TAB 5

Indexed as:
Olympia & York Developments Ltd. (Re)

Re Olympia & York Developments Ltd. and 23 other Companies set out in Schedule "A"

[1993] O.J. No. 545

12 O.R. (3d) 500

17 C.B.R. (3d) 1

38 A.C.W.S. (3d) 1149

Action No. B125/92

Ontario Court (General Division),

R.A. Blair J.

February 5, 1993

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1 **R.A. BLAIR J.** (orally):--On May 14, 1992, Olympia & York Developments Limited and 23 affiliated corporations (the "applicants") sought, and obtained, an order granting them the protection of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a period of time while they attempted to negotiate a plan of arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.

2 A Final Plan of compromise or arrangements has now been negotiated and voted on by the numerous classes of creditors. Twenty-seven of the 35 classes have voted in favour of the Final Plan; eight have voted against it. The applicants now bring the Final Plan before the court for sanctioning, pursuant to s. 6 of the Companies' Creditors Arrangement Act.

THE PLAN

3 The Plan is described in the motion materials as "The Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as the "Plan" or the "Final Plan". Its final purpose, as stated in art. 1.2,

> . . . is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

4 The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual

proposals -- with some common themes -- for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.

5 The contemplated O & Y restructuring has three principal components, namely:

1. The organization of O & Y Properties, a company to be owned as to 90 per cent by OYDL and as to 10 per cent by the Reichmann family, and which is to become OYDL's Canadian real estate management arm;
2. Subject to certain approvals and conditions, and provided the secured creditors do not exercise their remedies against their security , the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y Properties, in exchange for shares; and,
3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

6 There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely, by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".

7 Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class-by-class basis, for dealing with the outstanding debt in question during the five-year Plan period.

8 In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.

9 It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.

10 The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self- financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.

11 The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides:

a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically lifted; and,

b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders' Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan .

12 Finally, I note that art. 1.3 of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants".

THE PRINCIPLES TO BE APPLIED ON SANCTIONING

13 In Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 sub nom. Nova Metal Products Inc. v. Comiskey (Trustee of) (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the Companies' Creditors Arrangement Act, with this overview, at pp. 308-09 O.R., pp. 122-23 C.B.R.:

> Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (No. 1) (1989), 102 A.R. 161 (Q.B.), at p. 165.

14 Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a plan.

15 Section 6 of the CCAA reads as follows:

> 6. Where a majority in number representing three-fourths 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 Act or is in the course of being wound up under the Winding-up Act , on the trustee in bankruptcy or liquidator and contributories of the company.

(Emphasis added)

16 Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.

17 The general principles to be applied in the exercise of the court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

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

18 In an earlier Ontario decision, Re Dairy Corp. of Canada, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario Companies Act, R.S.O. 1927, c. 218. The Nova Scotia Court of Appeal recently followed Re Northland Properties Ltd. in Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116 (N.S.C.A.). Farley J. did as well in Re Campeau (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.).

Strict compliance with statutory requirements

19 Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any

unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: see Re Campeau.

20 At the outset, on May 14, 1992, I found that the applicants met the criteria for access to the protection of the Act -- they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings creditors' committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.

21 With the consent, and at the request of, the applicants and the creditors' committees, the Honourable David H.W. Henry, a former justice of this court, was appointed "claims officer" by order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or the Honourable M. Craig or the Honourable W. Gibson Gray -- both also former justices of this court -- as his designees, presided over the meetings of the classes of creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the court orders pertaining to them and the CCAA.

22 I am quite satisfied that there has been strict compliance with the statutory requirements of the Companies' Creditors Arrangement Act.

Unauthorized conduct

23 I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.

24 Since May 14, the court has been called upon to make approximately 60 orders of different sorts, in the course of exercising its supervisory function in the proceedings. These orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring costs throughout the "stay" period; they involved the confirmation of the sale of certain of the applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of creditors' committees, the classification of creditors for purposes of voting, the creation and defining of the role of "information officer" and, similarly, of the role of "claims officer". They involved the endorsement of the information circular respecting the Final Plan and the mail and notice that was to be given regarding it. The court's orders encompassed, as I say, the general supervision of the negotiation and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the applicants and the creditors along the way.

25 While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of compromise, I have, with one exception, been the judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA .

26 In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.

27 This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

28 The Plan must be "fair and reasonable". That the ultimate expression of the court's responsibility in sanctioning a plan should find itself telescoped into those two words is not surprising. "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 make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process.

29 From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs, whose decision in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p.

314 C.B.R., p. 116 B.C.L.R., that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

30 If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced -- or "reasonable" -- manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it -- technical and procedural compliance with the Act aside -- the plan should be sanctioned if it is "fair and reasonable".

31 When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be assessed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.

32 On the appeal in Re Northland Properties Ltd., supra, at p. 201, Chief Justice McEachern made the following comment in this regard:

> . . . there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

33 In Re Alabama, New Orleans, Texas & Pacific Junction Railway Co., [1891] 1 Ch. 213 (C.A.), a case involving a scheme and arrangement under the Joint Stock Companies Arrangement Act, 1870 (U.K.), c. 104, Lord Justice Bowen put it this way, at p. 243:

> Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation . . . Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

Again at p. 245:

> It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

34 Is the Final Plan presented here by the O & Y applicants "fair and reasonable"?

35 I have reviewed the Plan, including the provisions relating to each of the classes of creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian -- if not worldwide -- corporate history. It would be folly for me to suggest that I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.

36 One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

37 As 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.

38 This point has been made in numerous authorities, of which I note the following: Re Northland Properties Ltd., supra, at p. 205; Re Langley's Ltd. , [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.), at p. 129 O.R., pp. 233-34 D.L.R.; Re Keddy Motor Inns Ltd, supra; École internationale de haute esth etique Edith Serei Inc. (Receiver of) v. Edith Serei internationale (1987) Inc. (1989), 78 C.B.R. (N.S.) 36 (Que. S.C.).

39 In Re Keddy Motor Inns Ltd., the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a plan is not fair and reasonable, involving "matters of substance", when the plan has been approved by the requisite majority of creditors: see pp. 257-58 C.B.R., pp. 128-29 B.L.R. Freeman J.A. stated at p. 258 C.B.R., p. 129 B.L.R.:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

40 In Re École internationale, at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.

41 In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the Final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take a compromise on the part of the participants in the negotiating and bargaining process". The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of May 14, 1992". Each creditors' committee had the benefit of independent and experienced legal counsel.

42 With the exception of the eight classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the applicants. This level of approval is something the court must acknowledge with some deference.

43 Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of five years.

44 The claims of creditors -- in this case, secured creditors -- who did not approve the Plan are specifically treated under the Plan as "unaffected claims", i.e., claims not compromised or bound by the provisions of the Plan. Section 6.2(c) of the Final Plan states than the applicants may apply to the court for a sanction order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.

45 The claims of unsecured creditors under the Plan are postponed for five years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least annually, an amount out of OYDL's cash on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.

46 Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the applicants are able to become the "self- sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan".

47 Speaking as co-chair of the unsecured creditors' committee at the meeting of that class of creditors, Mr. Ed Lundy made the following remarks:

> Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a

position to give a general overview observation to the Plan.

The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.

In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.

The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.

After such consideration, the members have indicated their intentions as follows . . .

Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

48 After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26 per cent of the creditors represented and voting at the meeting and 93.37 per cent in value of the claims represented and voting at the meeting.

49 As for the O & Y applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.

50 In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non- intrusive and as non-prejudicial a manner as possible.

51 I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e., as much as they would have received had there not been a reorganization: see Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.

52 The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contemplated arrangement under the Business Corporations Act, R.S.O. 1990, c. B.16. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.

53 For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".

54 Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

55 As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each

class). In eight of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50/75 per cent test of s. 6.

56 The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:

> Class 2 -- First Canadian Place Lenders Class 8 -- Fifth Avenue Place Bondholders Class 10 -- Amoco Centre Lenders Class 13 -- L'Esplanade Laurier Bondholders Class 20 -- Star Top Road Lenders Class 21 -- Yonge-Sheppard Centre Lenders Class 29 -- Carena Lenders
> Class 33a -- Bank of Nova Scotia Other Secured creditors

57 While s. 6 of the CCAA makes the mathematics of the approval process clear -- the Plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class -- it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors . . . agree to any compromise or arrangement . . . the compromise or arrangement may be sanctioned by the court.

(Emphasis added)

58 What does "a majority . . . of the . . . class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?

59 This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.

60 At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See Re Keddy Motor Inns Ltd., supra. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

61 In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this . . . purpose": Elan Corp. v. Comiskey , supra, per Doherty J.A., at p. 307 O.R., p. 120 C.B.R. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297 O.R., pp. 110-11 C.B.R.:

> It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies . . . are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

62 Approaching the interpretation of the unclear language of s. 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.

63 Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of s. 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:

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

of any such creditor . . . order a meeting of the creditors or class of creditors.

(Emphasis added)

64 It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or any class -- as opposed to all classes -- of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.

65 Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in all classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.

66 In Re Wellington Building Corp., [1934] O.R. 653 (S.C.), Mr. Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

> I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value of each class should be obtained in support of the scheme before the Court could or should approve of it.

(Emphasis added)

67 This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 660):

> Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

68 Thus, the plan in Re Wellington Building Corp. went unsanctioned, both because the bondholders had unfairly been deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

69 On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in Multidev Immobilia Inc. v. S.A. Just Invest (1988), 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.). There, the arrangement had been accepted by all creditors except one secured creditor, S.A. Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal, was unconcerned because it had struck a separate agreement; and three classes of which Just Invest was a member, opposed.

70 The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved as regards the other creditors who voted in favour of the Plan. The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

71 While it might be said that Multidev, supra, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to

sanction.

72 I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.

73 By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the Plan, secured creditors have the right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different effect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not accepted and none of their rights is being "confiscated".

74 From this perspective it could be said that the parties are merely being held to -- or allowed to follow -- their contractual arrangement. There is, indeed, authority to suggest that a plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a plan that could be lawfully incorporated into any contract: see Re Canadian Vinyl Industries Inc. (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; Houlden & Morawetz, Bankruptcy Law of Canada, vol. 1 (Toronto: Carswell, 1984), pp. E-6 and E-7.

75 In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is nothing unfair in sanctioning the Final Plan without unanimity, in my view.

76 I am prepared to do so.

77 A draft order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semicolon, and capital letter has been vigilantly examined by the creditors and a battalion of advisers. I have been told by virtually every counsel who rose to make submissions, that the draft as it exists represents a very "fragile consensus", and I have no doubt that such is the case. Its wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan -- the First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.

78 Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning order should state this clearly and in a positive way. Paragraph 9 of his factum states the argument succinctly. It says:

> 9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.

79 The basis for the concern of these "no" creditors is set out in the next paragraph of the factum, which states:

> 10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.

80 The provision in the proposed draft order which is the most contentious is para. 4 thereof, which states:

> 4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors

holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

81 Mr. Barrack seeks to have a single, but much debated word -- "only" -- inserted in the second line of that paragraph after the word "will", so that it would read "and will only be binding on . . . the Applicants and the Creditors holding Claims in Classes [which have approved the Plan]". On this simple, single word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.

82 In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:

> 35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:
>
> 4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.
>
> 36. It is also submitted that any additional paragraph should be added if any provisions of the proposed Sanction Order are granted beyond paragraph 4 thereof as follows:
>
> This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

83 These suggestions are vigorously opposed by the applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed order is necessary in order to provide those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise if arise they do.

84 The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate restructuring. It may be, or it may not be, that the objecting project lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a reorganization and corporate restructuring of this dimension it may simply not be realistic to expect that the world of the secured creditor, which became not-so-perfect with the onslaught of the applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.

85 I do, however, agree with the thrust of Mr. Barrack's submissions that the sanction order and the Plan can be binding only upon the applicants and the creditors of the applicants in respect of claims in classes which have approved the Plan, and trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in s. 6.2 (c), it stipulates that, where classes of creditors do not agree to the Plan,

> (i) the applicants shall treat such class of claims to be an unaffected class of claims; and,
> (ii) the applicants shall apply to the court "for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan".

86 The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.

87 In terms of the court's jurisdiction, s. 6 directs me to sanction the order, if the circumstances are appropriate, and enacts that, once I have done so, the order "is binding . . . on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors . . . and on the company". As I see it, that is exactly what the draft order presented to me does.

88 Accordingly, an order will go in terms of the draft order marked "revised Feb. 5, 1993", with the agreed amendments

noted thereon, and on which I have placed my fiat.

89 These reasons were delivered orally at the conclusion of the sanctioning hearing which took place on February 1 and February 5, 1993. They are released in written form today.

Counsel:

COUNSEL FOR SANCTIONING HEARING ORDER SCHEDULE "A"

[para90] David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland, for Olympia & York.

[para91] Ronald N. Robertson, Q.C., for Hong Kong & Shanghai Banking Corp.

[para92] David E. Baird, Q.C., and Patricia Jackson, for Bank of Nova Scotia.

[para93] Michael Barrack and S. Richard Orzy, for First Canadian Place Bondholders, Fifth Avenue Place Bondholders and L'Esplanade Laurier Bondholders.

[para94] William G. Horton, for Royal Bank of Canada.

[para95] Peter Howard and J. Superina, for Citibank Canada.

[para96] Frank J.C. Nebould, Q.C., for Unsecured/Under Secured Creditors Committee.

[para97] John W. Brown, Q.C., and J.J. Lucki, for Canadian Imperial Bank of Commerce.

[para98] Harry Fogul and Harold S. Springer, for The Exchange Tower Bondholders

[para99] Allan Sternberg and Lawrence Geringer, for O & Y Eurocreditco Debenture Holders.

[para100] Arthur O. Jacques and Paul M. Kennedy, for Bank of Nova Scotia, Agent for Scotia Plaza Lenders.

[para101] Lyndon Barnes and J.E. Fordyce, for Crédit Lyonnais, Cr edit Lyonnais Canada.

J. Carfagnini, for National Bank of Canada.

J.L. McDougall, Q.C., for Bank of Montreal.

[para102] Carol V. E. Hitchman, for Bank of Montreal (Phase I First Canadian Place).

[para103] James A. Grout, for Credit Suisse.

[para104] Robert I. Thornton, for I.B.J. Market Security Lenders.

C. Carron, for European Investment Bank.

[para105] W.J. Burden, for some debtholders of O & Y Commercial Paper II Inc.

G.D. Capern, for Robert Campeau.

[para106] Robert S. Harrison and A.T. Little, for Royal Trust Co. as trustee.

Order accordingly.

TAB 6

H

2008 CarswellOnt 4811

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

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

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

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

Ontario Court of Appeal

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

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

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

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

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

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

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

Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)

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

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

John B. Laskin for National Bank Financial Inc., National Bank of Canada

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

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

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

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

Usman Sheikh for Coventree Capital Inc.

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

Neil C. Saxe for Dominion Bond Rating Service

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

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

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

Subject: Insolvency; Civil Practice and Procedure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C.A.) — considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

Generally — referred to

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

s. 182 — referred to

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

s. 192 — referred to

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

en général — referred to

Companies Act, 1985, c. 6

s. 425 — referred to

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

Generally — referred to

s. 4 — considered

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

s. 6 — considered

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

s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

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

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

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

A. Introduction

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

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

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

Leave to Appeal

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

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

Appeal

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

B. Facts

The Parties

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

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

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

The ABCP Market

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

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

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

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

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

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

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

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

The Liquidity Crisis

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

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

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

The Montreal Protocol

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

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

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

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

The Plan

a) Plan Overview

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

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

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

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

b) The Releases

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

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

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

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

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

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;

c) The Canadian banks provide below-cost financing for the margin funding facility and,

d) Other parties make other contributions under the Plan.

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

The CCAA Proceedings to Date

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

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

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

back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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

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

38 The appellants attack both of these determinations.

C. Law and Analysis

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

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?

2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

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

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[FN1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

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

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

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

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[FN2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly —

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

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

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

49 I adopt these principles.

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

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

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125

(Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

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

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[FN3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

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

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

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

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

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of

the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

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

The Statutory Wording

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

a) the skeletal nature of the CCAA;

b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

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

59 Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

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

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

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

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

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

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

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

64 *T&N Ltd., Re, supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.[FN4]

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

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[FN5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

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

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

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[FN6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA

supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

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

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

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

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;

c) The Plan cannot succeed without the releases;

d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

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

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

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

The Jurisprudence

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

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

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

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

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[FN7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

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

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and

Stelco Inc., Re (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

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

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

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

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

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

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

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode

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

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

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

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

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

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

fore the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

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

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

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

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

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

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

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

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

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

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

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

The 1997 Amendments

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

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

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

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

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

Resignation or removal of directors

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

1997, c. 12, s. 122.

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

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[FN8]

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

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

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of au-

thority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

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

The Division of Powers and Paramountcy

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

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

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

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

Conclusion With Respect to Legal Authority

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

(2) The Plan is "Fair and Reasonable"

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

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

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

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

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

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

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Note-

holders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

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

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

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

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

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

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confis-

cated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

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

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

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

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

D. Disposition

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

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

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

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

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

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

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

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

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

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

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

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

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

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

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

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy

Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

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

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

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

Application granted; appeal dismissed.

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

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

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

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

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

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

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

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

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

END OF DOCUMENT

TAB 7

2003 CarswellBC 1399

Skeena Cellulose Inc., Re

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

Skeena Cellulose Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corp. (Respondents / Petitioners) and Clear Creek Contracting Ltd. and Jasak Logging Ltd. (Appellants / Applicants) and The Truck Loggers' Association (Intervenor)

British Columbia Court of Appeal

Newbury, Hall, Levine JJ.A.

Heard: April 28-29, 2003
Judgment: June 9, 2003
Docket: Vancouver CA030149

Proceedings: affirming (2002), 5 B.C.L.R. (4th) 193 (B.C.S.C.)

Counsel: *J.S. Forstrom*, for Appellants

M.I. Buttery, S.A. Dubo, for Respondents

M. Maclean, J.I. McLean, for Intervenor, Truck Loggers' Association

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Natural Resources; Property

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

Respondent logging company held long term timber harvesting contracts with five contractors, including applicants — Contracts were required to be renewed indefinitely under Timber Harvesting Contract and Subcontract Regulation — Logging company entered into arrangement under Companies' Creditors Arrangement Act — Logging company obtained come-back order allowing it to terminate contracts pursuant to report from monitor being filed 21 days before implementation — Logging company sent letter terminating applicants' contracts — Contracts were terminated before relevant monitor's report was filed — Creditors' meeting took place within 21 days of report being issued — Application for declaration that cancellation of contracts was invalid was dismissed — Trial judge found that elimination of contracts was consolidation and downsizing, which was permitted under order — Trial judge found that no prejudice occurred by not giving proper notice of cancellation of contracts — Trial judge found that applicants were creditors with claim for specific performance — Applicants appealed — Appeal dismissed — Trial judge correctly found that granting application would allow inappropriate differentiation in treatment between applicants and other creditors — Act gave court authority to allow logging company to break contracts, despite renewal requirements in Regulations — Regulations did not create statutory requirements to which contracts were subject, but dictated specific terms of contracts — Plan was fair, equitable and reasonable considering broad range of interests at stake — Lack of notice did not affect outcome of creditors' meeting — Logging company did not act in bad faith.

Cases considered by *Newbury J.A.*:

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

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — considered

Blue Range Resource Corp., Re, 1999 CarswellAlta 597, 245 A.R. 154 (Alta. Q.B.) — considered

Cam-Net Communications v. Vancouver Telephone Co., 182 D.L.R. (4th) 436, 1999 BCCA 751, 1999 CarswellBC 2808, 71 B.C.L.R. (3d) 226, 132 B.C.A.C. 52, 215 W.A.C. 52, 2 B.L.R. (3d) 118, 17 C.B.R. (4th) 26 (B.C. C.A.) — considered

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

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

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

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

Mine Jeffrey inc., Re, 2003 CarswellQue 90, 35 C.C.P.B. 71, 40 C.B.R. (4th) 95 (Que. C.A.) — considered

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

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

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

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151, 1995 CarswellBC 369 (B.C. C.A.) — referred to

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

Repap British Columbia Inc., Re (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.) — referred to

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd., 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered

Royal Oak Mines Inc., Re, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — referred to

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

Smoky River Coal Ltd., Re, 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — referred to

Sulphur Corp. of Canada Ltd., Re, 2002 ABQB 682, 2002 CarswellAlta 896, 35 C.B.R. (4th) 304, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152 (Alta. Q.B.) — considered

T. Eaton Co., Re, 1999 CarswellOnt 3542, 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

United Used Auto & Truck Parts Ltd., Re, 2000 CarswellBC 2132, 2000 CarswellBC 2133, 261 N.R. 196 (note), 149 B.C.A.C. 160 (note), 244 W.A.C. 160 (note) (S.C.C.) — referred to

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331, 1992 CarswellBC 508 (B.C. S.C.) — referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46

s. 178 — referred to

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

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

Generally — referred to

Commercial Arbitration Act, R.S.B.C. 1996, c. 55

Generally — referred to

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

Generally — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11 — referred to

s. 11(1) — considered

s. 11(2) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

Forest Act, R.S.B.C. 1996, c. 157

Generally — considered

s. 56.1 [en. 1998, c. 29, s. 10] — referred to

Forest Amendment Act, 1991, S.B.C. 1991, c. 11

Generally — referred to

Mechanics' Liens Act, R.S.M. 1970, c. M80

Generally — referred to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157

Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

Pt. 2

Pt. 5

Div. 5

s. 1(1) "AAC reduction criteria"

s. 13

ss. 13-15

s. 24

s. 28(2)(d)

s. 32(g)

s. 32(h)

APPEAL by logging contractors from judgment reported at 2002 BCSC 1280, 2002 CarswellBC 2032, 5 B.C.L.R. (4th) 193 (B.C. S.C.), dismissing contractors' application for declaration that cancellation of contracts pursuant to *Companies' Creditors Arrangement Act* was invalid.

***Newbury J.A.*:**

1 This appeal turns on the interaction of two statutory regimes — the scheme of "replaceable" or "evergreen" logging contracts established by the Province under the *Forest Act*, R.S.B.C. 1996, c. 157, and the scheme of judicial stays and creditors' compromises available under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA"), to insolvent corporations whose indebtedness exceeds $5,000,000.

2 Both schemes are said to involve considerations of fairness and equity. In the case of the *Forest Act*, a detailed series of "contractual" terms is required to be incorporated in agreements between the holders of harvesting licences granted by the Crown, and the contractors they in turn retain to carry out the logging. Most aspects of the relationship are either provided for in the mandatory terms or must be resolved by arbitration, the principles and procedures of which are also regulated by the Act. Most importantly, a licence holder must agree that when such an agreement expires, it will be renewed (or in the statutory terminology, "replaced") on terms substantially the same as those of the expired contract, assuming the contractor has performed its obligations thereunder. In this way, the legislation seeks to provide contractors with a degree of "security" analogous to the security of tenure implicit in a Crown harvesting licence, and to achieve greater fairness between the licence holder and its contractors.

3 In the case of the CCAA, the fairness analysis required to be carried out by the court generally refers to fairness as between classes of creditors. That analysis is tempered by the starker realities of whether the proposal before the court offers a chance of survival to the debtor corporation and whether it will be acceptable to the requisite majority of creditors. Unlike the detailed provisions of the *Forest Act* and regulations thereto, the CCAA is a brief set of "broad-brush" provisions that leave wide avenues of discretion to be exercised by courts in circumstances that may not permit the fine weighing of individual interests. As observed in *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), at 258, the legislation contemplates "rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat but on the best terms they can get."

4 The substantive question raised by this appeal is to what extent considerations of fairness between individual logging contractors who have replaceable contracts with a corporation in CCAA proceedings, should figure in the "rough-and-tumble" considerations applicable to a large corporate insolvency. Looked at another way, does the desirability of staving off a bankruptcy which could have disastrous consequences for many individuals, local governments and communities, supplant considerations of fairness between the holders of replaceable logging contracts to which the debtor corporation is a party?

FACTUAL BACKGROUND

5 The insolvent corporation in this case is Skeena Cellulose Inc. ("Skeena"). At all material times, it owned and operated a pulp mill and three sawmills, and held related forest tenures, mainly in north-western British Columbia. It was a large employer in that region and was one of the major manufacturers of bleached softwood kraft pulp in North America.

6 Skeena has experienced financial difficulties for many years. It underwent a financial restructuring under the CCAA in 1997. Although many of the positive results hoped for from that arrangement improved Skeena's long-term prospects, it appears that various other factors prevented full recovery. In August 2001, the Toronto-Dominion Bank demanded payment of more than $350,000,000 from Skeena and its subsidiaries, froze their operating lines and began to refuse to honour their cheques, including payroll cheques. Other creditors followed suit, and on September 5, 2001, Skeena and its subsidiaries petitioned the Supreme Court of British Columbia for a stay of proceedings under the CCAA.

7 The petition alleged, and it is not disputed, that Skeena owed over $409,000,000 (exclusive of interest) mainly to the Toronto-Dominion Bank and to corporations owned by the Province, which also held over 70 percent of its common shares. This debt was represented by bonds issued under a trust deed secured by charges on all of Skeena's assets, present and future. The petition stated that Skeena and its subsidiaries were insolvent and described the impact their bankruptcy could have on the provincial economy:

> 50. If the Petitioners were to totally cease operations or go into liquidation, the direct loss of jobs in British Columbia would be enormous, including the approximately 1,050 existing Skeena employees and, at least 1,000 employees of logging contractors, road building and silviculture contractors. It would also directly and indirectly impact service industries and business which rely on Skeena for a source of revenue. By the Petitioners' estimate, as many as 7,000 additional jobs in British Columbia would be affected.
>
> 51. A liquidation of the Petitioners would be particularly devastating to the communities of Terrace, South Hazelton, and Prince Rupert. Skeena is the largest employer in those communities, and many hundreds of families depend on Skeena for their livelihoods in those communities.
>
> 52. The loss of this number of jobs would also, of course, have a generally damaging effect on the British Columbia economy, given the spillover effect of lost wages and lost purchases.
>
> 53. Skeena is currently in good standing under its collective agreements and other employment relationships. However, if some or all of the employees would be terminated, severance claims, including payments for group termination under the Employment Standards Act, could be significant.

8 Chief Justice Brenner, who I understand heard most if not all the applications in this matter in Supreme Court, granted an initial order *ex parte* on September 5, 2001, staying proceedings against Skeena and its subsi-

diaries for 30 days and appointing Arthur Andersen Inc. as Monitor. On October 5, he granted a "Come-back Order" which extended the stay and contemplated that the petitioners would file a formal plan of compromise or arrangement (entitled the "Reorganization Plan") with their creditors on or before November 5; that they would file a formal plan of arrangement (entitled the "Plan of Arrangement") with their shareholders under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44; and that meetings of their creditors would be called to vote on the Reorganization Plan. Under the heading "Post-Filing Operations", the Order stated:

> 11. The Petitioners shall remain in possession of the Assets and shall continue to carry on business in the ordinary course provided that they shall have the right with the approval of the Monitor, or this Court, to proceed with an orderly disposition of such of the Assets as they deem appropriate, either with the consent of any creditor holding security against such Assets or pursuant to an Order of this Court, in order to facilitate the downsizing and consolidation of their business and operations (the "Downsizing").
>
> 12. To facilitate the Downsizing, the Petitioners may:
>
> all without interference of any kind from third parties, including landlords and notwithstanding the provisions of any lease, other instrument or law affecting or limiting the rights of the Petitioners to remove or divest Assets from leased premises, and <u>that any liabilities of the Petitioners arising as a result thereof shall be claims provable in these proceedings</u> in the same manner as all creditor claims existing as at the Filing Date and provided that:

9 The deadline for the filing of the Reorganization Plan was extended by the Court on several occasions while solutions to Skeena's difficulties were sought and potential purchasers were pursued. Finally, on February 28, 2002, a Plan was filed which proposed that an outside buyer, NWBC Timber & Pulp Ltd. ("NWBC"), would acquire the interests of the secured lenders for $8,000,000. Of this, $2,000,000 would be paid to the Monitor for distribution to the unsecured creditors, so that the secured creditors would receive $6,000,000 on debt in excess of $400,000,000. The claims of governmental bodies for property taxes would be compromised, and the holders of existing common shares would surrender them for no consideration. Skeena would then issue new common shares to NWBC. The Plan was of course subject to many conditions, including approval by the specified classes of creditors and shareholders and the passing of applicable appeal periods in respect of the Court's order. After some amendments, the Plan was approved by the Court on April 4, 2002. Once the conditions contained in the Order were met, NWBC completed its purchase of the shares and secured debt of Skeena in early May.

The Appellants' Logging Contracts

10 The appellants or their predecessors had been performing logging services under contract with Skeena or its predecessors since the 1960s. In 1991, their contracts became "replaceable logging contracts" under new provisions of the *Forest Act*. At the time Skeena's financial difficulties became manifest in 2001, the corporation had five such contracts. All five were due to expire on December 31, 2001, and Skeena was required to offer replacement contracts to the contractors thereunder no later than September 30 of that year.

11 Skeena did not offer replacement contracts to the appellants, but did renew those of its three other logging contractors. Mr. Veniez, the president and chief executive officer of NWBC and Skeena following the Reorganization, explained this decision by reference, at least in part, to the fact that whereas the *Forest Act* scheme requires a licence holder to cut at least 50 percent of its allowable annual cut ("AAC") through replaceable contracts, Skeena had entered into such contracts for approximately 65 percent of its AAC. Moreover, the change in

control of Skeena contemplated by the Reorganization would result in a five percent reduction of its AAC, absent a ruling to the contrary by the Ministry of Forests. Mr. Veniez deposed in these proceedings that:

> 17. As part of its efforts to ensure the economic viability of Skeena, NWBC determined, in consultation with Skeena management at the time, that it would be desirable to reduce the amount of timber required to be harvested under replaceable contracts to the current statutory minimum of 50% of Skeena's AAC.
>
> 18. Because NWBC's acquisition of Skeena represents a change of control, I knew that Skeena's Terrace Woodlands' AAC would be reduced by 5% to approximately 878,000 m^3. Therefore, in consultation with Skeena management, I determined that it would be appropriate to reduce the volume of timber allocated to evergreen contractors to 439,000 m^3, representing a reduction of approximately 160,000 m^3.
>
> 19. I was advised by Skeena management that, until the terminations of Clear Creek and Jasak, Skeena's five evergreen contractors held the following volumes:
>
> 20. In consultation with Skeena management and the Province, NWBC determined that it would be appropriate to terminate the Clear Creek and Jasak contracts, representing a reduction of "evergreen" volume of approximately 166,662 m^3.
>
> 21. I recognize that by terminating these two contracts, Skeena will be slightly below the 50% allowable minimum under the Contract Regulation, but it is Skeena's intention to re-tender the approximately 6,000 m^3 difference in the form of a new evergreen contract. The approximately 160,000 m^3 balance will be tendered on the open market (as opposed to have to negotiate rates with its existing evergreen contractors). I expect that this tendering process will result in substantial savings to Skeena and significantly reduce its delivered wood costs for this 160,000 m^3. (If the cost differential is \$3.90/m^3, the savings could be as much as \$624,000 per year).
>
> 22. Moreover, a tendering process for this volume of wood will help to establish more accurate fair market values for both evergreen and non-evergreen contracts (in this regard, I am advised by Mr. Curtis that historically it has been difficult to establish these values in light of the predominance of evergreen contracts).
>
> 23. In deciding to terminate certain of Skeena's evergreen contracts, I reasoned that this would better allow Skeena to reorganise the size (volume) and equipment configurations for its different contracts. (Skeena does have the right to insist that its current evergreen contractors log by whatever methods Skeena stipulates, but historically it has been more cost-efficient for Skeena to introduce new logging methods via an open tendering process than by introducing changes to existing replaceable contracts).
>
> 24. Finally, I was advised by Skeena management that Clear Creek and Jasak had, historically, been more expensive than the three other evergreen contractors listed above. That is, through a combination of the rates charged by those two contractors, and their relative efficiency, the cost to Skeena of logs produced by Clear Creek and Jasak was greater than for the other three evergreen contractors above.
>
> 25. With the foregoing considerations in mind, I, on behalf of NWBC, advised Skeena's management at the time that NWBC would require, as a condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts.
>
> 26. By asking Skeena to terminate those contracts, NWBC was in no way motivated to frustrate the object-

> ives of the *Forest Act*. On the contrary, for the reasons set out above, NWBC perceives these terminations to be an important aspect of what I hope and fully expect will be a successful reorganization of Skeena. [Emphasis added.]

12 On or about March 1, 2002, each of the appellants received a letter from Skeena purporting to terminate its replaceable contract, effective immediately. Neither the Court nor the appellants had received prior notification from Skeena or the Monitor — even though under the terms of the Come-back Order, the Monitor was required to submit to the Court "a report of any proposed termination of any Forest Act Replacement Contract . . . at least 21 days before such plan is implemented" and even though within 21 days of the filing of the Monitor's report, the parties to such contracts were to be entitled to apply to the Court to "show cause why such agreement or agreements should not be terminated or for such directions as to the termination of such agreements as may be appropriate." Two weeks later, in its Eleventh Report to the Court, the Monitor referred to the terminations as *faits accomplis*:

> We have been advised that the petitioner has terminated replaceable logging contracts with Jasak Logging Ltd. and Clear Creek Contracting Ltd. in accordance with the Order. Copies of the letters of termination to each of the contractors dated March 4, 2002 and March 1, 2002, respectively are attached.
>
> These replaceable logging contracts have been terminated in accordance with the terms of the Purchase Agreement between NWBC Timber & Pulp Ltd., 552513 British Columbia Ltd. and Skeena Cellulose Inc. dated February 20, 2002.

13 It is not clear to me what "plan" was being referred to in subpara. 12(f) of the Come-back Order quoted above, nor whether it was necessary to "terminate" contracts that had not been renewed. On appeal, however, Skeena acknowledged that the Monitor's report had been filed two weeks after the termination letters were issued and that the "creditors' meeting to vote on the Plan took place before the 21-day time period referred to in the Come-back Order had expired." Thus counsel did not take issue with the Chief Justice's conclusion that Skeena had not complied strictly with the Come-back Order.

14 Upon receiving the letters of termination, the appellants' solicitors wrote to the Monitor's solicitors objecting that that the Come-back Order had not been complied with. They explained:

> Our clients are in a position where they cannot file proofs of claim on March 25 as their contracts are not terminated yet and they do not know if the contracts will be terminated and, if there is a termination, what class of creditor they will be. Due to the failure to deal with this matter in a timely fashion, it appears that the parties have no choice but to postpone the deadline for filing claims to the middle of April with a vote of creditors to take place in early May.

The appellants asked the Monitor for information as to how the termination would result in lower costs to Skeena and requested a copy of the contract of purchase between Skeena and NWBC. The Monitor declined to provide a copy of this agreement on the basis that it was confidential. The agreement was never adduced into evidence.

15 In further correspondence, Skeena characterized its earlier letters to the appellants as having "served to clarify that the previously expired contract with Jasak and Clear Creek would not be reinstated." (My emphasis.) Again, however, since that characterization of the letters was not pursued by counsel in this court or the court below, I will proceed on the footing that the contracts were terminated, as opposed to not having been renewed.

(In law, the distinction in this case may be insignificant.) The appellants were told that if they wished to vote on Skeena's Reorganization Plan, they would have to file proofs of claim by March 22. At the same time, Skeena told the appellants it was prepared to discuss future arrangements with them "for the continuation of their services to Skeena."

16 By March 22, the appellants did file conditional proofs of claim in the CCAA proceeding, claiming indebtedness in the amount of $2,925,315.14 in the case of Jasak Logging Ltd., and $2,896,680 in the case of Clear Creek Contracting Ltd. (Mr. Forstrom advised us that these amounts represented the present value of the income stream which the appellants stood to earn under their contracts over the next 50 years or so. I understand that apart from these 'future' losses, nothing was owing by Skeena to the appellants under their expired contracts.) The Monitor disallowed a portion of each claim and instead allowed a claim of $172,430.47 to Jasak and $166,670 to Clear Creek. The appellants notified the Monitor that they disagreed with its position.

17 On March 28, Jasak and Clear Creek filed a motion in Supreme Court seeking an order restraining Skeena from terminating their contracts and declaring them "in full force and effect and are binding upon the parties thereto". Alternatively, they sought the summary determination of the value of their respective claims as creditors in Skeena's plan of arrangement. However, before the motion could be heard, the meeting of Skeena's creditors took place and the Reorganization Plan was approved by the requisite numbers of each class. The appellants did not attend or vote at the meeting. On April 4, 2002 Skeena applied for and obtained court approval of the Plan. As earlier mentioned, NWBC closed its purchase of the shares of Skeena in accordance with the Reorganization Plan in early May. We are told that it has not yet resumed its logging operations.

18 The appellants' motion to have the termination of their contracts declared invalid was heard in Chambers on June 17 and was dismissed by the Chief Justice on September 4, 2002. His reasons are now reported at (2002), 5 B.C.L.R. (4th) 193 (B.C. S.C.).

The Chief Justice's Reasons

19 After reciting the facts before him, the Chief Justice briefly summarized the purpose of the replaceable contract scheme and the nature of replaceable contracts. He noted that in Skeena's CCAA proceeding in 1997, Thackray J. (as he then was) had determined that the Court had the authority under the CCAA to allow Skeena to terminate replaceable logging contracts notwithstanding their unusual 'statutory' aspects. (See *Repap British Columbia Inc., Re* (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.).) Thackray J. had observed:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of the Provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts. There is no doubt that the parties are governed by the regulation and that the regulations forming part of the contract will govern many events by parties to the contracts. However the issue here is whether or not the contract is subject to the particular order that I gave under the *Companies' Creditors Arrangement Act*. I am of the opinion that it is subject to the order which I gave and that this Court had the jurisdiction to give that order. [para. 7]

20 The Chief Justice then turned to the questions of whether on <u>this</u> occasion, Skeena had complied with the "procedures and conditions" stipulated in the Come-back Order and whether the termination conformed to the

"broader principles of economic necessity and fairness" underlying the Court's discretionary authority under the CCAA. In connection with the first question, he noted that the Come-back Order had authorized the termination of arrangements and agreements by Skeena only for the purpose of facilitating the "downsizing and consolidation of their business and operations (the 'Downsizing')". He noted the appellants' submission that although Skeena claimed to be "downsizing" its operations, it had maintained its timber harvesting rights and was planning to continue to harvest timber from them, presumably to the extent it always had in the past. On the other hand, there was the fact that the change in control of Skeena would result in a five percent reduction of Skeena's AAC, which Skeena proposed to reflect in a reduction in volume of timber allocated to "evergreen" contractors by approximately 160,000 cubic metres. The Chief Justice concluded that this reduction qualified as "Downsizing" for purposes of the Come-back Order. This conclusion was not specifically challenged on appeal.

21 In response to the appellants' objection that Skeena had terminated their contracts without first filing a report of the Monitor, the Chief Justice agreed that the letters of termination had been "issued untimely". He concluded, however, that since the appellants had had "clear and unequivocal notice", prior to the creditors' meeting, of Skeena's intention to terminate their contracts and to treat their claims as compromised under the Plan, they had not been prejudiced by the lack of strict compliance. (para. 41.)

22 The remaining question framed by the Chief Justice was whether Skeena's termination of two of its five replaceable logging contracts constituted an "inappropriate differentiation of treatment between the applicants and other [Skeena] creditors." (para. 42.) He noted that one of the unfortunate results of insolvency restructurings is that some persons suffer hardship. In this case, Skeena had had to terminate the employment of many individuals, its unsecured and secured creditors stood to recoup only a small fraction of their claims, and the Court had already dismissed an application brought by the Pulp, Paper and Research Institute of Canada similar to that brought by the appellants. The Court noted the comments of LoVecchio J. in *Blue Range Resource Corp., Re*, [1999] A.J. No. 788 (Alta Q.B.), to the effect that an order authorizing the termination of a contract is appropriate in a restructuring since, like others dealing with the insolvent corporation, the contracting party will have its claim for damages. But that claim should not be elevated above those of other contracting parties; as LoVecchio J. had stated:

> A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route. [paras. 37-8]

23 Similarly in this case, the Chief Justice concluded that the applicants before him were "seeking to be put

in a position superior to [Skeena's] other creditors." (para. 50.) In the result, since Thackray J. had already ruled that replaceable contracts could be terminated as part of a CCAA reorganization, and the appellants had had "full knowledge prior to the creditors' meetings that they would have claims under the Plan if their contracts were to be terminated", the Chief Justice saw no reason why the appellants should "in effect, be placed in a better position than other creditors." (para. 53.)

ON APPEAL

24 On appeal, the appellants challenged both the Court's ruling on the question of notice and its substantive ruling that the Come-back Order validly permitted Skeena to terminate the appellants' "evergreen" contracts. Since Mr. Forstrom, counsel for the appellants, focussed on the second argument in his oral submissions in this court — and rightly so in my view — I will deal with it first. It is linked to the argument made by the intervenor, the Truck Loggers' Association, which challenges the court's constitutional and statutory jurisdiction to "permit" Skeena to terminate <u>any</u> replaceable logging contracts, contrary to what Mr. Maclean says is the intention of the *Forest Act*. Mr. Maclean submits that this legislation must prevail over what he characterized as the exercise of the court's "inherent jurisdiction" under the CCAA when the court approves an arrangement which includes the termination of a lease or other contract.

25 It may be useful at this point to review in greater depth the unusual scheme of replaceable contracts imposed by the *Forest Act*, and then to review the CCAA and the "inherent" or 'supervisory' jurisdiction exercised by the courts thereunder.

The Forest Act Scheme

26 The Province first introduced a regime of statutorily-mandated logging contracts in 1991. The initial legislation was revised somewhat in 1996 when the present Regulation 22/96 to the *Forest Act* was enacted. Speaking in the Legislative Assembly in June 1991, the then Minister of Forests stated that the purposes of the legislation were to "address logging-contractor security in British Columbia", to "improve the balance in . . . contractual relationships" between holders of timber rights and logging contractors, and to provide a quick and inexpensive system for resolving disputes between them. The Minister drew an analogy between the desire of long-term licence holders for security of tenure from the Crown, and the needs of logging contractors and subcontractors, who also make large capital investments in logging equipment, for similar security vis-à-vis the licence holders. Accordingly, the *Forest Amendment Act, 1991*, c. 11, permitted the imposition of a series of requirements on the holders of certain classes of timber licences with respect to logging contracts already in existence, and logging contracts entered into thereafter.

27 Most of the provisions relevant to this appeal are contained in Regulation 22/96. Part 2, headed "Written Contracts and Subcontracts Required", states that persons entering into a timber harvesting contract or subcontract must do so in writing. If the terms of a contract do not comply with the Regulation, the parties are required to make reasonable efforts to cause the contract to do so. Every "replaceable contract" (defined in s. 152 of the Act) must provide that the contractor's interest thereunder is assignable, subject to the consent of the licence holder, which consent may not be unreasonably withheld. As well, every contract must provide that all disputes between the parties in connection with the contract "will be referred to mediation and, if not resolved by the parties through mediation, will be referred to arbitration." (The Regulation leaves unsaid the apparent intention that neither party will have recourse to courts of law to resolve such disputes.) The *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, applies to such arbitrations, but there are also detailed rules in Regulation 22/96 for the

mediation and arbitration proceedings and for the keeping of a publicly available "Register of Timber Harvesting Contract and Subcontract Arbitration Awards" by the Ministry of Forests.

28 Part 5 of the Regulation is headed "Replaceability of Contracts and Subcontracts". It requires that the holders of Crown licences carry out specified proportions of their timber harvesting operations by means of replaceable contracts. Different requirements apply to different classes of licence and to operations in the Coastal and Interior regions respectively. As I noted earlier, since Skeena operates in the Coastal region, it is required to harvest at least 50 percent of its timber by means of replaceable contracts.

29 Sections 13-15 of the Regulation deal with the commencement and expiration of replaceable contracts in the following terms:

> 13 (1) A replaceable contract must provide that
>
> (2) If a replaceable contract does not provide for an expiry date, the contract expires on the second anniversary of the date on which the contract commenced.
>
> 14(1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may require, for bona fide business and operational reasons, that the contractor
>
> (2) A replaceable contract must provide that if a requirement made pursuant to subsection (1) results in a substantial change in the timber harvesting services provided by the contractor, <u>the contractor may, within 60 days of receiving notice under subsection (1), elect by notice in writing to the licence holder to terminate the replaceable contract</u> without incurring any liability to the licence holder.
>
> (3) A replaceable contract must provide that, if a requirement is made pursuant to subsection (1) and the contractor does not elect to terminate the replaceable contract as provided for in subsection (2), either party may, within 90 days of the contractor receiving notice under subsection (1), request a review of the rate then in effect.
>
> (4) If, after any changes in timber harvesting services required by the licence holder under subsection (1), the parties are unable to agree upon the rate to be paid for timber harvesting services, a rate dispute is deemed to exist.
>
> 15 A replaceable contract must provide that the contract terminates, to the extent that it relates to the licence, upon the cancellation, expiry or surrender of a licence under which the timber harvesting services provided by the contractor are carried out. [Emphasis added.]

30 The Regulation stipulates that if a dispute arises regarding the amount of work to be specified in a replaceable contract, the matter may be referred to arbitration under s. 24. The same is true of any dispute regarding the rates chargeable by the contractor for its work. The arbitrator must determine a rate that is reasonable and competitive by industry standards and which "would permit a contractor operating in a manner that is reasonably efficient in the circumstances in terms of costs and productivity to earn a reasonable profit."

31 Division 5 of the Regulation deals with reductions in work under a replaceable contract due to a reduction in AAC. If the Crown reduces the AAC under a harvesting licence, the holder "must apportion the effect of the reduction in AAC . . . proportionately among (i) all contractors holding replaceable contracts, and (ii) any company operations in respect of the licence." (s. 28(2)(d).) Alternatively, the holder may make a proposal

either to reduce the AAC covered by one or more of its replaceable contracts or to terminate one or more such contracts. If the proposal is objected to by one or more of the affected contractors, a "dispute is deemed to exist" between the licence holder and the contractor(s). If not settled by mediation, this dispute must also be arbitrated in accordance with s. 32, which states in part:

> (g) an arbitrator must resolve the dispute in the manner that the arbitrator believes most fairly takes into account each of the AAC reduction criteria; [and]
>
> (h) for greater certainty, in making a decision with respect to the dispute

The Regulation defines the term "AAC reduction criteria" to mean each of the following factors:

> (a) the amount of work specified in each replaceable contract to which the proposal relates;
>
> (b) the relative seniority of each contractor with a replaceable contract;
>
> (c) the economic impact of the proposal on the timber harvesting operations carried out under that licence by each contractor with a replaceable contract;
>
> (d) the impact of the proposal on employment;
>
> (e) the economic impact of the proposal on the licence holder; [and]
>
> (f) the impact of the proposal on community stability; . . .

32 As Mr. Forstrom points out, then, the statutorily-mandated terms of replaceable logging contracts "tie" them in a sense to Crown licences themselves. A licence holder must carry out a specified percentage of its logging through contractors under replaceable contracts. If the AAC under the licence is reduced, the work committed to by the licence holder in its replaceable contracts may also be reduced. If the licence is cancelled or surrendered, any replaceable contract referable thereto also terminates. Mr. Forstrom and Mr. Maclean go further, however, and argue that the "tie" confers a "special status" on the contractor and that the status must be recognized in the event of a breach of the obligation to renew or continue the contract, and must be reflected in any CCAA arrangement. I will return below to these arguments.

The CCAA

33 Unlike the *Forest Act* and Regulation, the CCAA is very brief. It operates substantially through judge-made law interpreting and applying its 22 sections. For purposes of this appeal, the key ones are the following:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or

class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

* * *

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

* * *

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

. . . . .

(6) The court shall not make an order under subsection (3) or (4) unless

34 There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the prop-

> erty piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
>
> Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.
>
> *Public Interest*
>
> 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. [at 592-3]

(See also Duff, C.J.C. in *Reference re Companies' Creditors Arrangement Act (Canada)* [1934] S.C.R. 659 (S.C.C.).)

35 In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), for example, this court held that security granted under s. 178 of the *Bank Act* was not exempt from the CCAA provisions applicable to "security" and secured creditors, since otherwise a single creditor (in that case, a bank) could frustrate the objectives of the statute. Gibbs J.A. observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.
>
> There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. [at 88-9]

36 In connection with other "priority" issues — the power to grant priority to persons advancing debtor-in-possession ("DIP") financing and to the Monitor for the payment of its fees and disbursements before the payment of secured creditors — this court has called in aid Equity's ability to adapt to changing circumstances in order to achieve the objectives of the statute. In *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), this court declined to follow an earlier case in which the Ontario Court of Appeal had ruled that the receiver of a partnership had no authority to subordinate the interests of secured creditors to liability for the receiver's disbursements, unless one of three exceptions applied. (See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.).) Mackenzie J.A. commented:

> Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the *Kowal* statement of exceptions has been influential in subsequent cases and they were applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). But as Macdonald J. observed in *Westar Mining*, supra at 93-94, different considerations apply under the *CCAA*. The court is concerned with the survival of the debtor company long enough to present a plan of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the *Kowal* exceptions to serve that broader interest.
>
> Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the *CCAA*. In my opinion the jurisdiction under the *CCAA* cannot be restricted to the *Kowal* exceptions. [paras. 21-22; emphasis added.]

In conclusion, he stated:

> In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the *CCAA*. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgement for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.
>
> In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge. [paras. 30-31; emphasis added.]

(I understand that leave to appeal *United Used Auto & Truck Parts Ltd.* was granted by the Supreme Court of Canada [*United Used Auto & Truck Parts Ltd., Re*, 2000 CarswellBC 2132 (S.C.C.)], but that the case settled before the appeal was heard.)

37 In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999),.14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal Ltd.*; *supra*, and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA con-

text, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

38 But in approving and implementing compromises and arrangements under the statute, courts are concerned with more than the efficacy of the plans before them and their acceptability to creditors. Courts also strive to ensure fairness as between the unsecured, secured and preferred creditors of the corporation and as between the debtor and its creditors generally. In the article from which I have already quoted, Stanley Edwards also wrote:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest. If small groups are placed in too strong a position they become capable of acquiring a nuisance value which will make it necessary for the reorganizers to buy them off at a high price in order to effectuate the plan successfully. However, care should be taken that this statutory power of binding minorities should not be utilized to confiscate the legitimate claims of those minorities or of any class of creditors or shareholders. [at 595; emphasis added.]

39 This theme has been repeated and refined in various cases over the years as CCAA courts have struggled with increasingly complex forms of debt and security and with increasingly complicated plans of arrangement. In current terms, the principle of equity is expressed as a concern to see that a plan of arrangement is fair and reasonable and represents an attempt to "balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights". (*Per* Farley J. in *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at 173.) Elsewhere, it has been said that one measure of what is "fair and reasonable" is the "extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in a non-intrusive and as non-prejudicial a manner as possible." (*Per* Blair J. in *Olympia & York Developments Ltd.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.), at 513.) At the same time, fairness and reasonableness are not "abstract notions, but must be measured against the available commercial alternative." Thus in *Canadian Airlines Corp., Re*, [2000] A.J. No. 771, [2000] 10 W.W.R. 269 (Alta. Q.B.), the Court summarized the interaction between the objectives of a CCAA arrangement and the principles of fairness and reasonableness as follows:

> 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:
>
> 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 in-

stances, 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 Petroleums 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.).

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:

40 Of course, there are also statutory and constitutional limitations on the court's exercise of its authority under the CCAA. The Supreme Court of Canada's decision in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) confirmed that it is beyond the authority of a CCAA court to provide for a priority that runs contrary to the express terms of a statute (in that case, the *Mechanics Lien Act* of Manitoba.) Thus in *Baxter*, the fact that the provincial legislation created a lien having priority over "all judgments, executions, assignments, attachments, garnishments and receiving orders", precluded an order granting CMHC priority for new advances over and above all prior registered liens. Dickson J. (as he then was) stated for the Court:

. . . the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a Court simply cannot do. [at 480; emphasis added.]

41 *Baxter* continues to be applied today: see *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.). However, the Court in *United Used Auto & Truck Parts Ltd.* distinguished *Baxter* on the basis that the former did not involve an express statutory priority that could not be overcome by the Court's equitable jurisdiction. Mackenzie J.A. noted that the receiver's jurisdiction originates in the "equitable jurisdiction of the Court of Chancery and [that] while that jurisdiction cannot be exercised contrary to a statute, nothing precludes its exercise to supplement a statute and effect a statutory object." (para. 18.)

42 It may be unnecessary to add that in cases of direct or express conflict between the CCAA itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail. The only case brought to our attention which, on its face at least, applied the doctrine of paramountcy in the CCAA context was *Sulphur Corp. of Canada Ltd., Re*, [2002] A.J. No. 918 (Alta. Q.B.). In addressing the question of whether the Court had the authority to permit DIP financing ranking in priority to liens registered under the *Builders' Lien Act* of British Columbia, LoVecchio J. distinguished *Baxter* and *Royal Oak Mines Inc., supra*, on the basis that the discretion to grant priority for DIP financing was grounded in s. 11 of the CCAA rather than purely in the court's inherent jurisdiction. (This, at least, is what I draw from the Court's comments at paras. 35-37.) Seeing the case before him as involving a conflict between a federal statute and a provincial statute, LoVecchio J. ruled that the former prevailed and that in exercising its jurisdiction under the CCAA, the Court could grant priority for DIP financing. (See also *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 10 B.C.L.R. (3d) 62 (B.C. C.A.).)

The Issues in this Case

43 Against this background, I turn at last to the substantive questions raised by the intervenor and the appel-

lants respectively — did the Chambers judge have the jurisdiction to include in the Come-back Order provisions which contemplated the termination of any replaceable logging contracts; and if so, did he err by failing to consider whether the appellants would be treated fairly in relation to Skeena's other replaceable contractors or by failing to consider whether the termination of the appellants' contracts was, in their words, "a necessary or justifiable part of [Skeena's] reorganization plan at all"?

Jurisdiction

44 On behalf of the Truck Loggers' Association, Mr. Maclean contended that the Chambers judge had strayed outside his jurisdiction because nothing in s. 11 of the CCAA (which permits the granting of a stay) extends to the termination of a contract. On this view, any authority to sanction a termination must originate not in the statute, but in the Court's inherent jurisdiction. Based on the authority of *Baxter, Royal Oak Mines Inc.* and *Westar Mining Ltd.*, the intervenor submits that the court's inherent jurisdiction cannot be used to override legislation such as the *Forest Act* and Regulation 22/96.

45 It is true that in "filling in the gaps" or "putting flesh on the bones" of the CCAA — for example, by approving arrangements which contemplate the termination of binding contracts or leases — courts have often purported to rely on their "inherent jurisdiction". Farley J. did so in *Dylex*, for example, at para. 8, and in *Royal Oak Mines Inc., supra*, at para. 4, the latter in connection with the granting of a "superpriority"; and Macdonald J. did so in *Westar Mining Ltd., supra*, at 8 and 13. The court's use of the term "inherent jurisdiction" is certainly understandable in connection with a statute that confers broad jurisdiction with few specific limitations. But if one examines the strict meaning of "inherent jurisdiction", it appears that in many of the cases discussed above, the courts have been exercising a discretion given by the CCAA rather than their inherent jurisdiction. In his seminal article, "The Inherent Jurisdiction of the Court", (1970) 23 *Current Legal Problems*, Sir J.H. Jacob, Q.C., writes that the inherent jurisdiction of a superior court of law is "that which enables it to fulfill itself as a court of law." The author explains:

> On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by the ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticized as being "metaphysical," but I think nevertheless it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. . . . The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. [at 27-28; emphasis added]

The author also notes that unlike inherent jurisdiction, the source of statutory jurisdiction "is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition." (at 24.)

46 Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a

plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. (As to the meaning of "discretion" in this context, see S. Waddams, "Judicial Discretion", (2001) 1 *Cmnwth. L.J.* 59.) This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

47 In saying this, I leave to one side the jurisdiction of the court to make special provision for the payment of the fees and expenses of a monitor appointed under the CCAA. The monitor's functions are of course analogous to those of a receiver — traditionally a creature of Equity. I suspect that this particular power may be properly described as both an equitable jurisdiction and a statutory discretion. As this court said in *United Used Auto*, nothing precludes the exercise of the equitable jurisdiction of the Court of Chancery to "supplement a statute and effect a statutory object." (para. 18.) In any event, the distinction between these two sources of authority is one that, in my mind at least, 'eludes definition'.

48 Returning, then, to the intervenor's argument, the first question posed by it must in my view be revised to whether the Chief Justice erred in purporting to exercise the statutory discretion given by the CCAA in a manner that conflicts with the *Forest Act*. But the second branch of the question also incorporates an assumption that is problematic. Can it be said that the Come-back Order conflicts with the *Forest Act* or the scheme created thereby? It is true that the Act and Regulation contemplate a perpetual series of contracts (provided the contractor fulfils its obligations thereunder) and contemplate the termination of a replaceable contract only in the event of a reduction in AAC or the expiration or surrender of the licence. But nothing in the legislation to which we were referred purports to invalidate a termination of a replaceable logging contract by the licence holder or to require that a court make an order for specific performance in the event of such a termination. (In a CCAA context, such an order would be very unlikely, as well as futile.) The licence holder will of course be liable in damages for breach of contract, giving rise to a "claim" against the debtor corporation under the CCAA. The licence holder may also be in breach of one or more of its obligations under the Act; but ultimately, a logging contract is still a "contract" at law, notwithstanding that many of its terms are dictated by the legislation for the protection and security of the contractor.

49 Thus I disagree with the intervenor's assertion that the effect of the Come-back Order was to "eliminate" the licence holder's "statutory obligation under the *Forest Act* to replace the contract and to eliminate the other conditions that are required by the Regulation to be included in the contract." In fact, the renewal of the appellants' contracts was not required by the Act *per se*; what the Act required was that each of their contracts contain a clause requiring renewal. It was those contractual terms which were breached. The licence holder's obligations, mandated by the scheme, were not "eliminated" by the Come-back Order or even by Skeena: having been breached, the obligations are recognized as giving rise to claims against the corporation either for specific performance or for damages.

50 It follows in my view that in approving an arrangement in which the debtor corporation terminates a replaceable logging contract, a CCAA court is not overriding "provincial legislation" as the intervenor contends. Nor is the court "overriding" the terms of the contract: it is merely exercising the discretion given to it by the statute to approve a plan of arrangement. The breach of contract is recognized as a matter of fact by the court, but is not "permitted" in the sense that the licence holder is somehow immunized from the usual consequences

of its breach at law or in Equity. Finally, even if the *Forest Act* or Regulation did prohibit the termination of replaceable contracts, the federal government's powers with respect to bankruptcy and insolvency would become applicable once the CCAA was invoked and the doctrine of paramountcy would operate to resolve any direct conflict.

The Exercise of the Court's Discretion

51 The appellants and the intervenor argued that even if the Court did have the authority to grant the Comeback Order on the terms it did, the Chief Justice erred in failing to exercise his discretion so as to achieve "fairness" between the appellants and Skeena's three other logging contractors, whose contracts were, in theory at least, unaffected by the Reorganization Plan. As I mentioned earlier, both the appellants and the intervenor contend that contractors under replaceable contracts have "special status" as persons entitled to share in the benefits of a Crown resource (timber) and that the *Forest Act* scheme is predicated on fairness between them, and between them and the holders of Crown licences. They note that the Chief Justice referred in his "fairness" analysis only to the question of whether the Order differentiated inappropriately "between the applicants and other [Skeena] creditors" and made no reference to fairness as between the appellants and the other three contractors or as between the appellants and Skeena itself. In Mr. Forstrom's submission, it is unfair that his clients should suffer the loss of their very significant income streams under the replaceable contracts when the other three contractors will suffer no such loss, and when the licence holder itself suffers only the loss of five percent of its AAC under the *Forest Act*. (In fact, it is possible the Minister may revoke that reduction upon application by Skeena under s. 56.1 of the Act.) In essence, the argument of the appellants is "Why us?"

52 It is trite law that the scope of review open to an appellate court in respect of the exercise of discretion of a CCAA court (or any other court) is narrow. In *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]), Macfarlane J.A. (in Chambers) observed that this court should exercise its powers "sparingly" when asked to intervene in this context. In his words:

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. . . . In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. [para. 32]

Macfarlane J.A.'s comments were echoed by the Alberta Court of Appeal in *Smoky River Coal, supra*, where Hunt J.A. noted at para. 61 that ". . . Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases."

53 Another principle informing the court's task flows from the fact that a plan of arrangement approved by the court is not the plan of the court. It is a compromise arrived at by the debtor company and the requisite number of its creditors. The court should not readily interfere with their business decision, especially where the plan has been approved by a high percentage of creditors. As observed by Blair J. in *Re Olympia & York, supra*, "[I]t 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." (at 510.) (See also *Sammi Atlas Inc., Re, supra*, at para. 5, and *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), at 205, *per* McEachern C.J.B.C.)

54 In this case, the chief executive officer of NWBC and Skeena provided the Chambers judge below with

an explanation as to why they chose to reduce the volume of timber allocated to Skeena's evergreen contractors, and why they chose to terminate the contracts of the appellants rather than to terminate all five contracts or reduce the work allocated to all five. I have already mentioned Mr. Veniez's affidavit evidence (see para. 11 above) that the cost to Skeena of logs produced by each of the appellants was greater than those produced by the other three contractors and that NWBC made it a "condition of going forward with the acquisition of Skeena, that Skeena take steps within the context of the CCAA proceedings to terminate the Clear Creek and Jasak contracts."

55 In this court, Mr. Forstrom asked us to discount Mr. Veniez's evidence, contending that since the appellants' objections to the Come-Back Order had been known to NWBC when it completed its purchase of the Skeena shares, NWBC must be taken to have effectively "waived" this condition. I am not persuaded that such an inference necessarily follows from NWBC's completion of the Plan. At that time, the Come-back Order clearly authorized the termination of replaceable logging contracts, and the validity of a similar order had been upheld by Thackray J. in 1997. It may be that in deciding to proceed, NWBC undertook a risk that the appellants would be successful either before the Chief Justice or on appeal, but we have no evidence as to what concessions NWBC may have obtained to protect against that risk.

56 As for the argument that the appellants' contracts were no less costly to Skeena than those of the other three contractors (since the rates chargeable under all five contracts were subject to arbitration), Mr. Veniez deposed:

> 13. I acknowledge that the Contract Regulation dictates that any rates determined according to this process must be determined according to what a licence-holder and a contractor acting reasonably in similar circumstances would agree is a rate that is competitive by industry standards. However, this provides little comfort to licence-holders such as Skeena, because ultimately rates under the Contract Regulation are determined on a cost-plus reasonable profit for replaceable contractors basis which, in my view, acts as a significant disincentive for replaceable contractors to be cost effective on an ongoing basis.
>
> 14. On the contrary, the Contract Regulation in my view creates a legislated disincentive for evergreen contractors to control their cost structures, because volumes under these contracts are guaranteed. This results in high costs being passed on to Skeena.
>
> 15. Prior to NWBC's acquisition of Skeena, and the termination of the replaceable contract that has given rise to this application, I was advised that Skeena, on average, paid approximately 10% more for work done under replaceable contracts than work done pursuant to contracts issued after a competitive bid process. Indeed, I am advised by Derrick Curtis, Skeena's Terrace Woodland's Manager, that in March 2001 Skeena put out to tender a harvesting contract (Setting S83303), consisting of roughly 20,000 m^3, and received tenders from both evergreen and non-evergreen contractors. The latter offered significantly lower rates ($23.95/$m^3$ vs. $27.85/$m^3$, a difference of $3.90/$m^3$), resulting in a 14% reduction in costs to Skeena. [Emphasis added.]

57 There was, then, a "business case" for the actions taken by Skeena and NWBC vis-à-vis the appellants. Clear Creek and Jasak did not apply to cross-examine Mr. Veniez on this evidence, and did not bring anything to our attention which would cast doubt on his statements. In these circumstances, the Chambers judge was entitled to take seriously the assertion that the termination of the appellants' contracts would save Skeena a considerable sum per year and that that fact was important to the only purchaser willing to make an offer acceptable to the re-

quisite number of creditors. In the terminology used by Mr. Forstrom, there was a "causal link" between the terminations and the chances of success of the Reorganization Plan. For this reason, I do not agree with his submission that *Dylex* is different in principle from the case at bar: the appellants' contracts in particular were said to be too costly for Skeena to continue operating under them, in the same way the terminated leases were said to be too costly for Dylex to continue leasing under them. And, weighing Dylex's precarious financial position against that of the landlord (which was described as "less than robust"), the Court 'gave the nod' to the insolvent corporation, rejecting the proposition that Dylex should have to prove that without the three proposed closures (of leases), its proposal would not be viable. (*supra*, para. 10.)

58 In this case, the appellants deposed that the evergreen contracts were important to them, particularly for financing purposes. Mr. Rigsby, the controller of Clear Creek, for example, deposed:

> 26. Clear Creek requires its Replaceable Contract in order to obtain financing for capital costs. Lending institutions require that Clear Creek has a replaceable contract when considering lending money to, or financing equipment for, Clear Creek. Within the logging industry, it is very difficult to obtain financing without the security of a replaceable contract.
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> . . . . .
>
> 30. Clear Creek remains capable of properly capitalising itself, and maintaining its own equipment and other capital investments in good working order, provided that it has a replaceable contract. If Clear Creek's replaceable contract remains in place, Clear Creek will be able to provide competitive, cost-effective, and efficient services and rates to [Skeena] . . . .

59 This evidence brings us squarely to the question of fairness. As already noted, for purposes of the CCAA, the court must be satisfied that the arrangement proposed is "fair, reasonable and equitable." Courts have made it clear that "equity" is not necessarily "equality"; in the words of Farley J. in *Sammi Atlas Inc., Re*:

> 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 . . . . [para. 4]

60 I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis in this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the deferral and settlement of more than $400,000,000 in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period to save Skeena from bankruptcy was NWBC's acquisi-

tion of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims. As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

61 As has been seen, the purchaser required as a condition of proceeding with the Reorganization Plan that the appellants' contracts be terminated. In the absence of evidence that Skeena or the purchaser was motivated by anything other than a desire to improve the debtor corporation's financial prospects for survival post-arrangement, it cannot in my view be said that the Chambers judge erred in ruling that the termination of the appellants' replaceable contracts was a valid part of the Reorganization Plan in this case.

Procedural Question

62 The second ground of appeal advanced by the appellants was that since Skeena had failed to comply strictly with the requirements of the Come-back Order in relation to the termination of their contracts, the terminations were null and void. In response to the Chief Justice's conclusion that the appellants had not been prejudiced by the failure to give timely notice, the appellants submitted that the terminations could not have been effective until 21 days after they received the Monitor's Eleventh Report. In the meantime, the creditors' meeting took place. The appellants contend that since there was uncertainty as to whether their contracts had been validly terminated or would be terminated, it was unclear whether they were entitled to vote at the meeting. Accordingly, they submit that they:

> . . . were effectively disenfranchised in the *CCAA* proceeding. The Come-Back Order contemplates that the effectiveness of any proposed termination of a replaceable logging contract will be determined in a timely way, before the Plan of reorganisation is submitted to the creditors for approval. By failing to give proper notice, [Skeena] created uncertainty about both when and if the Appellants' contracts would be terminated. The Appellants were only entitled to vote in relation to the Plan if they acknowledged that the termination of their contracts was effective when the initial (and clearly invalid) notice was given on March 1, 2002.
>
> This placed the Appellants on the horns of a dilemma. Had the Appellants exercised the right to vote on April 2,2002, based on the premise that their contracts had been terminated, they would be guilty of approbation and reprobation in relation to their position that no valid notice of termination had yet been given and that their contracts remains in force. [Skeena] structured the approval process in such a way that the Appellants would effectively be required to waive their right to proper notice of termination under the Come-Back Order in order to vote on the Plan.

63 In response, Skeena emphasizes that the appellants did file proofs of claim with the Monitor prior to the creditors' meeting. Skeena says the Chief Justice was correct in concluding that the appellants were not prejudiced in fact, since if it is ultimately determined that the replaceable logging contracts were not validly terminated, the appellants will be free to withdraw their proofs of claim; and if the contracts were validly terminated, the appellants will share *pro rata* under the Plan with Skeena's other unsecured creditors once the amounts of all claims have been finally determined.

64 As for the proposition that the appellants could not both reprobate and approbate, Skeena notes that "conditional voting" was permitted by the Monitor in light of the time pressures attendant upon the approval of the Plan. These led the Monitor to allow voting even by those claimants whose claims it had disallowed. The Monit-

or noted their particular ballots as "objected to" in case the votes cast by them ultimately had an impact on the outcome of the vote for the applicable class. Mr. Zuk, the chair and claims officer for the meeting, deposed that even if all of the disallowed claims were reversed and the appellants' votes were counted, the result would not have been affected. This statement was not challenged by the appellants.

65 In these circumstances, I cannot agree with the appellants that the delay in their receipt of notice of the terminations of their contracts and the delay in the processing of their proofs of claim were prejudicial to them. It is certainly unfortunate that these delays occurred, but there is no evidence (as opposed to speculation) that the delays were the result of bad faith or deliberate omission. On the other hand, the appellants could have had little doubt that they faced major difficulties once the initial CCAA order was granted (September 5, 2001) and once the "replacement" deadline of September 30 passed. Ultimately, the effect of the delay in their receipt of formal notice made no difference to the appellants' position and did not influence the approval of the Reorganization Plan one way or the other, especially given the small amount allowed by the Monitor in respect of the appellants' claims in relation to Skeena's indebtedness. The appellants chose not to attend the meeting and not to vote, even on a conditional basis. In these circumstances, the Chief Justice correctly recognized that, as stated by Rowles J.A. for the Court in *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 71 B.C.L.R. (3d) 226 (B.C. C.A.), a supervising court under the CCAA must be alert to the incentive for creditors to "avoid the reorganization compromise" and must "scrutinize carefully any action by a creditor which would have the effect of giving it an advantage over the general body of creditors." (para. 20.)

66 Moreover, the arguments which the appellants would have made at the show cause hearing have now been made in the Supreme Court and in this court. If my analysis is correct, they would have failed even if the Court's approval of the Reorganization Plan had been delayed in accordance with the apparent intent of the Come-back Order.

67 I cannot say the Chief Justice was wrong in concluding that Skeena's failure to give timely notice was anything other than a procedural error without prejudicial consequences. I would dismiss this ground of appeal, as well as the substantive grounds, for the reasons I have given.

***Hall J.A.*:**

I agree.

***Levine J.A.*:**

I agree.

Appeal dismissed.

END OF DOCUMENT

TAB 8

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.

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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 9

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2002 CarswellQue 2472

Uniforêt Inc., Re

In the Matter of the Arrangement Relating to: Uniforêt Inc. and Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc., Debtors/Respondents and Richter & Associés Inc., Monitor and Highland Capital Management, L.P., ML CBO IV (Cayman), Ltd., Pamco Cayman, Ltd., Highland Legacy, Ltd., Pam Capital Funding, L.P. and Prospect Street High Income Portfolio Inc., Petitioners and Jolina Capital Inc., Mise en cause

Cour supérieure du Québec

Zerbisias J.

Judgment: October 23, 2002[FN*]
Docket: S.C. Montréal 500-05-064436-015

Proceedings: refused leave to appeal 2002 CarswellQue 2546 (Que. C.A.)

Counsel: *Me Louis Gouin, Me Sylvain Rigaud, Me Bernard Quinn*, for Debtors/Respondents

Me Denis Ferland, Me Alain Gaul, for Monitor

Me L.B. Erdle, Me Martin Desrosiers, Me David Tardif-Latourelle, for Petitioners

Me Jean Fontaine, Me Simon Richard, for Mise en cause

Subject: Corporate and Commercial; Insolvency

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

Debtors, forestry corporations, applied for protection under Companies' Creditors Arrangement Act — Debtors' plan proposed arrangement which contained seven classes of creditors — Debtors' plan was accepted by overwhelming majority of creditors, except for U.S. noteholders class who did not vote because of motion brought by petitioners for separation of class — Petitioners, U.S. noteholders, submitted that J Inc., other U.S. noteholder, should be separated from class as J Inc. was, among other things, major shareholder and creditor in other classes — Debtors' plan provided for payment of approximately 53 per cent of notes' face value — Motion dismissed — All U.S. noteholders, including petitioners and J Inc., had commonality and identity of interests — No logical or legal ground existed upon which class could be separated — Separating class would fragment class composed of claimants who had common and identical interests, who were treated in same fashion under proposed plan and would put success of plan in serious jeopardy — Petitioners clearly stated petitioners would only accept plan tailored by them which would assure them substantial capital gain — Dividing class or denying J Inc. right to vote in class would confiscate J Inc.'s rights and grant petitioners right of veto over entire plan, which was contrary to Act's legislative intent of facilitating reorganization of corporations — Petitioners were knowledgeable speculators who invested in low grade high risk investments and were well aware of debtors' financial difficulties when they purchased debtors' notes — Petitioners did not act in good faith as they persisted in obstructing plan to further own interest, to maximize own return at all costs and had no regard for terms, spirit and intent of Act.

Compagnies --- Arrangements et compromis — En vertu de la Loi sur les arrangements avec les créanciers des compagnies — Questions diverses

Débitrices, des compagnies forestières, ont demandé la protection de la Loi sur les arrangements avec les créanciers des compagnies — Plan des débitrices proposait un arrangement comprenant sept catégories de créanciers — Plan des débitrices a été accepté par une grande majorité des créanciers, à l'exception de la catégorie des détenteurs de billets libellés en dollars américains, qui n'a pu voter en raison de la requête présentée par les requérants visant à obtenir la division de leur catégorie — Requérants, des détenteurs de billets libellés en dollars américains, soutenaient que J inc., une autre détentrice de billets, devait être exclue de la catégorie puisqu'elle était notamment actionnaire et créancière importante dans d'autres catégories — Plan des débitrices prévoyait le paiement d'environ 53 pour cent de la valeur nominale des billets — Requête rejetée — Tous les détenteurs de billets libellés en dollars américains, y compris les requérants et J inc., avaient des intérêts en commun et identiques — Aucun motif logique ou juridique n'existait sur lequel on pouvait se fonder pour diviser la catégorie — Diviser la catégorie fragmenterait une catégorie composée de demandeurs qui avaient des intérêts en commun et identiques et qui étaient traités de la même façon par le plan proposé; cela compromettrait aussi sérieusement la réussite du plan — Requérants ont clairement indiqué que le seul plan qu'ils accepteraient serait un plan conçu par eux qui leur assurerait un gain en capital important — Diviser la catégorie ou nier le droit de J inc. de voter dans sa catégorie enlèverait à celle-ci ses droits et accorderait un droit de veto aux requérants à l'égard de tout le plan, ce qui était contraire à l'objet de la Loi qui visait à faciliter la réoganisation des compagnies — Requérants étaient des spéculateurs avertis qui investissaient dans les investissements à haut risque de catégorie inférieure; ils étaient au courant des difficultés financières des débitrices lorsqu'ils ont acheté les billets — Requérants n'ont pas agi de bonne foi puisqu'ils ont continué à entraver le plan afin de servir leurs intérêts et de maximiser leur rendement à n'importe quel prix; ils n'avaient aucune considération pour les termes, l'esprit et l'objet de la Loi — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Cases considered by *Zerbisias J.*:

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

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

Statutes considered:

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

Generally — considered

s. 6 — considered

MOTION by some creditors for separation of class of creditors included in arrangement plan proposed by debtors under *Companies' Creditors Arrangement Act*.

Zerbisias J.:

Introduction

1 Petitioners, beneficial owners at arm's length of 26.8% of US $33.5 million, of the debentures in the aggregate principal sum of U.S. $125 million (hereinafter the "U.S. notes"), bearing 11 1/8% interest, due in 2006, issued by the debtor Uniforêt Inc. (hereinafter "Uniforêt") and secured by Uniforêt Scierie-Pâte. Inc. (hereinafter Scierie), and Foresterie Port-Cartier Inc. (hereinafter Foresterie), hereinafter referred to collectively as "Groupe Uniforêt", or the "Debtors", apply by way of a "Motion for Directions Regarding The Classification of Creditors For Voting Purposes and For The Modification Of The Plan Of Compromise And Arrangement", seeking the following relief:

A. that mise en cause Jolina Capital Inc. and parties related to it (hereinafter "Jolina"), holder of U.S. notes of U.S. $83.679 million, (approximately 67%) be prohibited from voting in the plan;

B. subsidiarily, that if Jolina be allowed to vote, that it be placed in a separate class from that in which Petitioners are classified;

C. that the Plan of Compromise and Arrangement (hereinafter "the plan") filed by the Debtors under the Companies' Creditors Arrangement Act, R.S.C., 1985 c. C.-36 (hereinafter "CCAA"), be modified as follows:

D. that the Debtors be ordered to provide a list of the names, addresses, telephone and telecopier numbers and values of notes held by all beneficial owners of the U.S. notes;

E. finally, that the Court order Debtors to file an amended plan incorporating the terms of the judgment to be rendered.

2 In effect, Petitioners, by their present proceeding seek the following:

The Proceedings and Plan

3 The Debtors applied for protection under the CCAA by filing their "Petition for the Issuance of an Initial Order" on April 17, 2001. The initial order has subsequently been renewed several times and still remains in force.

4 On July 11, 2001, Groupe Uniforêt filed the plan. This was followed by an amended plan, filed on July 22, 2001, which slightly modifies the original plan but does not affect Class 2.

5 The plan proposes an arrangement whereby Debtors' seven classes of creditors will be paid as follows:

Class	Description	Plan of Arrangement
1	The Municipalities of Port-Cartier and of l'Ascension (for municipal taxes)	Pursuant to existing agreements
2	US Noteholders	First U.S. $25,000 cash with remaining balance, if any, exchanged for two new US Secured Notes; Note "A" 9% due on March 15, 2009; Note "B" convertible due on September 15, 2008; the whole for a total of $100,000,000 CDN

3	Holders of Capital Leases	Pursuant to existing agreements and contracts
4	Forestry Contractors	75% of proven claims
5	Unsecured Creditors	The lesser of $2,500 and the proven claim *or* a prorata share of a fund of $5,000,000
6	Canadian Debentureholders	Choice of receiving 8% of face value in cash *or* conversion into voting common shares of Uniforêt at a conversion rate of $6.00 per share.
7	Unsecured Shareholder Loan	Repayable on March 15, 2009 without interest

6 On July 17, 200 Petitioners filed their present Motion.

7 On August 15, 2001, at a meeting of the creditors conducted by Richter and Associates (hereinafter the "Monitor"), the amended plan received the overwhelming support of Classes 1, and, 3 through 7. The preliminary vote counts are demonstrated in the following chart:

	Total Value of Claims		0% by number		% by value	
Class	Yes	No	Yes	No	Yes	No
1	345,122.82	0.00	100.00	0.00	100.00	0.00
Municipalities	Municipalities					
2	0	0	0	0	0	0
U.S. Notes (No vote held)						
3	4,765,088.56	0.00	100.00	0.00	100.00	0.00
Capital Leases						
4	2,478,207.26	0.00	100.00	0.00	100.00	0.00
Forestry Creditors						
5	23,905,963.36	128,586.51	98.56	1.44	99.46	0.54
Unsecured Creditors						
6	6,538,980.01	299,210.00	92.45	7.55	95.63	4.37
Canadian Debentures						
7	5,405,000.00	0.00	100.00	0.00	100.00	0.00
Shareholder Loan						

8 No vote was held in Class 2, under an order issued on July 26, 2001 by Meyer J., on the application of Petitioners, which suspended the vote in Class 2 until the disposition of the present application.

Petitioners Submissions:

9 Petitioners claim that:

A) the plan, as formulated is confiscatory and prejudicial to their rights in that, by presenting its plan on a consolidated basis with its two subsidiaries, Uniforêt is attempting to preserve the economic benefit of the shares for the current shareholders, rather than for the secured creditors, i.e. the noteholders;

B) U.S. noteholders receive substantially less relative to the other categories of creditors, since they receive a nominal amount in cash, whereas the principal amount of their claim is deferred partly to 2008 and partly to 2009;

C) there is no commonality of interest but rather competing interests, between them and Jolina, since Jolina is a major shareholder who would benefit from the confiscation of the rights of other U.S. noteholders; furthermore since Jolina is a creditor in other classes, (i.e. under a capital lease, as an ordinary creditor, as a creditor of an unsecured shareholder loan), and, since it has been involved in the management of Groupe Uniforêt, Jolina would therefore act on interests which do not relate solely to its interests as U.S. noteholder;

D) the plan unfairly distorts the voting process within Class 2 because it offers favourable treatment to small U.S. noteholders by offering them for the first $25000 of their claims the lesser sum of U.S. $25,000 or the face amount of their notes: this provision constitutes an artificial mechanism to buy individual votes in order to neutralize the voting strength of Petitioners and to achieve the minimum voting requirements required by the CCAA;

E) it is inappropriate to permit Jolina to vote within Class 2 since it now holds approximately 67% of the face value of all the U.S. notes; moreover since Jolina acquired the notes held by 3735061 Canada Inc., (hereinafter "3735061") a wholly owned subsidiary of Uniforêt, through a voluntary giving in payment executed after the issue of the initial order, and, the transfer was allegedly not at arms' length, nor with the input of any creditors' representatives, and, the effect of the transfer resulted in increasing Uniforêt's liability to the benefit of Jolina, such a vote would be tantamount to the Debtors voting for their own plan.

10 On the other hand, Petitioners do admit in their proceedings, that the plan as framed, provides a payment of approximately 53% of the face value of the notes, but it argues that this offer is worth less because of the deferral of payment under the plan through the issuance of notes A and convertible notes B.

Disposition of the Application

11 Given the allegations of the present application, the length of the hearing, the nature and complexity of the proof made, what should have been a hearing on a classification issue became an attempt by Petitioners to convert it to a hearing on the fairness and reasonableness of the plan.

12 The Court will strictly deal with the classification issues, and fairness only to the extent that it affects the classification. The Court will not deal with the fairness and reasonability of the plan as whole on this application.

13 Section 6 of the CCAA provides that:

> Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, 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

14 The principles which govern the approval of a plan under the CCAA have been stated succinctly by Paperny J. in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), at 18 :

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

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.) [Commercial List] at paragraph 7.....

15 In the present instance, no evidence has been lead with regard to criterias 1 and 2. These must be examined at the sanctioning hearing of the plan under S. 6 CAAA. Moreover until all of the creditors have been consulted and had an opportunity to express themselves upon the plan, the Court should not intervene on fairness and reasonability. Such a ruling at this stage would be premature and usurp the creditors' rights.

16 However, strictly in the context of the classification dispute, the Court is of the view that the plan is fair and reasonable in its treatment of Petitioners as members of the disputed class. Therefore the application will be disposed of in the following manner:

The Debtors

17 Uniforêt was incorporated in 1993. It owns 100% of the shares of Foresterie, 100% of the shares of Scierie (which is composed of three divisions, a pulp mill and a sawmill at Port Cartier, and a sawmill in Peribonka); and 100% of the shares of 3735061 Canada Inc. (hereinfter "3735061") which has not filed for protection under the CCAA in the present matter.

18 Uniforêt's operations are concentrated in the province of Quebec. They are a group of integrated forest products corporations which manufacture softwood lumber and bleached chemithermomechanical pulp ("BCTMP"). They employ approximately 600 employees in rural areas. An additional 600 persons are employed directly or indirectly, through contractors, at the height of the logging season.

19 Since its activities commenced in November 1993, Uniforêt has acquired underutilized and, or, undervalued assets and equipment which have been upgraded over the years, through innovative operating methods and modernization programs for the purposes of increasing production and improving the quality of its products. These have cost in excess of $136.4 million.

20 In 1993, Uniforêt and the Coopérative des Employés de la Scierie de Péribonka acquired 70% and 30% respectively of the assets of the Peribonka sawmill owned by Abitibi Price Inc. At the end of 1995, Uniforêt acquired the shares of the Coopérative des Employés.

21 In 1994, Uniforêt acquired the pulp mill located at Port Cartier. Thereafter, Uniforêt undertook renovations and constructed a modern sawmill on adjacent land. Subsequent additional investments increased the production capacity of the two mills. The Debtors focused their efforts on integrating their operations with a view to having the Port-Cartier sawmill supply the adjacent pulp mill with wood chips, the principal raw material required to produce BCTMP.

22 In January 1996, Uniforêt acquired 65% of the shares of Tripap Inc. (hereinafter Tripap). In 1997, the mill was converted to permit the consumption of BCTMP produced by the Port-Cartier pulp mill. This integration resulted in virtually all the pulp production of the Port-Cartier mill being transferred to the Tripap mill, thereby reducing the production costs of the latter. In June 2000, Uniforêt announced the definitive closing of the Tripap mill as a result of significant financial losses by Tripap due to weakened product demand and obsolete equipment. Uniforêt and its financial partners examined several alternatives to revive the mill, however, no feasible solution was found. In February 2001, Uniforêt sold all its Tripap shares to a third party for a nominal amount.

23 In February 2001, Uniforêt announced the temporary suspension of production at its Port-Cartier pulp mill following a decrease in global demand for commercial pulp. The pulp mill's operations were subsequently suspended indefinitely: no date is foreseen for the resumption of its operations.

24 Uniforêt uses both short term credit financing as well as long term financing. On October 16, 1996, it completed a private placement in the United States of US $125 million senior notes, bearing 11 1/8% interest, due in 2006, i.e the notes dealt with in Class 2, and, are held by Petitioners and Jolina. These notes were secured, under a Trust Indenture Agreement dated October 15, 1996, by a charge on all the assets of Uniforêt, and guaranteed by first ranking hypothecs on the Peribonka sawmill, the Port Cartier sawmill and the Port Cartier pulp mill.

25 By early 2000, Uniforêt faced a liquidity crisis caused by its continued operating losses from the preceding four fiscal years. Since its lines of credit were fully utilized, it was unable to meet the interest payment due on the U.S. notes on April 15, 2000. This was announced publicly by a press release issued on February 18, 2000.

26 At that time, Uniforêt was already in the process of reviewing its capital structure and had retained the services of Banc of America Securities to assist it in the evaluation of its options, to reduce its financing costs, and to improve its liquidity.

27 Thus, in April 2000, Uniforêt approved a debt restructurization plan. Under that plan, a wholly owned subsidiary of Uniforêt, 3735061, specifically incorporated for the sole purpose of carrying out a tender offer for the purchase of Uniforêt's U.S. notes, launched a cash tender offer for the purchase of a maximum of US $87.5 million aggregate principal amount of the U.S. notes in consideration of U.S. $500 (i.e. 50%). per U.S. $1000 face value. The purchase of the notes by 3735061 was to be financed by a credit facility provided by a banking syndicate, which at the banking syndicate's request, was guaranteed by Jolina. The plan and tender provided that the U.S. notes so acquired would not be cancelled, but would be used as security for the banking syndicate.

28 The tender offer also made it clear that the financing was provided by a group of lenders with the financial support of Jolina. Similarly, the offer warned that non-tendering noteholders could be adversely affected, since Uniforêt would be permitted to take certain actions that could increase the risk attached to the notes, and, because the market for the remaining notes would become more limited, it could result in a lower price than for other comparable debt securities.

29 The object of the tender plan was to reduce Uniforêt's interest expenses and carrying expenses. It would also result in a substantial reduction of Uniforêt's long term debt on its consolidated balance sheet. Simultaneously, the banking syndicate which financed the tender offer, would be entitled to share on a *pari pasu* basis with all of the U.S. noteholders in the event of a default by Uniforêt in the collateral provided under the Trust Indenture Agreement dated October 15, 1996. In addition to being provided as collateral to the banking syndicate, the tendered notes would not be cancelled: such cancellation would effectively improve the security position of the non-tendering U.S. noteholders who shared the collateral under the original trust indenture, and thus create a disincentive for them to tender their notes.

30 In June 2000, upon the closing of the tender offer, Uniforêt announced that it would purchase U.S. notes tendered of a face value of U.S. $64.4 million or 51.6% of the U.S. notes for the sum of approximately U.S. $32.3 million. The purchase was executed through Uniforêt's subsidiary, 3735061, financed by the banking syndicate, and guaranteed by Jolina.

31 Simultaneously with the purchase of the U.S. notes, and as part of its restructuring plan in April 2000, Uniforêt was proceeding to redeem Canadian debentures of a principal amount of $5.3 million for a cash consideration of $0.9

million and to convert Canadian debentures of a face value of $8.1 million into common shares of a conversion rate of one share at $6 face value. This redemption was executed with the support of a guarantee provided by Jolina. In fact, Jolina at that time converted the Canadian debentures it held into shares of Uniforêt.

32 The effect of these two transactions was to reduce Uniforêt's consolidated long term debt by approximately $60 million. It also allowed Uniforêt to pay the outstanding interest charges due on the U.S. notes, thus correcting the default of April 2000 to the U.S. noteholders who then withdrew proceedings they had commenced in May 2000 to exercise their collateral against Uniforêt.

33 Petitioners, in anticipation of the late payment to them by Uniforêt of the interest due April 2000 which was to be made June 14, 2000, executed a waiver document on June 13, 2000, in favour of Uniforêt and 3735061, whereby they renounced to the defaults by Uniforêt to pay under the terms of the original trust indenture, and; specifically acknowledged that the purchased notes under the tender offer were not to be withdrawn; renounced to any default constituted by the tender offer transaction which failed to comply with any provision of the indenture agreement or the notes; waived any failure or obligation of the offerer, 3735061 to become a guarantor under the indenture; waived any failure by the offerer or Uniforêt to provide that the purchased notes became collateral under the indenture; and renounced to the creation and incurance by the offerer 3735061, or Uniforêt, of liens on the capital stock of the offerer and on the purchased notes. In other words, Petitioners consented that the purchased notes, as stated under the tender offer, could be given as security to the banking syndicate.

34 In fact, the U.S. notes of a face value of U.S. $64.4 million purchased through the cash tender offer were subsequently acquired by Jolina and are the basis of the present dispute.

35 The decision by Group Uniforêt to file for protection under the CCCA was made by the Board of Directors in April 2001 upon the recommendation of the new Chief Executive Officer and President, Mr. Pierre Moreau and its Chief Financial Officer, Mr. Serge Mercier. Mr. Moreau, an individual with extensive experience in similar business operations as those conducted by Uniforêt had been engaged in August 2000 as Vice-President of Operations. When Mr. Moreau was engaged, it was agreed that he would assume control and direction of the Company's activities as President in 2001 but first he was, at his request, given a delay of six months to conduct a complete review and evaluation of all the operations and financial affairs of Group Uniforêt. Upon completing his analysis, he assumed the Presidency and made his recommendation to restructure.

36 When the Board of Uniforêt decided to file for protection under the CCAA, its line of credit with the bank was full drawn upon; it was in arrears with its payments for cutting rights to the province for the year 2000; and it had been advised that it could no longer count on receiving the financial support of its shareholder, Jolina, to fulfill its financial obligations.

Reasons for Respondents' Financial Difficulties

37 Respondent's financial problems may be attributed to continued losses in its operation, from 1996 to 2000, resulting from the cost of its expansion and modernization program, the reduction of demand for its products and the drop in global prices for lumber. In addition to deteriorating conditions in the pulp and lumber market, which became acute in 2001, additional duties of 19.3% were imposed on the export of soft wood lumber products to the United States, effective mid-May 2001. This seriously affected Uniforêt's ability to export its products to the United States and further reduced its market share.

Monitor's Report and the Liquidation Scenario

38 According to the Monitor, an orderly liquidation of Group Uniforêt's assets, (excluding accounts receivable and inventories), after deducting the costs to liquidate and the payment of priority claims, (i.e. employees claims, unpaid cutting rights etc.), would yield between CDN$60 and $80 million, and would take between 18 to 24 months. This estimated realization would be insufficient to fully reimburse the secured claims. A forced liquidation, on the other hand, would yield 50% less. i.e. between CDN $30 to 40 million.

39 The Monitor also estimates that the accounts receivable and inventories, which management represents to have a book value of CDN$17 and 33 million respectively, would generate a return of CDN$20 million in a liquidation.

40 Based on these assumptions of a liquidation value of CND$20 million for the accounts receivable and inventories and CND$65 million for the other assets, i.e., a total of $85 million, the Monitor estimates such a liquidation would yield the following net realisable values for the various classes:

CLASS	OUTSTANDING LIABILITY	PLAN OF ARRANGEMENT		LIQUIDATION (ESTIMATED NET REALIZABLE VALUE	
1	$ 298,971	$298,271	*100%*	$300,000	*100%*
2	195,337,500	100,000.00	*51%*	65,000,000	*33%*
				16,000,000	*8%*
3	5,135,824	5,135,924	*100%*	5,150,000	*100%*
4	2,534,190	1,900,642	*75%*	300,000	*12%*
5	24,849,498	5,700,000	*23%*	3,000,000	*42%*
6	16,554,904	1,324,392	*8%*		*— %*
7	5,405,000	1,104,858	*20%*	650,000	*12%*
Total	$250,115,987	$115,464,087	*46%*	$90,400,000	*36%*

41 It is evident that all classes of creditors would benefit more from the plan as proposed by the Debtors than from a liquidation. This is not challenged by the Petitioners as such. Indeed, Petitioners accept the Debtors' and Monitor's financial evaluations of the assets and debt capacity of Debtors and their operating scenarios. Petitioners take issue with the proposed form of distribution under the plan.

Jolina

42 The mise en cause, Jolina, is a private company controlled by Mr. Emmanual (Lino) Saputo.

43 In early 1998, Uniforêt, in an attempt to ensure its long term viability, decided to explore possible partnerships or asset disposal. The search for a partner led Mr. Michel Perron, President of Somniper, majority shareholder in Uniforêt, who had founded Uniforêt in 1993, and was Uniforêt's President and Chief Executive Officer to Jolina. It was agreed that Jolina, who had been a shareholder in Uniforêt since 1996, and whose representative, Mr. Saputo was already a member of its Board of Directors, would substantially increase its investment in Uniforêt by acquiring additional subordinated voting shares.

44 By the end of October 1998, Jolina had invested approximately CND$50 million in the capital of Uniforêt and had acquired approximately 26,500 subordinated voting shares, i.e. approximately 40% of the outstanding shares equivalent to 19.6% of the voting rights in Uniforêt.

45 On November 2, 1998, Mr. Saputo took over as President and Chief Executive Officer of Uniforêt. He remained in both those positions until January 12, 2001. From January 12, 2001 to April 17, 2001, he acted solely as Director and Chairman of the Board of Uniforêt. .

46 During 1998, 1999 and 2000, Jolina provided administrative and consulting assistance to Uniforêt. It was paid approximately $300,000 per annum for services rendered which included accounting, providing personnel and in some instances physical office premises and equipment. During 2001, no payment was made to Jolina for the services it rendered to Uniforêt.

47 Since its involvement in 1998, Jolina provided substantial financial assistance to Uniforêt such as financing the acquisition of equipment. From July 2000 to February 2001, it provided operating funds in the amount of CND$5,405,000 as required by Uniforêt, now claimed as an unsecured shareholder's loan by Jolina from Uniforêt..

48 When Uniforêt, in April 2000, following an extensive review of its affairs and an attempt to restructure its finances, launched a cash tender offer for its U.S. notes through 3735061, which offered on the open market to purchase a maximum of U.S. $87.5 million aggregate principal amount of U.S. notes at a discounted price, it was agreed that the acquisition was to be financed by a banking syndicate and would be guaranteed by Jolina. Thus in June 2000, Uniforêt through 3735061, purchased U.S. notes of a principal sum of $U.S. 64.6 million, for the sum of U.S.$32.3 million: this represented 51.6% of the original issue in the aggregate amount of U.S. $125 million.

49 From October 2000 to the end of January 2001, Jolina itself purchased approximately 15.2% of the U.S. notes on the open market in the United States for U.S. $19,108,000.

50 After 3735061 defaulted to the banking syndicate which had financed its acquisition of the U.S. notes, Jolina, as guarantor of the loan to the syndicate, purchased the loan of each lender and was subrogated its in rights against 3735061.

51 On May 18, 2001, after giving the Debtors prior notice on April 25, 2001 of the intended exercise of its hypothecary rights, Jolina exercised its security and acquired the purchased U.S. notes by the voluntary surrender and giving in payment to it by 3735061.

52 Thus Jolina, now owns 66.9% of U.S. notes of a face value of U.S.$83.679 million at an average price of 56% of the face value of each U.S. note.

53 Prior to the exercise by Jolina of its security, its representative, Mr. Saputo, on April 17,2001, resigned from the Board of Uniforêt. Simultaneously, Jolina also terminated the voting trust agreement it had entered into with Somniper Inc. in August 1998, to exercise the Somniper votes as a shareholder in Uniforêt and, renounced to its rights of first refusal to purchase the shares of Somniper in Uniforêt.

54 The recommendation made to the Board of Uniforêt to file for protection under the CCAA by Uniforêt's new President, Mr. Moreau and its Chief Financial Officer, Mr. Mercier in the spring 2001 was not discussed with Mr. Saputo of Jolina until April 5, 2001. In fact, neither Jolina nor Mr. Saputo participated in Uniforêt's decision to file for protection under the CCAA. However, Jolina had by then informed Uniforêt, both informally in March 2001 and formally on April 5, 2001, that Uniforêt could no longer count on receiving its financial support to fulfill its financial obligations.

55 Jolina has filed several claims against Uniforêt: as a U.S. noteholder, as a shareholder, and as a holder of a capital lease. Its claim under the capital lease has not yet been evaluated by the Monitor and therefore Petitioner's objection to

that claim at the present time is premature. As to its claim as a U.S. noteholder, there is no evidence of any misconduct or bad faith by Jolina. Jolina never had the control of Uniforêt, in fact or in law. It is Uniforêt's largest single creditor, secured or unsecured. Its interests are distinct from those of Uniforêt. Its interests as a secured creditor, i.e. as a U.S. noteholder, to the extent of almost U.S.$84 million supersede all of its other claims and interests, including those as a shareholder. There is no reason to believe it would act in any manner other than in accordance with the common interests of all members of Class 2. The Court finds no basis in law or in fact to deprive Jolina of its rights to vote in the plan as a member of Class 2.

The Petitioners:

56 prospect Street High Income Portfolio Inc. (hereinafter "Prospect"); ML CBO IV (Cayman) Ltd. (hereinafter "ML CBO"); Pamco Cayman Ltd (hereinafter "Pamco"); Highland Legacy Ltd (hereinafter "Legacy"); Pam Capital Funding, L.P.(hereinafter "Pam"); are all investment funds managed by Petitioner, Highland Capital Management, L.P. (hereinafter "Highland"). Mr. James Dondero is President of both Prospect and Highland, which manages all of the Petitioner funds.

57 Petitioners collectively own U.S $33.5 million or 26.8% of the Uniforêt U.S. notes. The combined holdings of Prospect and Highland total 18.6% of the outstanding U.S. notes whereas their co-Petitioners hold the other 8.4%. Other than Jolina's holdings of 66.9% of the U.S. notes, others, unnamed, not party to the proceedings, hold the balance of 6.2%.

58 Prospect, which holds U.S. notes having a face value of US $20 million, i.e. 59.7% of the U.S. notes of $33.5 million held collectively by Petitioners, is in fact, a diversified, closed end management company that primarily invests in high risk and non-investment-grade corporate debt securities. In fact, a high proportion of its investment portfolio is invested in securities which are in or near default of their contractual obligations and not generating any income. Thus, capital gains as opposed to interest income normally generated by higher grade investments is the most probable means of achieving a positive investment return in its portfolio.

59 In fact, Prospect describes its investment policy in its notes to its financial statements, dated January 31 and April 30, 2001 which form part of its N-30D Reports (Annual or Semi-Annual Reports) filed on March 15, 2001 and June 26, 2001 respectively[FN1] as follows:

> Prospect Street High Income Portfolio Inc. (the "Fund") was organized as a corporation in the state of Maryland on May 13, 1988 and is registered with the Securities and Exchange Commission as a diversified, closed-end, management investment company under the Investment Company Act of 1940. ... The following is a summary of significant accounting policies consistently followed by the Fund, which are in conformity with those generally accepted in the investment company industry.
>
> The Fund invests primarily in securities of fixed-maturity, corporate debt securities and in redeemable preferred stocks that are rated less than investment grade. Risk of loss upon default by the issuer is significantly greater with respect to such securities compared to investment-grade securities because these securities are generally unsecured and are often subordinated to other creditors of the issuer, and because these issuers usually have high levels of indebtedness and are more sensitive to adverse economic conditions, such as a recession, than are investment-grade issuers. ...
>
> Other investments, which comprise the major portion of the Fund's portfolio holdings, are primarily non-investment grade corporate debt securities, for which market quotations are not readily available due to a thinly traded market

with a limited number of market makers. (Underlining added)

60 It restates its investment objective and policies in its 497 H2 Report (prospectus with public offering of its own shares) filed March 14, 2001[FN2]

Investment Objective and Policies:

The Fund's investment objective is to provide high current income, while seeking to preserve stockholders' capital, through investment in a professionally managed, diversified portfolio of high-yield, high risk securities (commonly referred to as "junk bonds"). The Fund seeks to achieve its objective of preserving stockholders' capital through careful selection of the Fund's high-yield, high risk investments, portfolio diversification, and portfolio monitoring and repositioning. The Fund invests primarily in fixed-income securities rated in the lower categories by establishing rating agencies (consisting principally of fixed-income securities rated "BB" or lower by S& P and "Ba" or lower by Moody's) or nonrated fixed-income securities deemed by the Adviser to be of comparable quality.

Under normal market conditions, at least 65% of the Fund's total assets are invested in high-yield fixed-income securities rated in the lower categories by recognized rating agencies or nonrated fixed income securities deemed by the Adviser to be of comparable quality. ...

High-yield bonds, the generic name for corporate bonds rated between "Ba"/"BB" and "C"/"C" by the rating agencies, are frequently issued by corporations in the growth stage of their development, but also may be issued by established companies. These bonds are regarded by the rating agencies, on balance as predominantly speculative with respect to capacity to pay interest and repay principal in accordance with the terms of the obligation. Such securities also are generally considered to be subject to greater risk than securities with higher ratings with regard to a deterioration of general economic conditions. Securities that are rated BB by S&P or Ba by Moody's have speculative characteristics with respect to capacity to pay interest and repay principal. Securities that are rated B by S&P or Moody's reflect the rating agency's view that such securities generally lack characteristics of a desirable investment and assurance of interest and principal payments over any long period of time may be small. Securities that are rated CCC by S&P or Caa by Moody's or below are of poor standing. Those issues may be in default (such as those rated D by S&P) or present elements of danger with respect to principal or interest. The Fund may purchase or hold securities that are in payment default... High yield securities held by the Fund may include securities held by the Fund may include securities received as a result of a corporate reorganization or issued as part of a corporate takeover. Securities issued to finance corporate restructurings may have special credit risks because of the highly leveraged conditions of the issuers, and such securities usually are subordinate to securities subsequently issued by the issuer. In addition, such issuers may lose experienced management as a result of the restructurings. Finally, the market price of such securities may be more volatile to the extent that expected benefits from restructuring do not materialize. (Underlining added)

61 Prospect describes the risks of investing in its own preferred shares:[FN3]

General risks of Investing in the Fund

High yield Investments

The Fund is designed for long-term investors who can accept the risks entailed in seeking a high level of current income available from investments in long-term, high-yielding, lower quality, fixed-income securities. ...

> Fixed-income securities offering the high current income sought by the Fund will ordinarily be in the lower rating categories of recognized rating agencies or will be unrated. The values of such securities tend to reflect individual corporate developments or adverse economic changes to a greater extent than higher rated securities which react primarily to fluctuations in the general level of interest rates. Periods of economic uncertainty and changes generally result in increased volatility in the market prices and yields of high-yield, high risk securities and thus in the fund's NAV. The rating agencies generally regard these securities as upredominantly speculative with respect to capacity to pay interest and repay principal and riskier than securities in the higher rating categories. ...
>
> The Fund may incur additional expenses to the extent it is required to seek recovery upon a default in the payment of principal of or interest on its portfolio holdings. The high-yield, high risk securities held by the Fund are frequently subordinated to the prior payment of senior indebtedness and are traded in markets that may be relatively less liquid than the market for higher rated securities. Changes by recognized rating services in their ratings of any fixed-income security and in the ability of an issuer to make payments of interest and principal may also affect the value of the Fund's investments. Changes in the value of portfolio securities will not necessarily affect cash income derived from such securities, but will affect the Fund's net asset value...
>
> The credit ratings issued by credit rating agencies may not fully reflect the true risks of an investment. For example, credit ratings typically evaluate the safety of principal and interest payments, not market value risk, of high yield, high risk securities. Also, credit rating agencies may fail to change on a timely basis a credit rating to reflect changes in economic or company conditions that affect a security's market value. .... (Underlining added)

62 Prospect actually purchased its U.S. notes of U.S. $23 million between February 15 and March 29, 2000 at prices varying between U.S.$23.50 and $29.50, i.e. at an average price of U.S.$27.79 (or 27.79%) per U.S.$100.[FN4] Then, between December 1, 2000 and June 18, 2001, it sold notes of U.S. $3 million, at U.S. $80 per U.S. $100 face value (i.e. 80%).

63 Highland which did not own any Uniforêt notes (and therefore as funds manager would have had no claim under the plan nor standing in the present proceedings) purchased in December 2000 and June 18, 2001, exactly the same amounts as those traded by Prospect at an average price of U.S. $80.10 per U.S. $100 (or 80.10%) of the face value.

64 At the time that these transactions were executed by Prospect and Highland, an independent evaluation service assessed the current market value of Uniforêt's U.S. notes at an average price of 31% of face value. The trades by Prospect and Highland at U.S. $80 per U.S. $100 (or 80%) is at a price which grossly exceeds the market value and unrealistically inflated.

65 Furthermore, all transactions executed by both Prospect and Highland, whereby they acquired 18.6% of the U.S. notes, occurred at a time when they were ranked by reputable investment ranking agencies, such as Standard and Poor, as being below investment grade. In fact, throughout 2000 and 2001, Uniforêt U.S. notes were rated at C.C.C. or lower. This means that they then were currently vulnerable to non -payment, or, would likely be unable to meet their financial commitments on their obligations or were already in default.[FN5]

66 Mr. Jame Dondero, President of Prospect and of Highland, the fund manager for all of the Petitioners, testified that investors in Prospect and the other funds, knew and accepted the speculative and risky nature of the investments made in their portfolios; that most of the investments made by Prospect were below investment grade; that at the time they were acquired, he was aware of the low investment grade of Uniforêt's U.S. notes; and that he was informed concerning Uniforêt's financial situation; that he was aware of various Press releases issued by the Debtors and 3735061:

December 21, 1999: Uniforêt was seeking to revise its financial structure;

December 21, 1999: Uniforêt had hired an expert as its financial adviser in order to help it reduce its costs and improve its liquidity;

February 18, 2000: Uniforêt was unable to pay the interest due April 15, 2000 on its U.S. notes;

April 18, 2000: a cash tender offer was being launched by 3735061 to purchase U.S. notes on the open market;

May 29, 2000: a notice of the exercise of a notice of intention by U.S. noteholders of approximately 41% intending to enforce their security; as well as that the cash tender offer to purchase outstanding U.S. notes at 50%, was still valid and unchanged;

June 9, 2000: U.S. notes of over U.S. $64 million had been purchased through the tender offer for less than their face value;

April 17, 2001: Uniforêt, Scierie, and Foresterie had filed for protection under the CCAA and that Mr.Saputo had resigned as Chairman of the Board of Directors; that Jolina had renounced to its proxy rights and rights of first refusal in its favour granted by Somniper the controlling shareholder of Uniforêt;

May 18, 2001:Jolina's subsidiary 3735061 had defaulted and was unable to meet its obligations resulting in Jolina exercising its hypothecary rights to take the U.S. notes in exercise of its security;

August 29, 2001: the closure of the Port Cartier pulp mill, originally announced as being temporary in February 2001, was now definitive;

67 In fact, the acquisitions by Prospect of U.S. notes of U.S. $23 million and by Highland of U.S. notes of U.S.$3 million were subsequent to the press releases issued in December 1999 that Uniforêt was attempting to restructure its finances; and to the press release of February 2000 that it would default on the interest payments due on the notes on April 15, 2000. The acquisitions by Highland of U.S. notes at an average price of 80.1% was also subsequent to the press releases announcing the cash tender offer of April 10, 2000 to purchase U.S. notes on the open market originally at 30%, subsequently modified to 50% of face value; the press release of May 29, 2000 which announced that holders of 41% of the U.S. notes had sent a notice of intention to enforce their security against Uniforêt for its default to pay and confirmed that the cash tender offer made by 3735061 to purchase Uniforêt's notes on the open market as well as the Canadian debentures remained valid and unchanged. Finally, Highland's acquisitions of U.S. notes of U.S. $2 million in June 2001, were subsequent to the filing of the proceedings under the CCAA.

68 In other words, both Prospect as a professional investment company and Highland, as a professional manager of portfolios, were all aware of the financial difficulties of Uniforêt and market value of its U.S. notes but nonetheless acquired them when they were already in default.

69 Furthermore, notwithstanding Prospect's stated policy in its prospectus that it uses an independent evaluation service to evaluate its acquisitions and holdings, its President, Mr. James Dondero admits that it does not use any such independent evaluation service. No explanation is offered for the values attributed by Prospect to the U.S. notes it owns in its statements: these values appear to bear an inverse illogical relationship to the financial well-being of Uniforêt and are stated at inflated values relative to the market price as assessed by independent evaluation services:

A) in the financial statement accompanying its N30-D Report for the period ended *April 30, 2000* (filing date June

26, 2000), it evaluates its Uniforêt' s U.S. notes of U.S. *$23* million, then rated by Standard and Poor and Moody as "*D*" and "Ca" respectively, as having a market value of U.S. *$8.05* million, noting that the security was "*currently in default*".[FN6]

B) in its financial statement, accompanying its N30-D Report for the period ended *October 31, 2000*, (filing date January 3, 2001), it values its Uniforêt's U.S. notes of U.S. *$23* million, then rated as "*CCC-*" and "C.a" by Standard and Poor and Moody respectively, as having a market value of U.S. *$16.1* million.[FN7]

C) in its first quarterly report for the period terminating *January 31, 2001* dated March 14, 2001, it values its Uniforêt's U.S. notes of U.S. *$22* million, then rated by Standard and Poor and Moody as "*C. C. C.-*" or "Caa1"respectively as having a market value of U.S. *$17.6* million;[FN8]

D) in its N-30 D Report, for the period ending *April 30, 2001*, (filing date June 26, 2001), it values its Uniforêt notes of U.S. *$22* million, then rated by Standard and Poor and Moody as "*D*" and "Caa1" respectively as having a market value of U.S. *$17.6* million while noting that the Company had *filed for bankruptcy protection* and was *already in default*.[FN9]

70 Petitioners produce in support of their position that the plan is unfair to all Class 2 creditors other than Jolina, a report prepared by Houlihan Lokey Howard and Zukin, Financial Advisors of New York, (hereinafter "Houlihan") dated October 8, 2000.[FN10] Defendants rebut this report with another prepared by Houlihan on May 15, 2000,[FN11] when it was engaged to report to an informal committee of U.S. noteholders in connection with Uniforêt's tender offer for the U.S. notes on the public market.

71 Mr. Derron Slonecker of Houlihan was called as an expert by Petitioners regarding the fairness of the plan and to explain the reports. Mr. Slonecker, however, did not prepare the reports alone. Others in the firm who had participated in the preparation of the reports and the evaluation of the assets and the operations of the enterprises did not testify.

72 Houlihan's first report, of May 15, 2000, assesses the value of the assets of Uniforêt at *U.S. $123 to $134* million, excluding the assets of Tripap, but including the Port Cartier pulpmill whose assets are therein evaluated at U.S. $38 to 41 million. On that basis, the report and Mr.Slonecker conclude that the recovery rate relative to the face value of the notes is approximately *49 to 56%*, compared to the current market trading price between 27 to 30%.

73 Houlihan's second report, of October 8 2001, was prepared by Houlihan at Petitioner's request as a reply to the Report of the Monitor on the Debtor's financial affairs and on the fairness of the plan. Mr. Slonecker and the report re-evaluate the assets of the Uniforêt at *CND $90* million. No value whatsoever is attributed to the assets of the Port Cartier pulpmill because it was not operating.[FN12] Mr. Slonecker in his report, then evaluates the new securities, redeemable or convertible at a future date being provided to the Class 2 noteholders under the plan, at CDN$56.4 million, which implies a recovery rate of *51.2%* of the total face value of the Class 2 claims. After discounting for the delay in payment, he concludes that this implies a real recovery rate of only 28.9%.[FN13] He adds that the trading value of the class A notes is 74% of face value, whereas the trading value of the class B notes is 31% of face value.[FN14]

74 Jolina, as a Class 2 creditor is affected by the same determinations as to its potential recovery on its U.S. notes. In addition, Houlihan and Mr. Slonecker evaluate the trading value of Jolina's new note under the plan in payment of its claim for its shareholder loan of CND $5.4 million at 18.8% of face value, i.e. worth approximately $1 million Canadian when discounted, for the delay in payment.[FN15].

75 Thus, Houlihan and Mr. Slonecker conclude on the basis of two completely different scenarios as set forth in the

two reports, that the recovery rate on the U.S. notes is approximately the same: 49 to 56% on the first report and 51.2% on the second report, without attributing any value to the Port Cartier pulpmill, absent any discount for delays in payment. Similarly, the Monitor concludes that the recovery rate for Class 2 claimants is 51% under the plan, or 33% on a forced liquidation. Thus it appears that Petitioners will gain more under the plan and less on liquidation.

76 Although accepting the operational scenarios and financial information provided by the Monitor and Uniforêt, and acknowledging: that the Debtors do not have the resources and are unable to meet the terms of any plan that would impose additional financial burdens on them; that Debtors require an injection of a substantial amount of capital to improve their financial position and the equity of the shareholders; that such an injection of capital is highly unlikely; that the current market conditions for Uniforêt's products are unlikely to improve; Mr. Slonecker criticizes Uniforêt's plan as being unfair and confiscatory of the rights of the U.S. noteholders other than Jolina.

77 An analysis of his criticism of the plan follows:

The Legal Principles that Apply to Classification Disputes

78 The CCAA does not offer any guidance with regard to the classification of claims, other than identifying secured and unsecured classes. Instead, the governing principles and process have been developed by the case law.

79 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.) a creditor, Resurgence, sought to have Air Canada, which had a claim as an unsecured creditor, placed in a separate class from the other unsecured creditors, and to oblige it to vote in a separate class from all the other affected unsecured claims. Resurgence submitted that Air Canada had appointed the board which caused Canadian to enter into the CCAA proceedings, under which Air Canada stood to gain substantial benefits in its own operations, and that since Air Canada had provided the funds which were to be distributed to the unsecured creditors under the plan, it would be paying itself a portion of the money if it was included in the same class.

80 Paperny J. refused the application, and permitted Air Canada to vote on the plan. In arriving at her conclusion, she conducts an extensive review of the applicable case law, rejecting the principle of identity of interest and adopting the test described as "the commonality of interest" test. The salient points of her analysis are as follows.

81 She commences at page 16:

> The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)...
>
> Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, Re *Fairview Industries Ltd.* (1991)11 C.B.R. (3d) 71(N.S. T.D.)
>
> The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-à-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting

a plan is not a classification issue in the authorities. (Underlining added)

82 She continues on page 17:

> Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A. which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.
>
> The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v Excelsior Life Insurance Co of Canada (*1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) where it was held that various mortgages with different mortgages against different properties were included in the same class. (Underlining added)

83 She then states at page 18:

> In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.
>
> In *Fairview Industries Ltd.*, the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.
>
> In *Sklar Peppler Furniture Corp. v Bank of Nova Scotia (*1991) 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.*, the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.
>
> Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan" He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power". (Underlining added)

84 Paperny J. summarizes the principles at pp. 18-19:

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

85 In *Canadian Airlines Corp.* , Paperny J. found that all the creditors proposed to be included in the unsecured class were all unsecured, were being treated in the same fashion under the plan, and, were to be paid the same remuneration. Their legal interests were essentially the same and no issue could be taken with the presence of Air Canada as supporter and funder of the plan since it had taken an assignment of a substantial unsecured claim. Absent bad faith, who the cred-

itors were was not relevant. Air Canada's mere presence in the unsecured class did not in and of itself constitute bad faith. She then concludes by enunciating another important principle at page 20:

> To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A. (Underlining added).

86 Applying the relevant principles to the facts at hand, there is not only commonality but indeed identity of interests. Both Petitioners and Jolina, as well as all the other U.S. noteholders, hold the same U.S. notes; issued under the same circumstances; governed by the same terms, conditions and limitations; emanating from the same source i.e. a private placement in the United States of U.S $125 million, bearing 11 $^1/_8$% interest, due in 2008; secured under the same indenture agreement; and, hold the identical security against the common assets of the Debtors. All the U.S. noteholders are being treated in identically the same fashion under the proposed plan.

87 There is neither any logical nor legal ground upon which the class can be separated: to do so would constitute a fragmentation of a class composed of claimants who have not only common but identical interests, are being treated exactly in the same fashion under the proposed plan, and would constitute a serious jeopardy to the success of the plan.

88 Petitioners, i.e. Prospect and Highland have made their position clear. They will not accept the plan proposed by Uniforêt. They will only accept that plan which they, themselves, impose or tailor to their fashion and which assures them a substantial capital gain. They have no interest in the reorganization of the Debtors. To divide the class, or, to deny Jolina its right to vote in it, would not only confiscate Jolina's rights but would moreover effectively grant Petitioners a right of veto over the entire plan. This would be contrary to the legislative intent of the CCAA, which is to facilitate corporate reorganizations particularly where overwhelming support has been shown for the plan by all the other classes as well as other members of the class in dispute.

Petitioners' Attitude and Good Faith

89 In order to gain support for Uniforêt's reorganization and its plan, the new President, Mr. Moreau and its Chief Financial Officer, Mr. Mercier met with creditors in various classes to explain to them the Company's financial situation and to obtain their support for the plan Uniforêt proposed to file. Generally, the creditors indicated their support for the plan.

90 Two such meetings were held in June 2001 with representatives of Petitioners. A third meeting was held in New York in October 2001.

91 At the first meeting held June 5, 2001 in Montreal, Petitioners were informed as to the financial problems of the Company, its activities, its difficulties in the market, and was provided with a copy of a report, called "Status Report on Financial Restructuring Plan", dated June 5, 2001, prepared by Debtors' Bank which analyzed their financial affairs.

92 At the second meeting, on June 19, 2001, in an attempt to obtain Petitioner's support, Uniforêt proposed a modification to its Class 2, whereby the class would be divided into two, namely: a class to consist of Jolina and a distinct class to consist of all other U.S. noteholders other than Jolina. Both classes were offered the same plan of payment: the exchange of their notes for a new category of notes, "A", for a total consideration of Canadian $65 million, bearing an interest at 7.5% due in 2008, and, category "B" notes for a total consideration of CND $40 million, bearing 3% interest. There was no right of conversion attached to either of these notes.

93 Petitioners rejected this new proposal on the grounds that the plan had provided cash payments to other categories of creditors whose rights were subordinated to those of the U.S. noteholders; it reduced the face value of the U.S. notes; it preserved the equity of the Company as it existed without allowing any participation in any future improvement in its operations by the U.S. noteholders; and there was a delay in payment to the U.S. noteholders. Finally, it was made clear by Mr. Kaufman, representative of the Petitioners at that meeting that no plan which offered less than 65% of the face value of the existing U.S. notes would even be considered.

94 Faced with Petitioners' position, Uniforêt had no choice but to prepare and deposit a plan which it considered to be fair and reasonable for all its creditors; the terms of which it could meet; which would permit it to continue its operations, and, the Company to survive. Uniforêt considered Petitioners' demand unreasonable, contrary to the interests of the mass of creditors, since it would have forced Uniforêt into immediate liquidation. However in finalizing its plan, as filed into the Court record, Uniforêt did add a conversion option to the new Canadian notes being offered. This would permit U.S. noteholders to share in future equity and to thereby participate in any future growth of the Company, while simultaneously, protecting the U.S. noteholders, with security for Canadian $100 million, i.e. equal to the full value of Uniforêt's assets as an on-going operation.

95 On the other hand, Petitioners' motives and good faith are seriously in issue. They have admitted that under the plan, as submitted, they would obtain a higher rate of return than under a forced liquidation of the Debtors. They have admitted that Uniforêt does not have the revenues and assets to comply with the conventional plan proposed in their expert's report of October 2001 which states their final position, and, which they have not even reviewed or accepted. They have admitted that the Debtors' potential for growth and expansion and therefore an increase in shareholders equity cannot be achieved without a substantial investment of capital or a drastic change in market conditions for Uniforêt's products, both of which are unlikely to occur. They agreed to the creation of a lien on the purchased U.S. notes by 3735061 but now object because Jolina acquired them by payment of the lenders who financed the tender offer. Nevertheless, Petitioners persist in obstructing the plan in order to achieve their own ends, without regard to the results on the Company, the creditors, and community as a whole. They obviously have no interest in facilitating the reorganization of the Company but seek to maximize their return at all costs, even if it means liquidation, in which case they too will lose.

96 Moreover, since the cost of acquisition of the U.S. notes by Prospect, which holds the major part of the collective holdings of Petitioners, is substantially less than that offered to it under the proposed plan, it stands to make a substantial gain under the plan. As for Highand's acquisitions, both its and Prospects' trades at inflated prices of 80% in debentures of a Company that was already in default is seriously suspect. Both are uncompromising speculators, knowledgeable, who invest in low grade high risk investments, prepared to accept the risks relating to the capacity of their debtors to repay interest and capital, with the expectation of exercising their security against the assets of the Companies in which they invest.

97 Petitioners have not shown good faith. They should not be given the opportunity to control the outcome of the vote of the U.S. noteholders by the division of Class 2 as they request. To permit them to control the vote would be contrary to the terms, spirit and intent of the CCAA whose object is to facilitate reorganization rather than force companies into liquidation.

Other Outstanding Issues

98 Additional issues have been pleaded and must be disposed of by this Court.

99 Petitioners submit:

1. they are entitled to have disclosed to them the identity of the other beneficial U.S. noteholders;

2. 3735061 should have been made a party to the consolidated application by the Debtors for protection under the CCAA;

3. the offer of $25,000 as an initial payment to U.S. noteholders is an attempt to manipulate votes.

100 Respondents submit that Petitioners are not credible because they have failed to comply with the U.S. securities legislation and formalities.

The Identity of the Other U.S. Holders

101 Petitioners demand the disclosure of the names, addresses, telephone numbers, and telecopier numbers of the remaining 6.2% beneficial U.S. noteholders who are not involved in this application.

102 The evidence is that neither the Monitor nor Uniforêt are in possession of this information, nor are they able to secure it. Under the circumstances, the demand is unreasonable and will be refused. However, to the extent that either the Monitor or Debtors have any such information, they will be required to provide it to Petitioners.

The Non Inclusion of 3735061 Canada Inc. as a Party to the Application Under the CCAA

103 Petitioners submit that the failure to include 3735061, a subsidiary of Uniforêt, in the application for protection by the Debtors constitutes an attempt to protect the interests of Jolina which exercised its security and acquired all of U.S. notes purchased by 3735061 under the terms of the tender offer.

104 3735061 has no assets nor any operations. It was incorporated as a wholly owned subsidiary of Uniforêt specifically to proceed with the tender offer whereby Uniforêt's consolidated debt, interest expenses and carrying charges were reduced. Its acquisition of the U.S. notes was financed by a credit facility guaranteed by Jolina. It was the default of 3735061 and Uniforêt under the terms of the financing agreements and subsequent purchase by Jolina of the claims of the creditors that allowed Jolina to exercise its security against the U.S. notes. This resulted in an increase of the Debtors consolidated debt.

105 It was the default by Uniforêt and 3735061 which entitled Jolina to protect itself. The consequences of Jolina's action are not the responsibility nor fault of Jolina: they flow directly from the defaults of the Debtors and 3735061.

106 Under the circumstances and in accordance with the evidence that Petitioners had agreed, in June 13, 2000, that the purchased U.S. notes would be given as collateral to the banking syndicate, and, that Jolina purchased the syndicate's claims against 3735061, this argument is unfounded. Furthermore under the CCAA, debtors, not creditors, decide who will file for protection.

The Proposal to Pay U.S.$25 000 to Noteholders

107 Petitioners claim that the plan which proposes to pay U.S. noteholders the lesser of U.S. $25,000 in cash or the face amount of their claim, with the remaining balance, if any, to be exchanged for new notes, constitutes an attempt to manipulate the vote by attempting to secure the votes of the remaining 6.2% U.S. noteholders.

108 There is no evidence of such intent or manipulation before the Court. Such a clause is one which is currently used and is perfectly acceptable.

Non Compliance by Petitioners With U.S. Securities Legislation and Formalities:

109 Evidence has been made submitted by Debtors through an expert in securities legislation and regulations in the United States, Mr. Lawrence Stadulis, that Petitioners have committed certain infringements under U.S. Law (Investment Company Act of 1940; and the Securities and Exchange Commission, "S.E.C", Rules and Regulations):

A) Highland's purchases of Uniforêt's notes of U.S.$3 million in December 2000 and June 2001 were not permissible under U.S. securities laws;

B) the parties to the transaction failed to disclose the transactions in question as required under the legislation and rules; and,

C) Prospect, as vendor, failed to have determined the value of the notes based on the current market value and to disclose the fair market value of its holdings in public filings.

110 This evidence is uncontradicted, given that the Court attaches absolutely no credibility to the witness produced as its expert by Petitioners, Mr. Charles Miller. Not only was Mr. Miller's demeanor arrogant and rude, but, moreover as an expert, he lacked credibility and objectivity. As Attorney for Prospect and Highland who advised them on these matters, his evidence constitutes an attempt to defend his own position and legal advice rather than provide an independent review of the transactions, actions and applicable laws and regulations.

111 In any event, this evidence is irrelevant, save and except insofar as it impeaches the credibility of and confirms the attitude of Petitioners generally with regard to the main issue i.e., that Petitioners are determined at all costs to achieve their objectives, and will take whatever measures necessary to attain them without regard to the consequences.

Conclusion

b) FOR THESE REASONS THE COURT:

Motion dismissed.

FN* Leave to appeal refused 2002 CarswellQue 2546, 40 C.B.R. (4th) 281 (Que. C.A.).

FN1 Exhibit D-11, page 8; Exhibit D-14, pages 9 and 10.

FN2 Exhibit D-18, pages 15-16.

FN3 Exhibit D-18, pages 26-27.

FN4 As to the other Petitioners, who collectively hold 8.4% of the U.S. notes, their acquisition price is as follows

FN5 See Standard and Poor Classification Exhibits D-16 and D-17. Also see D-45, page 12.

FN6 Exhibit D-14, pages 4 and 6.

FN7 Exhibit D-14 page 4.

FN8 Exhibit D-11, page 3.

FN9 Exhibit D-14, pages 2 and 4.

FN10 Exhibit R-57.

FN11 Exhibit D-49.

FN12 Exhibit R-57, page 12.

FN13 Exhibit R-57, pages13 and 55.

FN14 Exhibit R-57, pages 59 and 63.

FN15 Exhibit R-57 page 64.

END OF DOCUMENT

Court File No. CV-10-8561-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985 c. C-36
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
SIGNATURE ALUMINUM CANADA INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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