumming J. committed two errors: (1) he erred in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner; and (2) he erred in his understanding of the principle of comity and failed to consider the prejudice to Lord Black, a Canadian resident, arising from the use of the Payments Report in the American criminal proceedings against Lord Black.

10 Lord Black contends that his proposed appeal raises issues significant to bankruptcy practice for which there is no guidance, including the extent and nature of the court's role in supervising the work of a court-appointed receiver whose interests, which are adverse to a major stakeholder, conflict with his duties to act in an even-handed manner, and the appropriate conduct of the receiver where it has consequences to stakeholders beyond the Canadian border. Lord Black also contends that granting leave to appeal will not hinder the administration of the receivership as the receiver conceded in submissions before Cumming J. that there is no need to file the Payments Report now

for any reason relating to the administration of the receivership.

IV

11 As Armstrong J.A. noted, at para. 15 of *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A.) there appears to be a "measure of confusion" in respect to the test for leave to appeal under s. 193(e) of the BIA. However, the caselaw is clear that one factor that is considered in all cases is whether the appeal is *prima facie* meritorious, a factor that Armstrong J.A. relied on in *SVCM*. See, e.g., *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol* (1995), 30 C.B.R. (3d) 90 (Ont. C.A.); *Re Baker* (1995), 22 O.R. (3d) 376 (C.A.); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A.); *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.). Similarly, this factor is also considered by the court in applications seeking leave to appeal under s. 193(e) from orders made under the CCAA: *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (C.A.).

12 *Ravelston*, supra, is a helpful example of the need for a *prima facie* meritorious appeal as the starting point in the application of the test under s. 193(e). If the proposed appeal is found to be *prima facie* meritorious, the court must then consider whether the other elements of the test have been met. At paras. 27-32 of *Ravelston*, Doherty J.A. provided this helpful guidance:

As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the BIA. The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: [Citations omitted.]

The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.

A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.

In *Re Canadian Airlines Corp.* (2000), 261 A.R. 120 at para. 35 (C.A.), Wittmann J.A. (in chambers) was faced with an application for leave under the CCAA. He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is *prima facie* meritorious." He described the necessary merits inquiry in this way:

... There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

I think the same level of merits inquiry is warranted on an application for leave to appeal under the BIA. I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.

The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has *prima facie* merit. I do not reach those other considerations on this motion.

V

13 As I have indicated, Lord Black's proposed appeal focuses on two aspects of the reasons of Cumming J. He submitted that Cumming J. failed to act fairly and even-handedly in preferring the interests of the other stakeholder, USAO to his interests, thereby possibly prejudicing his right to a fair trial in the American criminal proceedings. Second, he contends that Cumming J. erred in his understanding of the principles of comity. In my view, neither of the proposed grounds of appeal is *prima facie* meritorious.

14 There are two important principles that this court has endorsed in considering whether leave to appeal should be granted in bankruptcy and CCAA proceedings. In *Ravelston Corp. (Re)*, [2007] O.J. No. 749 at para. 3 (C.A.), the court stated: "It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere." In *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 at para. 40 (Ont. C.A.), Doherty J.A. stated: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all the stakeholders, the court will support the receiver's decision." These principles, necessarily, inform the determination of whether the

proposed appeal is *prima facie* meritorious.

15 Turning to the first proposed ground of appeal, as Cumming J. said, the Payments Report is a necessary and normative analysis and part of the receiver's fiduciary duties in determining the financial situation of the bankrupt's estate. It will permit the stakeholders to learn and better understand the historical transactions of the insolvent business. Moreover, the motion judge found that the receiver had considered all relevant interests relating to the administration of the Ravelston estate in its decision to complete the Payments Report and to file it with the court. The interests that are relevant are those that are economic in nature, involving the debtor's assets, property and undertaking.

16 Lord Black has raised no competing economic interest to delay the filing of the Payments Report on its completion. Therefore, Cumming J. was correct in finding that his interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Lord Black's alleged interest is not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the Payments Report is in his capacity as defendant in the American criminal proceedings.

17 It is noteworthy that Lord Black presented no evidence that the filing of the Payments Report would prejudice him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. In my view, this is not surprising as it is difficult to understand how any relevant information in the Payments Report introduced in evidence by the United States Attorney could prejudice Lord Black's right to a fair trial. There is nothing unfair in the prosecution's introduction of relevant and admissible evidence against a defendant in a criminal trial.

18 I see no viable argument that Cumming J. erred in principle in the exercise of his discretion in approving the filing of the Payments Report. The proposed appeal has no realistic possibility of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error. In other words, Cumming J. made no apparent error in law or apparent palpable and overriding error of fact in his supervision of the receiver.

19 As for the second proposed ground of appeal, Lord Black contends that Cumming J.'s misapprehension of the principle of comity caused him to refuse to consider the prejudice to him from the use of the Payments Report by the USAO. In my view, this contention is also untenable.

20 The motion judge's comments in respect to comity were general in nature. He stated that comity requires that each society, and its courts, must recognize and respect the legal processes of the courts of other societies, and that, accordingly, it would be for the United States District Court to determine the admissibility of any information contained in the Payments Report that the prosecution may seek to introduce against Lord Black in his criminal trial. Cumming J. was never

asked to rule on any foreign law or procedure, nor was evidence of a foreign law or procedure introduced. He made it clear at para. 25 that "[t]he issue as to whether the Payments Report is to be filed in this Court is, of course, a matter for this Court alone". He properly recognized that there was nothing improper in the receiver voluntarily providing the information in the Payments Report to the USAO, especially where the information may be relevant to the administration of justice.

21 I see no viable argument that Cumming J. erred in principle in his comments on the principle of comity. The proposed appeal has no realistic chance of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error.

VI

22 I would confirm the order that I made at the close of argument on March 22, 2007 refusing Lord Black's motion for leave to appeal the order of Cumming J. to this court. The parties have agreed that the successful responding parties should have their costs, and have agreed on the amount of costs as follows: RSM Richter Inc. - \$5,000; Hollinger Inc. - \$2,500; Sun-Times Media Group, Inc. - \$1,500. All costs include disbursements and GST.

S. BORINS J.A.

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TAB 11

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 interpretation. 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

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S.

(3d) 391 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); *Stelco Inc. (Re)*, [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); *Stelco Inc. (Re)*, [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); *consd*

Other cases referred to

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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 references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

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

The statutory wording

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

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

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

[59] Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [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 exchange 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 votes⁶ and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of

a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

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

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

- (a) The parties to be released are necessary and essential to the restructuring of the debtor; [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 between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank 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 its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

. [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 company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

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

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

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [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 it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. 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 protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *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 usual 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; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
- (4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
- (5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
- (6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
- (7) Mario J. Forte, for Caisse de Dépôt et Placement du Québec
- (8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [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 12

Indexed as:
Canadian Airlines 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 the Business Corporations Act (Alberta)
S.A. 1981, c. B-15, as amended, Section 185
AND IN THE MATTER OF Canadian Airlines Corporation and
Canadian Airlines International Ltd.**

[2000] A.J. No. 771

2000 ABQB 442

[2000] 10 W.W.R. 269

84 Alta. L.R. (3d) 9

265 A.R. 201

9 B.L.R. (3d) 41

20 C.B.R. (4th) 1

98 A.C.W.S. (3d) 334

Action No. 0001-05071

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Heard: June 5 - 19, 2000.

Judgment: filed June 27, 2000.

(185 paras.)

Counsel:

A.L. Friend, Q.C., H.M. Kay, Q.C., R.B. Low, Q.C. and L. Goldbach, for the petitioners.
S.F. Dunphy, P. O'Kelly and E. Kolers, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., D.N. Nishimura, A.Z.A. Campbell and D. Tay, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C. and G. McCue, for Neil Baker, Michael Salter, Hal Metheral and Roger Midity.
F.R. Foran, Q.C. and P.T. McCarthy, Q.C., for the Monitor, PwC.
G.B. Morawetz, R.J. Chadwick and A. McConnell, for the Senior Secured Noteholders and the Bank of Nova Scotia Trust Company.
C.J. Shaw, Q.C., for the unionized employees.
T. Mallett and C. Feasby, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Coastal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for the Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for the Calgary and Edmonton Airport Authority.

REASONS FOR DECISION

PAPERNY J.:-

I. INTRODUCTION

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

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority

shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

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

II. BACKGROUND

Canadian Airlines and its Subsidiaries

4 CAC and CAIL are corporations incorporated or continued under the Business Corporations Act of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd. ("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul

and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing \$200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for \$246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of \$120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately \$712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled \$771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the Canada Transportation Act (relaxing certain rules under the Competition Act to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from \$7.90 to \$1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada.

While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of \$5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. \$175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. \$100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of \$137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of

additional strategic initiatives including entering the oneworld™ Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of

CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the Air Canada Public Participation Act. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately \$500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of \$500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of

proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

- a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
- b) sales for future air travel were down by approximately 10% compared to 1998;
- c) CAIL's liquidity position, which stood at approximately \$84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for \$25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately \$20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate \$45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350

purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the \$45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from \$70 million to \$120 million in January, 2000 and then to \$145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's \$70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts

to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. \$175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

- (a) provide near term liquidity so that Canadian can sustain operations;
- (b) allow for the return of aircraft not required by Canadian; and
- (c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US\$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary

airports, the shares in CRAL 98 and a \$53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.

The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

- a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
- b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
- c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
- d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
- e. Claims of tax authorities against Canadian; and
- f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over \$700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately \$1.059 million.

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

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

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence

clients hold \$58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

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

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

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

III. ANALYSIS

59 Section 6 of the CCAA provides that:

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

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

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

- (1) there must be compliance with all statutory requirements;
- (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, *aff'd* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and *Re T. Eaton Co.*, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

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

- (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
- (b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of \$5,000,000;
- (c) the notice calling the meeting was sent in accordance with the order of the court;
- (d) the creditors were properly classified;
- (e) the meetings of creditors were properly constituted;
- (f) the voting was properly carried out; and
- (g) the plan was approved by the requisite double majority or majorities.

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

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

- confirmed in the testimony given by Mr. Carty at this hearing.
- (b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of \$5,000,000.
 - (c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.
 - (d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.
 - (e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Cadillac Fairview (Re)*, [1995] O.J. No. 274, 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

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

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

- a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for \$1.00; and
- b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

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

- (a) consolidating all of the issued and outstanding common shares into one common share;
- (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
- (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
- (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
- (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
- (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

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

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

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

71 The relevant portions of section 167 provide as follows:

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

- (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
- (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
- (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

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

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) - consolidation of Common Shares	167(1)(f)
(b) - change of designation and rights	167(1)(e)
(c) - cancellation	167(1)(g.1)
(d) - change in shares	167(1)(f)
(e) - change of designation and rights	167(1)(e)
(f) - cancellation	167(1)(g.1)

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

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

75 The architects of the business corporation act model which the ABCA follows, expressly

contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

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

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

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of Royal Oak Mines Inc., [1999] O.J. No. 4848 and Re T Eaton Co., supra in which Farley J. of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

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

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

Section 183 of the ABCA

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

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Company Ltd*, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

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

5.1

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

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

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

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

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

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "excluding the claims excepted by s. 5.1(2) of the CCAA" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the

CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

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

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

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

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

3. Fair and Reasonable

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

"Fairness" and "reasonableness" are, in my opinion, the two keynote concepts

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

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

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

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

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

As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment

of the participants. The parties themselves know best what is in their interests in those areas.

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

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

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

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

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

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

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

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

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

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

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

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

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (Keddy Motor Inns Ltd. (Re) (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (Campeau Corp. (Re) (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); Skydome Corp. (Re), [1999] O.J. No. 1261, 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (Quintette Coal Ltd. (Re), (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and Northland Properties (Re), supra at 9.

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

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

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from \$673 million to \$1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less.

Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

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

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

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

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

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

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

CRAL

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

Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

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

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

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

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

International Routes

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

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

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

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

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

Tax Pools

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

Capital Loss Pools

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

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *Re T. Eaton Co.*, [1999] O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

One has to be cognizant of the function of a balancing of their prejudices.

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

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

d. Oppression

Oppression and the CCAA

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

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*, (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Re Diligenti v. RWMD Operations Kelowna* (1976), 1 B.C.L.R. 36 (S.C.).

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

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

142 While expectations vary considerably with the size, structure, and value of the corporation,

all expectations must be reasonably and objectively assessed: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Re Royal Oak Mines Ltd.*, supra, para. 4., *Re Cadillac Fairview*, [1995] O.J. 707 (Ont. Sup. Ct), and *Re T. Eaton Company*, supra.

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

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

Oppression allegations by Resurgence

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

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached.

On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

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

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

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

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

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

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

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

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

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

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

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

e. Unfairness to Shareholders

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

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

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

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

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

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders.

Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

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

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

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of \$790 million. The Preferred Shares have a liquidation preference of \$347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of \$790 million to a deficit of \$1.214 million, an erosion of \$424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a

meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of \$1 billion, it is not unfair that shareholders receive nothing.

e. The Public Interest

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, *Reorganizations Under the Companies' Creditors Arrangement Act (1947)*, 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C.S.C.) the court noted that

the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd.*, supra, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Canadian Red Cross Society (Re)*, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) and *Algoma Steel Corp. v. Royal Bank of Canada (Trustee of)*, [1992] O.J. No. 795 (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the Transportation Act, which allowed an opportunity for CAIL to approach other

entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example *Wandlyn Inns Ltd. (Re)* (1992), 15 C.B.R. (3d) 316 (N.B.Q.B), *Quintette Coal*, supra and *Repap*, supra. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to *Algoma Steel v. Royal Bank of Canada*, supra at 9 in which Farley J. endorsed this approach:

What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in *Re Sammi Atlas Inc.*, (1998), 3 C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

180 I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than \$1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

PAPERNY J.

cp/i/qljpn/qlhcs

TAB 13

Case Name:
Canwest Global Communications (Re)

**IN THE MATTER OF Section 11 of the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of
Canwest Global Communications and the other applicants**

[2010] O.J. No. 3233

2010 ONSC 4209

70 C.B.R. (5th) 1

2010 CarswellOnt 5510

Court File No. CV-09-8396-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Oral judgment: July 28, 2010.

(39 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --
Compromises and arrangements -- Sanction by court -- Application by CMI Entities for approval of
plan allowed -- Plan contemplated acquisition of Canwest television interests by Shaw subsidiary
with proceeds used to satisfy claims of senior subordinated noteholders and additional payment to
Monitor to satisfy claims of other affected creditors -- Plan contemplated delisting and
extinguishment of equity compensation plans and related options or equity-based awards --
Creditor support for plan was overwhelming -- Plan reflected settlement with existing shareholders
-- Plan was fair and reasonable, met statutory requirements and was in public interest -- Plan
emergence agreement outlining implementation was also approved -- Companies' Creditors
Arrangement Act, s. 6.*

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 173, s. 173(1)(e), s. 173(1)(h), s. 191, s. 191(1)(c), s. 191(2)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 6, s. 6(1), s. 6(2), s. 6(3), s. 6(5), s. 6(6), s. 6(8), s. 11, s. 36

Counsel:

Lyndon Barnes, Jeremy Dacks and Shawn Irving, for the CMI Entities.

David Byers and Marie Konyukhova, for the Monitor.

Robin B. Schwill and Vince Mercier, for Shaw Communications Inc.

Derek Bell, for the Canwest Shareholders Group (the "Existing Shareholders").

Mario Forte, for the Special Committee of the Board of Directors.

Robert Chadwick and Logan Willis, for the Ad Hoc Committee of Noteholders.

Amanda Darrach, for Canwest Retirees.

Peter Osborne, for Management Directors.

Steven Weisz, for CIBC Asset-Based Lending Inc.

REASONS FOR DECISION

1 S.E. PEPALL J. (orally):-- This is the culmination of the *Companies' Creditors Arrangement Act*¹ restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US \$440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US \$2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional \$38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

- (a) the Noteholders; and
- (b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date,

all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of \$11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

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

See *Re: Canadian Airlines Corp.*²

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding \$5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (1) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Re Canadian Airlines*³.

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious

from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Re Canadian Airlines*:

The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.⁴

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

- (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
- (b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Re Armbro Enterprises Inc.*⁵ Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

"I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."⁶

23 Similarly, in *Re: Uniforêt Inc.*⁷ a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for

substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *Metcalfe v. Mansfield Alternative Investments II Corp.*⁸, the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested.⁹

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Re Air Canada*¹⁰ and *Re Calpine Canada Energy Ltd.*¹¹ I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods v. Merrill Lynch Capital Partners Inc.*¹² and *Re Laidlaw Inc.*¹³. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

- (e) create new classes of shares;
- (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *Re: A & M Cookie Co. Canada*¹⁴ and *Mei Computer Technology Group Inc.*¹⁵

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

S.E. PEPALL J.

cp/e/qlafz/qlmxj/qljxr/qlcas/qljyw

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

2 2000 ABQB 442 at para. 60, leave to appeal denied 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to S.C.C. refused July 12, 2001, [2001] S.C.C.A. No 60.

3 Ibid, at para. 64 citing *Olympia and York Developments Ltd. v. Royal Trust Co.* [1993] O.J. No. 545 (Gen. Div.) and *Re: Cadillac Fairview Inc.* [1995] O.J. No. 274 (Gen. Div.).

4 Ibid, at para. 3.

5 (1993), 22 C.B.R. (3rd) 80 (Ont. Gen. Div.).

6 *Ibid*, at para. 6.

7 (2003), 43 C.B.R. (4th) 254 (QUE. S.C.).

8 (2008), 92 O.R. (3rd) 513 (C.A.).

9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

11 (2007), 35 C.B.R. (5th) 1.

12 (1996), 43 CBR (4th) 10.

13 (2003), 39 CBR (4th) 239.

14 [2009] O.J. No. 2427 (S.C.J.) at para. 8/

15 [2005] Q.J. No. 22993 at para. 9.

TAB 14

Indexed as:
T. Eaton 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
The T. Eaton Company Limited, applicant**

[1999] O.J. No. 5322

15 C.B.R. (4th) 311

95 A.C.W.S. (3d) 219

Court File No. 99-CL-3516

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: November 23, 1999.

Judgment: November 23, 1999.

(13 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval.

Application for approval for a plan under the Companies' Creditors Arrangement Act. The creditors and the shareholders voted overwhelmingly in favour of the plan. No one presented an alternative plan for the interested parties to vote on.

HELD: Application allowed. The criteria for Court approval were strict compliance with all statutory requirements, that all material filed and procedure carried out had to be examined to determine if anything had been done or purported to be done that was not authorized by the Act, and that the plan be fair and reasonable. Of concern was the size of the pot going to the shareholders. That was a bone of contention amongst the creditors. There was a hierarchy of interest to receive

value in a liquidation or liquidation related transaction and the shareholders were at the bottom. The plan was fair and reasonable.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, Ontario Business Corporations Act.

Counsel:

No counsel mentioned.

1 **FARLEY J.** (endorsement):-- The criteria that a debtor company must satisfy in seeking the court's approval for a plan under the Companies' Creditors Arrangement Act ("CCAA") are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedure carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.

See: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at pp. 182-3, affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont.Gen.Div.) at p. 172.

2 In exercising its discretion to approve an arrangement under the Ontario Business Corporations Act ("OBCA"), the court must be satisfied that the arrangement meets the same criteria as set out above for approving a plan under the CCAA. See *Olympia & York Developments Ltd.* (1993) 18 C.B.R. (3d) 176 (Ont.Gen.Div.) at p. 186.

3 It would appear to be undisputed by anyone (including myself) that items (a) and (b) have been met and complied with. That leaves the question of whether what is advanced is fair and reasonable. The majority can bind the minority in a plan provided that the purchase does not bind the minority to terms that are unfair or unconscionable. See *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S.C.A.) at pp. 247-8, 258.

4 In reviewing the fairness and reasonableness of a plan the court does not require perfection; nor will the court second guess the business decisions reached by the stakeholders as a body.

5 In *Sammi Atlas*, supra, I cited *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont.Gen.Div.),

Re Northland, supra, and Re Olympia & York Developments Ltd. (1993), 12 O.R. (3d) 500 (Gen.Div.) at pp. 173-4 where I observed:

... A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights ...

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

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

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

6 As well there is a heavy onus on parties seeking to upset a plan that the required majority have supported. See Sammi Atlas, supra, at p. 274 citing Re Central Guaranty Trustco Ltd. (1993) 21 C.B.R. (3d) 139 (Ont.Gen.Div.) at p. 141.

7 It is also appropriate to take into consideration the fact that both classes of creditors as well as the shareholders voted overwhelmingly in favour of the Eaton's Plan. In the case of the unsecured creditors this was 99% plus in number and 94% plus in value; the landlords unanimously; and the shareholders 99.5%. This was not a scrape by the minimum requirement situation.

8 The alternative to a favourable vote would be that Eaton's would be in bankruptcy today as per the provisions of last week. Thus there would be some uncertainty as to recoveries - and whether or not a plan could arise from the ashes so as to utilize the tax loss potential. I note specifically that no one presented an alternative plan for the interested parties to vote on.

9 What is of concern is the question of the size of the pot going to the shareholders. That was a bone of contention amongst the various creditors - but as I have observed, no one advanced a competing plan. I would also like to make it clear that I have no doubt that many of the shareholders have suffered significant losses as a result of the demise of Eaton's and I know that it is painful for them. It is not my intention to increase that pain but I do think that it is important for at least future situations that in devising and considering plans persons recognize that there is a natural and legal "hierarchy of interest to receive value in a liquidation or liquidation related transaction" and that in that hierarchy the shareholders are at the bottom. See my endorsement of November 22, 1999 in Re Royal Oak Mines Ltd., [1999] O.J. No. 4848:

Further in these particular circumstances [here I was talking of Royal Oak, but the same would appear to hold true for Eaton's], there are, in relation to the available tax losses (which is in itself a "conditional" asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation without restructuring, would have to wait a long while before their interests saw the light of day.

10 I think it appropriate to note that in Sammi Atlas, the shareholder got \$1.25 million U.S.; in Cadillac Fairview Inc. nothing; and in Royal Oak it is proposed the shareholders be diluted down to 1% equity interest underneath a heavy blanket of other obligations. When viewed in contrast, the Eaton's deal would appear to be on the rich side.

11 I also think it helpful to note my observations in Re A Proposed Arrangement Involving Cadillac Fairview Inc. And Its Shareholders, [1995] O.J. No. 707, released March 7, 1995, at pp. 11-16 and especially the analysis In Re Tea Corporation Limited, Sorsbie v. Same Company, [1904] 1 Ch.D. 12 (C.A.) as well as the other cases referred to therein.

12 I trust that a forward thinking analysis of these views will be of assistance to those involved in future cases.

13 However, in the subject Eaton's case, in the circumstances here prevailing, I find the plan to be fair and reasonable, notwithstanding my concerns that it might well have been appropriately modified to get it closer to perfection. While "perfection" is an impossible goal, "closer to perfection" should always be strived for. The Eaton's plan is approved for both CCAA and OBCA purposes.

FARLEY J.

cp/s/qlala/qlalm

TAB 15

Indexed as:
Sammi Atlas Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36
IN THE MATTER OF the Courts of Justice Act, R.S.O. 1990,
c. C-43
IN THE MATTER OF a Plan of Compromise or Arrangement of Sammi
Atlas Inc.**

[1998] O.J. No. 1089

59 O.T.C. 153

3 C.B.R. (4th) 171

78 A.C.W.S. (3d) 10

Commercial List Nos. 97-BK-000219 and B230/97

Ontario Court of Justice (General Division)
Commercial List

Farley J.

Heard: February 27, 1998.

Judgment: February 27, 1998.

(7 pp.)

*Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation
-- Arrangement, judicial approval -- Arrangement, judicial approval -- Amendment of Plan.*

Application by Sammi Atlas to approve its Plan of compromise and arrangement as amended and approved by its secured creditors. It was also a motion by Argo Partners for an order to direct that a person who held unsecured claims was entitled to elect treatment for each unsecured claim held by it on an individual basis, and not on an aggregate basis as provided for in the Plan. The Plan provided for a sliding scale of distribution. Claims of \$7,500 were entitled to receive the highest

amount, namely cash of 95 per cent of the proven claim. Argo had acquired 40 claims. Each claim was under \$100,000, but the aggregate of the claims was over \$100,000. Argo wanted to treat its claims separately because it could have kept the individual claims separate by having them held by a different person.

HELD: Sammi's application was allowed. Argo's motion was denied. Sammi was a corporation to which the Companies' Creditors Arrangement Act applied. The Plan complied with the requirements of the Act. The Plan was fair and reasonable as no one opposed it being approved. Argo merely wanted the Plan amended to accommodate its particular concerns. Argo wanted to amend the Plan after it was voted upon. It wanted a substantive change, which the court lacked jurisdiction to grant under the Act. Argo's change was also not allowed because it was treated fairly and reasonably as a creditor as were all the unsecured creditors. An aggregation clause was not inherently unfair and the sliding scale provisions, which were intended to protect small investors, were reasonable.

Statutes, Regulations and Rules Cited:

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

Counsel:

Norman J. Emblem, for the applicant, Sammi Atlas Inc.
James Grout, for Argo Partners, Inc.
Thomas Matz, for the Bank of Nova Scotia.
Jay Carfagnini and Ben Zarnett, for Investors' Committee.
Geoffrey Morawetz, for the Trade Creditors' committee.
Clifton Prophet, for Duk Lee.

1 FARLEY J. (endorsement):-- This endorsement deals with two of the motions before me today:

- 1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and
- 2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

2 As to the Applicant's sanction motion, the general principles to be applied in the exercise of the court's discretion are:

- 1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;
- 2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Companies' Creditors Arrangement Act ("CCAA"); and
- 3) the Plan must be fair and reasonable.

See *Re Northland Properties Limited* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) at p. 201; *Re Olympia & York Developments Ltd.* (1993), 12 O.R. (3d) 500 (Gen. Div.) at p. 506.

3 I am satisfied on the material before me that the Applicant was held to be a corporation as to which the CCAA applies, that the Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings, that the meetings were held in accordance with the directions of the court and that the Plan was approved by the requisite majority (in fact it was approved 98.74% in number of the proven claims of creditors voting and by 96.79% dollar value, with Argo abstaining). Thus it would appear that items one and two are met.

4 What of item 3 - is the Plan fair and reasonable? A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the Plan which a majority have approved - subject only to the court determining that the Plan is fair and reasonable: see *Northland* at p. 201; *Olympia & York* at p. 509. In the present case no one appeared today to oppose the Plan being sanctioned; Argo merely wished that the Plan be amended to accommodate its particular concerns. Of course, to the extent that Argo would be benefited by such an amendment, the other creditors would in effect be disadvantaged since the pot in this case is based on a zero sum game.

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

As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment

of the participants. The parties themselves know best what is in their interests in those areas.

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests. The vote in the present case is even higher than in *Re Central Guaranty Trustco Ltd.* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div.) where I observed at p. 141:

... This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.

The Courts should not second guess business people who have gone along with the Plan ...

6 Argo's motion is to amend the Plan - after it has been voted on. However I do not see any exceptional circumstances which would support such a motion being brought now. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) the Court of Appeal observed at p. 15 that the court's jurisdiction to amend a plan should "be exercised sparingly and in exceptional circumstances only" even if the amendment were merely technical and did not prejudice the interests of the corporation or its creditors and then only where there is jurisdiction under the CCAA to make the amendment requested. I was advised that Argo had considered bringing the motion on earlier but had not done so in the face of "veto" opposition from the major creditors. I am puzzled by this since the creditor or any other appropriate party can always move in court before the Plan is voted on to amend the Plan; voting does not have anything to do with the court granting or dismissing the motion. The court can always determine a matter which may impinge directly and materially upon the fairness and reasonableness of a plan. I note in passing that it would be inappropriate to attempt to obtain a preview of the court's views as to sanctioning by bringing on such a motion. See my views in *Central Guaranty* at p. 143:

... In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust where no interest was adversely affected. The same cannot be said here. FSTQ aside from s. 11(c) of the CCAA also raised s. 7. I am of the view that s. 7 allows an amendment after an adjournment - but not after a vote has been taken. (Emphasis in original)

What Argo wants is a substantive change; I do not see the jurisdiction to grant same under the CCAA.

7 In the subject Plan creditors are to be dealt with on a sliding scale for distribution purposes only; with this scale being on an aggregate basis of all claims held by one claimant:

- i) \$7,500 or less to receive cash of 95% of the proven claim;
- ii) \$7,501 - \$100,000 to receive cash of 90% of the first \$7,500 and 55% of balance; and;
- iii) in excess of \$100,000 to receive shares on a formula basis (subject to creditor agreeing to limit claims to \$100,000 so as to obtain cash as per the previous formula).

8 Such a sliding scale arrangement has been present in many proposals over the years. Argo has not been singled out for special treatment; others who acquired claims by assignment have also been affected. Argo has acquired 40 claims; all under \$100,000 but in the aggregate well over \$100,000. Argo submitted that it could have achieved the result that it wished if it had kept the individual claims it acquired separate by having them held by a different "person"; this is true under the Plan as worded. Conceivably if this type of separation in the face of an aggregation provision were perceived to be inappropriate by a CCAA applicant, then I suppose the language of such a plan could be "tightened" to eliminate what the applicant perceived as a loophole. I appreciate Argo's position that by buying up the small claims it was providing the original creditors with liquidity but this should not be a determinative factor. I would note that the sliding scale provided here does recognize (albeit imperfectly) that small claims may be equated with small creditors who would more likely wish cash as opposed to non-board lots of shares which would not be as liquidate as cash; the high percentage cash for those proven claims of \$7,500 or under illustrates the desire not to have the "little person" hurt - at least any more than is necessary. The question will come down to balance - the plan must be efficient and attractive enough for it to be brought forward by an applicant with the realistic chance of its succeeding (and perhaps in that regard be "sponsored" by significant creditors) and while not being too generous so that the future of the applicant on an ongoing basis would be in jeopardy; at the same time it must gain enough support amongst the creditor body for it to gain the requisite majority. New creditors by assignment may provide not only liquidity but also a benefit in providing a block of support for a plan which may not have been forthcoming as a small creditor may not think it important to do so. Argo of course has not claimed it is a "little person" in the context of this CCAA proceeding.

9 In my view Argo is being treated fairly and reasonably as a creditor as are all the unsecured creditors. An aggregation clause is not inherently unfair and the sliding scale provisions would appear to me to be aimed at "protecting (or helping out) the little guy" which would appear to be a reasonable policy.

10 The Plan is sanctioned and approved; Argo's aggregation motion is dismissed.

POSTSCRIPT

11 I reviewed with the insolvency practitioners (legal counsel and accountants) the aspect that

industrial and commercial concerns in a CCAA setting should be distinguished from "bricks and mortgage" corporations. In their reorganization it is important to maintain the goodwill attributable to employee experience and customer (and supplier) loyalty; this may very quickly erode with uncertainty. Therefore it would, to my mind, be desirable to get down to brass tacks as quickly as possible and perhaps a reasonable target (subject to adjustment up or down according to the circumstances including complexity) would be for a six month period from application to Plan sanction.

FARLEY J.

qp/d/mii/DRS/DRS

TAB 16

Case Name:
Algoma Steel Inc. (Re)

**IN THE MATTER OF The Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36 and The Business Corporations Act, R.S.O.
1990, c. B-16
AND IN THE MATTER OF a proposed plan of arrangement with
respect to Algoma Steel Inc.,
Algoma Steel Inc., applicant**

[2002] O.J. No. 66

30 C.B.R. (4th) 1

111 A.C.W.S. (3d) 401

2002 CanLII 49571

Court File No. 01-CL-4115

Ontario Superior Court of Justice
In Bankruptcy and Insolvency - Commercial List

LeSage C.J.S.C.

Heard: December 19, 2001.
Oral Judgment: January 10, 2002.

(8 paras.)

*Creditors and debtors -- Debtors relief legislation -- Companies' creditors arrangement legislation
-- Arrangement, judicial approval -- When available.*

Motion by Algoma Steel for sanction of its Plan of Arrangement made under the Companies' Creditors Arrangement Act. The Plan had been approved in meetings with very large quorums by each class of affected creditors by votes substantially in excess of the statutory requirements.

HELD: Motion allowed. Algoma strictly complied with all the statutory requirements and had not

acted in any way not authorized by the Act. The Plan was fair and reasonable.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act.

Counsel:

Michael Barrack, James D. Gage and Geoff R. Hall, for Algoma Steel Inc.

Edmond Lamek, for the Province of Ontario.

John B. Laskin, for the Noteholders.

James P. Dube, for Union Gas Limited.

James Grout, for the Monitor.

Michael Mazzuca, for the (Ontario) Superintendent of Financial Services.

Steven J. Weisz, for the Independent Pension Counsel.

Lily Harmer, for United Steelworkers of America.

1 LeSAGE C.J.S.C. (orally):-- Algoma Steel Inc. ("Algoma") has brought this sanction motion now that its Plan of Arrangement, its Third Plan, has been approved by the statutory majorities of its five classes of affected creditors:

(1)	Municipality of Sault Ste. Marie	Unanimous in Writing
(2)	132 Noteholders	80.3% by number; 79.9% by dollar value
(3)	1183 Indexed Pensioners	93.8% by number; 94.8% by dollar value
(4)	677 Non-Indexed Pensioners	99.3% by number; 99.5% by dollar value
(5)	213 General Unsecured Creditors	100% by number; 100% by dollar value

2 In a sanction hearing under the Companies' Creditors Arrangement Act ("CCAA") the general

principles to be applied in the exercise of the court's discretion are:

- (a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;
- (b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) The Plan must be fair and reasonable.

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

3 I am satisfied that on the material before me that Algoma was held to be a corporation which was able to avail itself of the CCAA, that the Third Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings (including the adjourned meeting of the Noteholders on December 10 and the "revote" meetings of the other classes on December 17th (with the municipality voting by resolution in writing by December 14th), that the subject meetings were held in accordance with the directions of the court and that the Third Plan was approved by the requisite majority (majority in number representing two-thirds in value of the class represented) with a quorum present. Thus it appears to me that items (a) and (b) have been met.

4 The remaining issue (c) is whether the court determines that the Third Plan is fair and reasonable. The previous Second Plan was overwhelmingly approved by all classes except that of the Noteholders who decisively turned it down on December 7th. On the weekend after the turn down, to their credit the Chief Restructuring Officer Hap Stephen and management of Algoma, with the assistance of the Monitor, reinstated negotiations with advisors to the Noteholders, to the lending banks and to the union. As Justice Farley was brought in on an emergency basis on Sunday, December 9th in the role of facilitator, he did not think it appropriate to sit today in judgment of a plan which he was involved in having a hand in resolving. He therefore asked me to take on the sanction hearing. What evolved out of these negotiations was the Third Plan - the result of discussion, understanding, negotiating and hard bargaining, all in the face of a substantially more unpalatable alternative - the receivership of Algoma with continued unsettled conditions, a severe lack of confidence and a swift erosion of business. The Third Plan on the other hand allows Algoma to go forward with a brighter future relative to the alternative.

5 As Farley J. stated at pp. 173-4 of *Sammi Atlas* in reference to the 3rd element for consideration:

... Is the Plan fair and reasonable? A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the plan which a majority have approved - subject only to the court determining that the plan is fair and reasonable: see *Northland Properties Ltd.* at p. 201; *Olympia & York Developments Ltd.* at p. 509. ...

Later on the same page he continued:

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

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

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. ...

I accept those observations. Here the Third Plan has been approved in meetings with very large quorums by each class of affected creditors by votes substantially in excess of the statutory requirements and this speaks positively of the view of those voting. As a side note I see that Algoma and the two locals of the Union have reached a tentative agreement on new collective agreements, meeting the requirements of the Third Plan and that ratification votes will soon take place. The prospects for the business enterprise of Algoma surviving in the long run are better than the likely alternative - and this for the benefit of all classes of affected creditors, not to mention for the benefit of all stakeholders in this situation including Algoma's employees, the three levels of government and the citizens of Sault Ste. Marie and its surrounding area. All those who have participated directly or indirectly in the evolution of the Third Plan or in manifesting support for it or its underpinnings are to be congratulated and applauded for their positive and thoughtful contribution.

6 It seems to me that in these circumstances there has been an appropriate, fair and reasonable balancing of interests. I therefore find that the Third Plan is fair and reasonable.

7 The Third Plan is sanctioned and approved. Order accordingly together with the ancillary relief requested including the amendment to Algoma's articles of incorporation to cancel the existing common shares (as not having any value); see s. 186 of the (Ontario) Business Corporations Act; Re Beatrice Foods Inc., Oct. 21, 1996 unreported decision of Houlden J.A. sitting in the Ontario General Division; Canadian Airlines, supra, at pp. 288-90.

8 I pause to note that this is the second time in a decade that Algoma has had to seek insolvency protection under the CCAA. It has been operating in difficult markets in unsettled times. But that is inherent in the nature of competitive markets. Everyone involved will have to do their part - in fact go the extra mile - to ensure to the maximum human possibility that Algoma survives - and prospers, that it is strongly competitive, innovative, flexible and able to withstand temporary adversity. It will take a cooperative team effort. The cost of failure to this beautiful northern Ontario community and the spillover to the three levels of government (including environmental concerns, welfare payments, tax losses, unemployment claims, etc.) would be immense. The benefits of success are obvious to those directly affected - employees, shareholders, pensioners, creditors - but as well there is the positive multiplier effect for the community as well as the breathing space for the three levels of government to look at flexibility and diversification programs. So in closing, I would say: "Remember the past - but build for the future."

LeSAGE C.J.S.C.

cp/d/qlhcc/qlmlt

TAB 17

Case Name:

Muscletech Research and Development Inc. (Re)

**RE: IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Muscletech Research and
Development Inc. and those Entities Listed on
Schedule "A" hereto, Applicants**

[2007] O.J. No. 695

30 C.B.R. (5th) 59

156 A.C.W.S. (3d) 22

2007 CarswellOnt 1029

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List - Toronto, Ontario

J.D. Ground J.

Heard: February 15, 2007.

Judgment: February 22, 2007.

(27 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Application by the insolvent applicants for the sanction of a distribution plan to resolve large number of product liability and other lawsuits allowed -- Applicants complied with the Act and did nothing that was contrary to it -- Plan was fair and reasonable.

Application by certain applicants under the Companies' Creditors Arrangement Act for the sanction of their distribution plan -- Plan proposed distributions to each creditor in the General Claimants Class and each creditor in the Personal Injury Claimants Class -- Such distributions were to be funded from the contributed funds paid to the Monitor by the subject parties defined in the Plan --

Plan was not a restructuring plan but was a unique liquidation plan funded entirely by parties other than the applicants -- Purpose and goal of the applicants seeking relief under the Act was to achieve global resolution of a large number of product liability and other lawsuits that were commenced principally in the United States by numerous claimants and which related to products formerly advertised, marketed and sold by Muscletech Research and Development Inc. -- Applicants' successful restructuring depended on the resolution of the product liability claims -- HELD: Application allowed -- Applicants complied with all the requirements of Act and had adhered to previous court orders -- They were insolvent and had total claims in excess of \$5 million -- Nothing was done that was not authorized by the Act -- Plan was fair and reasonable -- Applicants had no assets and no funds with which to fund a distribution to creditors -- Without the contributed funds there would be no distribution and no Plan and the applicants' only alternative would be bankruptcy -- Unsecured creditors would receive nothing in the event of a bankruptcy -- Part of the Plan was that certain affected parties to the litigation would receive releases -- Releases were necessary because without them no funds would be contributed -- If the Plan was not sanctioned the parties would continue to be mired in extensive and expensive litigation that would have no predictable outcome.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 6, s. 12

Corporations Tax Act, s. 107

Excise Tax Act, s. 270

Income Tax Act, s. 159

Counsel:

Fred Myers and David Bish, for CCAA Applicants.

Derrick Tay and Randy Sutton, for Iovate Companies.

Natasha MacParland and Jay Schwartz, for the RSM Richter Inc.

Steven Gollick, for Zurich Insurance Company.

A. Kauffman, for GNC Oldco.

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

Pamela Huff and Beth Posno for Representative Plaintiffs.

Jeff Carhart, for Ad Hoc Tort Claimants Committee.

David Molton and Steven Smith, for Brown Rudnick.

Brent McPherson, for XL Insurance America Inc.

Alex Ilchenko, for Walgreen Co.

Lisa La Horey, for E&L Associates, Inc.

ENDORSEMENT

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

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

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

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

The Claims Process

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

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

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

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

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

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

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

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

13 It is well settled law that, for the court to exercise its discretion pursuant to s. 6 of the CCAA and sanction a plan, the Applicants must establish that: (a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court; (b) nothing has been done or purported to be done that is not authorized by the CCAA; and (c) the Plan is fair and reasonable.

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

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

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

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

The Plan is Fair and Reasonable

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

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

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

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

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

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

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

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

[35] In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether

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

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

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

motion brought by certain personal injury claimants, as follows:

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

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

Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs of Claim settling [sic] out in detail their claims against numerous Third Parties.

It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) Paperny J. stated at p. 92:

While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such

releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

24 The representative Plaintiffs have referred to certain decisions in the United States that appear to question the jurisdiction of the courts to grant Third Party Releases. I note, however, that Judge Rakoff, who is the U.S. District Court Judge is seized of the *MuscleTech* proceeding, and Judge Drain stated in a hearing in *Re TL Administration Corporation* on July 21, 2005:

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

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

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

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

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

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

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

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

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

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

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

J.D. GROUND J.

* * * * *

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

* * * * *

SCHEDULE "B"

Court File No. 06-CL-6241

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE) THURSDAY, THE 15TH

)
MR. JUSTICE GROUND) DAY OF FEBRUARY, 2007

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND
DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE
"A" HERETO

Applicants

SANCTION ORDER

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

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

DEFINITIONS

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

SERVICE AND MEETING OF CREDITORS

2. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Plan and the Monitor's Seventeenth Report to all Creditors.
3. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Meeting Materials (as defined in the Meeting Order) to all Creditors, and that the Meeting was duly convened, held and conducted, in conformity with the CCAA, the Meeting Order and all other Orders of this Court in the

CCAA Proceedings. For greater certainty, and without limiting the foregoing, the vote cast at the Meeting on behalf of Rhodrick Harden by David Molton of Brown Rudnick Berlack Israelis LLP, in its capacity as representative counsel for the Ad Hoc Committee of MuscleTech Tort Claimants, is hereby confirmed.

4. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the within Notice of Motion and Motion Record, and of the date and time of the hearing held by this Court to consider the within Motion, such that: (i) all Persons have had an opportunity to be present and be heard at such hearing; (ii) the within Motion is properly returnable today; and (iii) further service on any interested party is hereby dispensed with.

SANCTION OF PLAN

5. **THIS COURT ORDERS AND DECLARES** that:
- (a) the Plan has been approved by the requisite majorities of the Creditors in each class present and voting, either in person or by proxy, at the Meeting, all in conformity with the CCAA and the terms of the Meeting Order;
 - (b) the Applicants have acted in good faith and with due diligence, have complied with the provisions of the CCAA, and have not done or purported to do (nor does the Plan do or purport to do) anything that is not authorized by the CCAA;
 - (c) the Applicants have adhered to, and acted in accordance with, all Orders of this Court in the CCAA Proceedings; and
 - (d) the Plan, together with all of the compromises, arrangements, transactions, releases, discharges, injunctions and results provided for therein and effected thereby, including but not limited to the Settlement Agreements, is both substantively and procedurally fair, reasonable and in the best interests of the Creditors and the other stakeholders of the Applicants, and does not unfairly disregard the interests of any Person (whether a Creditor or otherwise).
6. **THIS COURT ORDERS** that the Plan be and is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

PLAN IMPLEMENTATION

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

- contemplated pursuant to the Plan.
8. **THIS COURT ORDERS** that upon the satisfaction or waiver, as applicable, of the conditions precedent set out in Section 7.1 of the Plan, the Monitor shall file with this Court and with the U.S. District Court a certificate that states that all conditions precedent set out in Section 7.1 of the Plan have been satisfied or waived, as applicable, and that, with the filing of such certificate by the Monitor, the Plan Implementation Date shall have occurred in accordance with the Plan.
 9. **THIS COURT ORDERS AND DECLARES** that as of the Plan Implementation Date, the Plan, including all compromises, arrangements, transactions, releases, discharges and injunctions provided for therein, shall inure to the benefit of and be binding and effective upon the Creditors, the Subject Parties and all other Persons affected thereby, and on their respective heirs, administrators, executors, legal personal representatives, successors and assigns.
 10. **THIS COURT ORDERS AND DECLARES** that, as of the Plan Implementation Date, the validity or invalidity of Claims and Product Liability Claims, as the case may be, and the quantum of all Proven Claims and Proven Product Liability Claims, accepted, determined or otherwise established in accordance with the Claims Resolution Order, and the factual and legal determinations made by the Claims Officer, this Court and the U.S. District Court in connection with all Claims and Product Liability Claims (whether Proven Claims and Proven Product Liability Claims or otherwise), in the course of the CCAA Proceedings are final and binding on the Subject Parties, the Creditors and all other Persons.
 11. **THIS COURT ORDERS** that, subject to the provisions of the Plan and the performance by the Applicants and the Monitor of their respective obligations under the Plan, and effective on the Plan Implementation Date, all agreements to which the Applicants are a party shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations under, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such agreement, by reason of:
 - (a) any event that occurred on or prior to the Plan Implementation Date that would have entitled any Person thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Applicants);
 - (b) the fact that the Applicants have: (i) sought or obtained plenary relief under the CCAA or ancillary relief in the United States of America, including pursuant to Chapter 15 of the *United States Bankruptcy Code*, or (ii) commenced or completed the CCAA Proceedings or the U.S. Proceedings;

- (c) the implementation of the Plan, or the completion of any of the steps, transactions or things contemplated by the Plan; or
 - (d) any compromises, arrangements, transactions, releases, discharges or injunctions effected pursuant to the Plan or this Order.
12. **THIS COURT ORDERS** that, from and after the Plan Implementation Date, all Persons (other than Unaffected Creditors, and with respect to Unaffected Claims only) shall be deemed to have waived any and all defaults then existing or previously committed by the Applicants, or caused by the Applicants, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "Agreement"), existing between such Person and the Applicants or any other Person and any and all notices of default and demands for payment under any Agreement shall be deemed to be of no further force or effect; provided that nothing in this paragraph shall excuse or be deemed to excuse the Applicants from performing any of their obligations subsequent to the date of the CCAA Proceedings, including, without limitation, obligations under the Plan.
13. **THIS COURT ORDERS** that, as of the Plan Implementation Date, each Creditor shall be deemed to have consented and agreed to all of the provisions of the Plan in their entirety and, in particular, each Creditor shall be deemed:
- (a) to have executed and delivered to the Monitor and to the Applicants all consents, releases or agreements required to implement and carry out the Plan in its entirety; and
 - (b) to have agreed that if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Creditor and the Applicants as of the Plan Implementation Date (other than those entered into by the Applicants on or after the Filing Date) and the provisions of the Plan, the provisions of the Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.
14. **THIS COURT ORDERS AND DECLARES** that any distributions under the Plan and this Order shall not constitute a "distribution" for the purposes of section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada) and section 107 of the *Corporations Tax Act* (Ontario) and the Monitor in making any such payments is not "distributing", nor shall be considered to have "distributed", such funds, and the Monitor shall not incur any liability under the above-mentioned statutes for making any

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

APPROVAL OF SETTLEMENT AND FUNDING AGREEMENTS

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

RELEASES, DISCHARGES AND INJUNCTIONS

19. **THIS COURT ORDERS AND DECLARES** that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Subject Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan (and without which it would not be possible to complete the global resolution of the Product Liability Claims upon which the Plan and the Settlement Agreements are premised), and that, effective on the Plan Implementation Date, all such releases, discharges and injunctions are hereby sanctioned, approved and given full force and effect, subject to: (a) the rights of Creditors to receive distributions in respect of their Claims and Product Liability Claims in accordance with the Plan and the Settlement Agreements, as applicable; and (b) the rights and obligations of Creditors and/or the Subject Parties under the Plan, the Settlement Agreements, the Funding Agreements and the Mutual Release. For greater

certainty, nothing herein or in the Plan shall release or affect any rights or obligations under the Plan, the Settlement Agreements, the Funding Agreements and the Mutual Release.

20. **THIS COURT ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan or in the Call For Claims Order, the Subject Parties and their respective representatives, predecessors, heirs, spouses, dependents, administrators, executors, subsidiaries, affiliates, related companies, franchisees, member companies, vendors, partners, distributors, brokers, retailers, officers, directors, shareholders, employees, attorneys, sureties, insurers, successors, indemnitees, servants, agents and assigns (collectively, the "Released Parties"), as applicable, be and are hereby fully, finally, irrevocably and unconditionally released and forever discharged from any and all Claims and Product Liability Claims, and any and all past, present and future claims, rights, interests, actions, liabilities, demands, duties, injuries, damages, expenses, fees (including medical and attorneys' fees and liens), costs, compensation, or causes of action of whatsoever kind or nature whether foreseen or unforeseen, known or unknown, asserted or unasserted, contingent or actual, liquidated or unliquidated, whether in tort or contract, whether statutory, at common law or in equity, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly: (A) any proof of claim filed by any Person in accordance with the Call For Claims Order (whether or not withdrawn); (B) any actual or alleged past, present or future act, omission, defect, incident, event or circumstance from the beginning of the world to the Plan Implementation Date, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, any alleged personal, economic or other injury allegedly based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, the research, development, manufacture, marketing, sale, distribution, fabrication, advertising, supply, production, use, or ingestion of products sold, developed or distributed by or on behalf of the Applicants; or (C) the CCAA Proceedings; and no Person shall make or continue any claims or proceedings whatsoever based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, the substance of the facts giving rise to any matter herein released (including, without limitation, any action, cross-claim, counter-claim, third party action or application) against any Person who claims or might reasonably be expected to claim in any manner or forum against one or more of the Released Parties, including, without limitation, by way of contribution or indemnity, in common law, or in equity, or under the provisions of any statute or regulation, and that in the event that any of the Released Parties are added to such claim or proceeding, it will immediately discontinue any such claim or proceeding.
21. **THIS COURT ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan or in the Call For Claims Order, all Persons (regardless of whether or not such Persons are Creditors), on

their own behalf and on behalf of their respective present or former employees, agents, officers, directors, principals, spouses, dependents, heirs, attorneys, successors, assigns and legal representatives, are permanently and forever barred, estopped, stayed and enjoined, on and after the Plan Implementation Date, with respect to Claims, Product Liability Claims, Related Claims and all claims otherwise released pursuant to the Plan and this Sanction Order, from:

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

DISCHARGE OF MONITOR

22. **THIS COURT ORDERS** that RSM Richter Inc. shall be discharged from its duties as Monitor of the Applicants effective as of the Plan Implementation Date; provided that the foregoing shall not apply in respect of: (i) any obligations of, or matters to be completed by, the Monitor pursuant to the Plan or the Settlement Agreements from and after the Plan Implementation Date; or (ii) matters otherwise requested by the Applicants and agreed to by the Monitor.
23. **THIS COURT ORDERS** that, subject to paragraph 22 herein, the completion of the Monitor's duties shall be evidenced, and its final discharge shall be effected by the filing by the Monitor with this Court of a certificate of discharge at, or as soon as

- practicable after, the Plan Implementation Date.
24. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Monitor in the CCAA Proceedings and as foreign representative in the U.S. Proceedings, as disclosed in its reports to the Court from time to time, including, without limitation, the Monitor's Fifteenth Report dated December 12, 2006, the Monitor's Sixteenth Report dated December 22, 2006, and the Seventeenth Report, are hereby approved and that the Monitor has satisfied all of its obligations up to and including the date of this Order, and that in addition to the protections in favour of the Monitor as set out in the Orders of this Court in the CCAA Proceedings to date, the Monitor shall not be liable for any act or omission on the part of the Monitor, including with respect to any reliance thereof, including without limitation, with respect to any information disclosed, any act or omission pertaining to the discharge of duties under the Plan or as requested by the Applicants or with respect to any other duties or obligations in respect of the implementation of the Plan, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Monitor. Subject to the foregoing, and in addition to the protections in favour of the Monitor as set out in the Orders of this Court, any claims against the Monitor in connection with the performance of its duties as Monitor are hereby released, stayed, extinguished and forever barred and the Monitor shall have no liability in respect thereof.
25. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court and on prior written notice to the Monitor and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any proposed action or proceeding.
26. **THIS COURT ORDERS** that the Monitor, its affiliates, and their respective officers, directors, employees and agents, and counsel for the Monitor, are hereby released and discharged from any and all claims that any of the Subject Parties or their respective officers, directors, employees and agents or any other Persons may have or be entitled to assert against the Monitor, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of issue of this Order in any way relating to, arising out of or in respect of the CCAA proceedings.

CLAIMS OFFICER

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

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

MEDIATOR

29. **THIS COURT ORDERS** that the appointment of Mr. David Geronemus (the "Mediator") as a mediator in respect of non-binding mediation of the Product Liability Claims pursuant to the Order of this Court dated April 13, 2006 (the "Mediation Order"), in the within proceedings, shall automatically cease, and his roles and duties in the CCAA Proceedings and in the U.S. Proceedings shall terminate, on the Plan Implementation Date.
30. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Mediator pursuant to the Mediation Order, and as disclosed in the Monitor's reports to this Court, are hereby approved, and that the Mediator has satisfied all of his obligations up to and including the date of this Order, and that any claims against the Mediator in connection with the performance of his duties as Mediator are hereby stayed, extinguished and forever barred.

ESCROW AGENT

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

REPRESENTATIVE COUNSEL

32. **THIS COURT ORDERS** that Representative Counsel (as defined in the Order of this Court dated February 8, 2006 (the "Appointment Order")) shall not be liable, either prior to or subsequent to the Plan Implementation Date, for any act or omission on its part as a result of its appointment or the fulfillment of its duties in carrying out the provisions of the Appointment Order, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on its part, and that no action, application or other proceedings shall be taken, made or continued against

Representative Counsel without the leave of this Court first being obtained.

CHARGES

33. **THIS COURT ORDERS** that, subject to paragraph 33 hereof, the Charges on the assets of the Applicants provided for in the Initial CCAA Order and any subsequent Orders in the CCAA Proceedings shall automatically be fully and finally terminated, discharged and released on the Plan Implementation Date.
34. **THIS COURT ORDERS that:** (i) the Monitor shall continue to hold a charge, as provided in the Administrative Charge (as defined in the Initial CCAA Order), until the fees and disbursements of the Monitor and its counsel have been paid in full; and (ii) the DIP Charge (as defined in the Initial CCAA Order) shall remain in full force and effect until all obligations and liabilities secured thereby have been repaid in full, or unless otherwise agreed by the Applicants and the DIP Lender (as defined in the Initial CCAA Order).
35. **THIS COURT ORDERS AND DECLARES** that, notwithstanding any of the terms of the Plan or this Order, the Applicants shall not be released or discharged from their obligations in respect of Unaffected Claims, including, without limitation, to pay the fees and expenses of the Monitor and its respective counsel.

STAY OF PROCEEDINGS

36. **THIS COURT ORDERS** that, subject to further order of this Court, the Stay Period established in the Initial CCAA Order, as extended, shall be and is hereby further extended until the earlier of the Plan Implementation Date and the date that is 60 Business Days after the date of this Order, or such later date as may be fixed by this Court.
37. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to apply to the U.S. District Court for a comparable extension of the Stay Period as set out in paragraph 36 hereof.

INITIAL CCAA ORDER AND OTHER ORDERS

38. **THIS COURT ORDERS** that:
 - (a) except to the extent that the Initial CCAA Order has been varied by or is inconsistent with this Order or any further Order of this Court, the provisions of the Initial CCAA Order shall remain in full force and effect until the Plan Implementation Date; provided that the protections granted in favour of the Monitor shall continue in full force and effect after the Plan Implementation Date; and
 - (b) all other Orders made in the CCAA Proceedings shall continue in full force

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

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

APPROVAL OF THE SEVENTEENTH REPORT

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

FEES

41. **THIS COURT ORDERS** that the fees, disbursements and expenses of the Monitor from November 1, 2006 to January 31, 2007, in the amount of \$123,819.56, plus a reserve for fees in the amount of \$100,000 to complete the administration of the Monitor's mandate, be and are hereby approved and fixed.
42. **THIS COURT ORDERS** that the fees, disbursements and expenses of Monitor's legal counsel in Canada, Davies Ward Phillips & Vineberg LLP, from October 1, 2006 to January 31, 2007, in the amount of \$134,109.56, plus a reserve for fees in the amount of \$75,000 to complete the administration of its mandate, be and are hereby approved and fixed.
43. **THIS COURT ORDERS** that the fees, disbursements and expenses of Monitor's legal counsel in the United States, Allen & Overy LLP, from September 1, 2006 to January 31, 2007, in the amount of USD\$98,219.87, plus a reserve for fees in the amount of USD\$50,000 to complete the administration of its mandate, be and are hereby approved and fixed.

GENERAL

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

EFFECT, RECOGNITION, ASSISTANCE

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

cp/e/qlgxc/qlpwb

**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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

Court of Appeal File Numbers: M42068
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

**BOOK OF AUTHORITIES OF SINO-
FOREST CORPORATION
(Motion for Leave to Appeal)**

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