

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990, C. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF
NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF
NURSES FOR CANADA – WESTERN REGION

Applicants

**BOOK OF AUTHORITIES
(Re Motion Returnable November 23, 2016)**

November 21, 2016

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TAB 1

2010 QCCS 4450
Quebec Superior Court

AbitibiBowater Inc., Re

2010 CarswellQue 10118, 2010 QCCS 4450, 193 A.C.W.S. (3d) 360, 72 C.B.R. (5th) 80, EYB 2010-179705

In The Matter of the Plan of Compromise or Arrangement of

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The Other
Petitioners Listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor)

Clément Gascon, J.S.C.

Heard: September 20-21, 2010

Judgment: September 23, 2010

Docket: C.S. Montréal 500-11-036133-094

Counsel: Mr. Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors

Me Gilles Paquin, Me Avram Fishman, for the Monitor

Mr. Robert Thornton, for the Monitor

Me Bernard Boucher, for BI Citibank (London Branch), as Agent for Citibank, N.A.

Me Jocelyn Perreault, for Bank of Nova Scotia (as Administrative and Collateral Agent)

Me Marc Duchesne, Me François Gagnon, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank
National Association, Indenture Trustee for the Senior Secured Noteholders

Mr. Frederick L. Myers, Mr. Robert J. Chadwick, for the Ad hoc Committee of Bondholders

Mr. Michael B. Rotsztein, for Fairfax Financial Holdings Ltd.

Me Louise Hélène Guimond, for Syndicat canadien des communications, de l'énergie et du papier (SCEP) et ses sections
locales 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 et 1455 and
for Syndicat des employés(es) et employés(es) professionnels(-les) et de bureau - Québec (SEPB) et les sections locales
110, 151 et 526

Me Neil Peden, Mr. Raj Sahni, for The Official Committee of Unsecured Creditors of AbitibiBowater Inc. & al.

Me Sébastien Guy, for Cater Pillar Financial Services and Desjardins Trust inc.

Mr. Richard Butler, for Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General
of British Columbia

Me Louis Dumont, Mr. Neil Rabinovitch, for Aurelius Capital Management LLC and Contrarian Capital Management
LLC

Mr. Christopher Besant, for NPower Cogen Limited

Mr. Len Marsello, for the Attorney General for Ontario

Mr. Carl Holm, for Bowater Canada Finance Company

Mr. David Ward, for Wilmington Trust US Indenture Trustee of Unsecured Notes issued by BCFC

Subject: Insolvency

MOTION by debtor company seeking Court's approval of plan of arrangement.

Clément Gascon, J.S.C.:

Introduction

1 This judgment deals with the sanction and approval of a plan of arrangement under the *CCAA*¹. The sole issue to resolve is the fair and reasonable character of the plan. While the debtor company, the monitor and an overwhelming majority of stakeholders strongly support this sanction and approval, three dissenting voices raise limited objections. The Court provides these reasons in support of the Sanction Order it considers appropriate and justified to issue under the circumstances.

The Relevant Background

2 On April 17, 2009 [2009 CarswellQue 14194 (C.S. Que.)], the Court issued an Initial Order pursuant to the *CCAA* with respect to the Abitibi Petitioners (listed in Schedule A), the Bowater Petitioners (listed in Schedule B) and the Partnerships (listed in Schedule C).

3 On the day before, April 16, 2009, AbitibiBowater Inc., Bowater Inc. and certain of their U.S. and Canadian Subsidiaries (the "*U.S. Debtors*") had, similarly, filed Voluntary Petitions for Relief under Chapter 11 of the U.S. Bankruptcy Code.

4 Since the Initial Order, the Abitibi Petitioners, the Bowater Petitioners and the Partnerships (collectively, "*Abitibi*") have, under the protection of the Court, undertaken a huge and complex restructuring of their insolvent business.

5 The restructuring of Abitibi's imposing debt of several billion dollars was a cross-border undertaking that affected tens of thousands of stakeholders, from employees, pensioners, suppliers, unions, creditors and lenders to government authorities.

6 The process has required huge efforts on the part of many, including important sacrifices from most of the stakeholders involved. To name just a few, these restructuring efforts have included the closure of certain facilities, the sale of assets, contracts repudiations, the renegotiation of collective agreements and several costs saving initiatives².

7 In a span of less than 18 months, more than 740 entries have been docketed in the Court record that now comprises in excess of 12 boxes of documents. The Court has, so far, rendered over 100 different judgments and orders. The Stay Period has been extended seven times. It presently expires on September 30, 2010.

8 Abitibi is now nearing emergence from this *CCAA* restructuring process.

9 In May 2010, after an extensive review of the available alternatives, and pursuant to lengthy negotiations and consultations with creditors' groups, regulators and stakeholders, Abitibi filed its Plan of Reorganization and Compromise in the *CCAA* restructuring process (the "*CCAA Plan*³"). A joint Plan of Reorganization was also filed at the same time in the U.S. Bankruptcy Court process (the "*U.S. Plan*").

10 In essence, the Plans provided for the payment in full, on the Implementation Date and consummation of the U.S. Plan, of all of Abitibi's and U.S. Debtors' secured debt obligations.

11 As for their unsecured debt obligations, save for few exceptions, the Plans contemplated their conversion to equity of the post emergence reorganized Abitibi. If the Plans are implemented, the net value would likely translate into a recovery under the *CCAA* Plan corresponding to the following approximate rates for the various Affected Unsecured Creditors Classes:

(a) 3.4% for the ACI Affected Unsecured Creditor Class;

(b) 17.1% for the ACCC Affected Unsecured Creditor Class;

(c) 4.2% for the Saguenay Forest Products Affected Unsecured Creditor Class;

- (d) 36.5% for the BCFPI Affected Unsecured Creditor Class;
- (e) 20.8% for the Bowater Maritimes Affected Unsecured Creditor Class; and
- (f) 43% for the ACNSI Affected Unsecured Creditor Class.

12 With respect to the remaining Petitioners, the illustrative recoveries under the *CCAA* Plan would be nil, as these entities have nominal assets.

13 As an alternative to this debt to equity swap, the basic structure of the *CCAA* Plan included as well the possibility of smaller unsecured creditors receiving a cash distribution of 50% of the face amount of their Proven Claim if such was less than \$6,073, or if they opted to reduce their claim to that amount.

14 In short, the purpose of the *CCAA* Plan was to provide for a coordinated restructuring and compromise of Abitibi's debt obligations, while at the same time reorganizing and simplifying its corporate and capital structure.

15 On September 14, 2010, Abitibi's Creditors' Meeting to vote on the *CCAA* Plan was convened, held and conducted. The resolution approving the *CCAA* Plan was overwhelmingly approved by the Affected Unsecured Creditors of Abitibi, save for the Creditors of one the twenty Classes involved, namely, the BCFC Affected Unsecured Creditors Class.

16 Majorities well in excess of the statutorily required simple majority in number and two-third majority in value of the Affected Unsecured Claims held by the Affected Unsecured Creditors were attained. On a combined basis, the percentages were 97.07% in number and 93.47% in value.

17 Of the 5,793 votes cast by creditors holding claims totalling some 8,9 billion dollars, over 8,3 billion dollars worth of claims voted in favour of approving the *CCAA* Plan.

The Motion⁴ at Issue

18 Today, as required by Section 6 of the *CCAA*, the Court is asked to sanction and approve the *CCAA* Plan. The effect of the Court's approval is to bind Abitibi and its Affected Unsecured Creditors to the terms of the *CCAA* Plan.

19 The exercise of the Court's authority to sanction a compromise or arrangement under the *CCAA* is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that⁵:

- a) There has been strict compliance with all statutory requirements;
- b) Nothing has been done or purported to be done that was not authorized by the *CCAA*; and
- c) The Plan is fair and reasonable.

20 Only the third condition is truly at stake here. Despite Abitibi's creditors' huge support of the fairness and the reasonableness of the *CCAA* Plan, some dissenting voices have raised objections.

21 They include:

- a) The BCFC Noteholders' Objection;
- b) The Contestations of the Provinces of Ontario and British Columbia; and
- c) The Contestation of NPower Cogen Limited.

22 For the reasons that follow, the Court is satisfied that the *CCAA* Plan is fair and reasonable. The Contestations of the Provinces of Ontario and British Columbia and of NPower Cogen Limited have now been satisfactorily resolved by adding to the Sanction Order sought limited "carve-out" provisions in that regard. As for the only other objection that remains, namely that of some of the BCFC Noteholders, the Court considers that it should be discarded.

23 It is thus appropriate to immediately approve the *CCAA* Plan and issue the Sanction Order sought, albeit with some minor modifications to the wording of specific conclusions that the Court deems necessary.

24 In the Court's view, it is important to allow Abitibi to move forthwith towards emergence from the *CCAA* restructuring process it undertook eighteen month ago.

25 No one seriously disputes that there is risk associated with delaying the sanction of the *CCAA* Plan. This risk includes the fact that part of the exit financing sought by Abitibi is dependent upon the capital markets being receptive to the high yield notes or term debt being offered, in a context where such markets are volatile. There is, undoubtedly, continuing uncertainty with respect to the strength of the economic recovery and the effect this could have on the financial markets.

26 Moreover, there are numerous arrangements that Abitibi and their key stakeholders have agreed to or are in the process of settling that are key to the successful implementation of the *CCAA* Plan, including collective bargaining agreements with employees and pension funding arrangements with regulators. Any undue delay with implementation of the *CCAA* Plan increases the risk that these arrangements may require alterations or amendments.

27 Finally, at hearing, Mr. Robertson, the Chief Restructuring Officer, testified that the monthly cost of any delay in Abitibi's emergence from this *CCAA* process is the neighbourhood of 30 million dollars. That includes the direct professional costs and financing costs of the restructuring itself, as well as the savings that the labour cost reductions and the exit financing negotiated by Abitibi will generate as of the Implementation Date.

28 The Court cannot ignore this reality in dealing rapidly with the objections raised to the sanction and approval of the *CCAA* Plan.

Analysis

1. The Court's approval of the CCAA Plan

29 As already indicated, the first and second general requirements set out previously dealing with the statutory requirements and the absence of unauthorized conduct are not at issue.

30 On the one hand, the Monitor has reached the conclusion that Abitibi is and has been in strict compliance with all statutory requirements. Nobody suggests that this is not the case.

31 On the other hand, all materials filed and procedures taken by Abitibi were authorized by the *CCAA* and the orders of this Court. The numerous reports of the Monitor (well over sixty to date) make no reference to any act or conduct by Abitibi that was not authorized by the *CCAA*; rather, the Monitor is of the view that Abitibi has not done or purported to do anything that was not authorized by the *CCAA*⁶.

32 In fact, in connection with each request for an extension of the stay of proceedings, the Monitor has reported that Abitibi was acting in good faith and with due diligence. The Court has not made any contrary finding during the course of these proceedings.

33 Turning to the fairness and reasonableness of a *CCAA* Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection⁷.

34 Considering that a plan is, first and foremost, a compromise and arrangement reached, between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body⁸.

35 In that regard, courts in this country have held that the level of approval by the creditors is a significant factor in determining whether a *CCAA* Plan is fair and reasonable⁹. Here, the majorities in favour of the *CCAA* Plan, both in number and in value, are very high. This indicates a significant and very strong support of the *CCAA* Plan by the Affected Unsecured Creditors of Abitibi.

36 Likewise, in its Fifty-Seventh Report, the Monitor advised the creditors that their approval of the *CCAA* Plan would be a reasonable decision. He recommended that they approve the *CCAA* Plan then. In its Fifty-Eighth Report, the Monitor reaffirmed its view that the *CCAA* Plan was fair and reasonable. The recommendation was for the Court to sanction and approve the *CCAA* Plan.

37 In a matter such as this one, where the Monitor has worked through out the restructuring with professionalism, objectivity and competence, such a recommendation carries a lot of weight.

38 The Court considers that the *CCAA* Plan represents a truly successful compromise and restructuring, fully in line with the objectives of the *CCAA*. Despite its weaknesses and imperfections, and notwithstanding the huge sacrifices and losses it imposes upon numerous stakeholders, the *CCAA* Plan remains a practical, reasonable and responsible solution to Abitibi's insolvency.

39 Its implementation will preserve significant social and economic benefits to the Canadian economy, including enabling about 11,900 employees (as of March 31, 2010) to retain their employment, and allowing hundreds of municipalities, suppliers and contractors in several regions of Ontario and Quebec to continue deriving benefits from a stronger and more competitive important player in the forest products industry.

40 In addition, the business of Abitibi will continue to operate, pension plans will not be terminated, and the Affected Unsecured Creditors will receive distributions (including payment in full to small creditors).

41 Moreover, simply no alternative to the *CCAA* Plan has been offered to the creditors of Abitibi. To the contrary, it appears obvious that in the event the Court does not sanction the *CCAA* Plan, the considerable advantages that it creates will be most likely lost, such that Abitibi may well be placed into bankruptcy.

42 If that were to be the case, no one seriously disputes that most of the creditors would end up being in a more disadvantageous position than with the approval of the *CCAA* Plan. As outlined in the Monitor's 57th Report, the alternative scenario, a liquidation of Abitibi's business, will not prove to be as advantageous for its creditors, let alone its stakeholders as a whole.

43 All in all, the economic and business interests of those directly concerned with the end result have spoken vigorously pursuant to a well-conducted democratic process. This is certainly not a case where the Court should override the express and strong wishes of the debtor company and its creditors and the Monitor's objective analysis that supports it.

44 Bearing these comments in mind, the Court notes as well that none of the objections raised support the conclusion that the *CCAA* Plan is unfair or unreasonable.

2. The BCFC Noteholders' objections

45 In the end, only Aurelius Capital Management LP and Contrarian Capital Management LLC (the "*Noteholders*") oppose the sanction of the *CCAA* Plan¹⁰.

46 These Noteholders, through their managed funds entities, hold about one-third of some six hundred million US dollars of Unsecured Notes issued by Bowater Canada Finance Company ("*BCFC*") and which are guaranteed by Bowater Incorporated. These notes are *BCFC*'s only material liabilities.

47 *BCFC* was a Petitioner under the *CCAA* proceedings and a Debtor in the parallel proceedings under Chapter 11 of the U.S. Bankruptcy Code. However, its creditors voted to reject the *CCAA* Plan: while 76.8% of the Class of Affected Unsecured Creditors of *BCFC* approved the *CCAA* Plan in number, only 48% thereof voted in favour in dollar value. The required majorities of the *CCAA* were therefore not met.

48 As a result of this no vote occurrence, the Affected Unsecured Creditors of *BCFC*, including the Noteholders, are Unaffected Creditors under the *CCAA* Plan: they will not receive the distribution contemplated by the plan. As for *BCFC* itself, this outcome entails that it is not an "Applicant" for the purpose of this Sanction Order.

49 Still, the terms of the *CCAA* Plan specifically provide for the compromise and release of any claims *BCFC* may have against the other Petitioners pursuant, for instance, to any inter company transactions. Similarly, the *CCAA* Plan specifies that *BCFC*'s equity interests in any other Petitioner can be exchanged, cancelled, redeemed or otherwise dealt with for nil consideration.

50 In their objections to the sanction of the *CCAA* Plan, the Noteholders raise, in essence, three arguments:

(a) They maintain that *BCFC* did not have an opportunity to vote on the *CCAA* Plan and that no process has been established to provide for *BCFC* to receive distribution as a creditor of the other Petitioners;

(b) They criticize the overly broad and inappropriate character of the release provisions of the *CCAA* Plan;

(c) They contend that the NAFTA Settlement Funds have not been appropriately allocated.

51 With respect, the Court considers that these objections are ill founded.

52 First, given the vote by the creditors of *BCFC* that rejected the *CCAA* Plan and its specific terms in the event of such a situation, the initial ground of contestation is moot for all intents and purposes.

53 In addition, pursuant to a hearing held on September 16 and 17, 2010, on an *Abitibi's Motion for Advice and Directions*, Mayrand J. already concluded that *BCFC* had simply no claims against the other Petitioners, save with respect to the Contribution Claim referred to in that motion and that is not affected by the *CCAA* Plan in any event.

54 There is no need to now review or reconsider this issue that has been heard, argued and decided, mostly in a context where the Noteholders had ample opportunity to then present fully their arguments.

55 In her reasons for judgment filed earlier today in the Court record, Mayrand J. notably ruled that the alleged Inter Company Claims of *BCFC* had no merit pursuant to a detailed analysis of what took place.

56 For one, the Monitor, in its Amended 49th Report, had made a thorough review of the transactions at issue and concluded that they did not appear to give rise to any inter company debt owing to *BCFC*.

57 On top of that, Mayrand J. noted as well that the Independent Advisors, who were appointed in the Chapter 11 U.S. Proceedings to investigate the Inter Company Transactions that were the subject of the Inter Company Claims, had completed their report in this regard. As explained in its 58th Report, the Monitor understands that they were of the view that *BCFC* had no other claims to file against any other Petitioner. In her reasons, Mayrand J. concluded that this was the only reasonable inference to draw from the evidence she heard.

58 As highlighted by Mayrand J. in these reasons, despite having received this report of the Independent Advisors, the Noteholders have not agreed to release its content. Conversely, they have not invoked any of its findings in support of their position either.

59 That is not all. In her reasons for judgment, Mayrand J. indicated that a detailed presentation of the Independent Advisors report was made to BCFC's Board of Directors on September 7, 2010. This notwithstanding, BCFC elected not to do anything in that regard since then.

60 As a matter of fact, at no point in time did BCFC ever file, in the context of the current *CCAA* Proceedings, any claim against any other Petitioner. None of its creditors, including the Noteholders, have either purported to do so for and/or on behalf of BCFC. This is quite telling. After all, the transactions at issue date back many years and this restructuring process has been going on for close to eighteen months.

61 To sum up, short of making allegations that no facts or analysis appear to support or claiming an insufficiency of process because the independent and objective ones followed so far did not lead to the result they wanted, the Noteholders simply have nothing of substance to put forward.

62 Contrary to what they contend, there is no need for yet again another additional process to deal with this question. To so conclude would be tantamount to allowing the Noteholders to take hostage the *CCAA* restructuring process and derail Abitibi's emergence for no valid reason.

63 The other argument of the Noteholders to the effect that BCFC would have had a claim as the holder of preferred shares of BCHI leads to similar comments. It is, again, hardly supported by anything. In any event, assuming the restructuring transactions contemplated under the *CCAA* Plan entail their cancellation for nil consideration, which is apparently not necessarily the case for the time being, there would be nothing unusual in having the equity holders of insolvent companies not receive anything in a compromise and plan of arrangement approved in a *CCAA* restructuring process.

64 In such a context, the Court disagrees with the Noteholders' assertion that BCFC did not have an opportunity to vote on the *CCAA* Plan or that no process was established to provide the latter to receive distribution as a potential creditor of the other Petitioners.

65 To argue that the *CCAA* Plan is not fair and reasonable on the basis of these alleged claims of BCFC against the other Petitioners has no support based on the relevant facts and Mayrand J.'s analysis of that specific point.

66 Second, given these findings, the issue of the breadth and appropriateness of the releases provided under the *CCAA* Plan simply does not concern the Noteholders.

67 As stated by Abitibi's Counsel at hearing, BCFC is neither an "Applicant" under the terms of the releases of the *CCAA* Plan nor pursuant to the Sanction Order. As such, BCFC does not give or get releases as a result of the Sanction Order. The *CCAA* Plan does not release BCFC nor its directors or officers acting as such.

68 As it is not included as an "Applicant", there is no need to provide any type of convoluted "carve-out" provision as the Noteholders requested. As properly suggested by Abitibi, it will rather suffice to include a mere clarification at paragraph 15 of the Sanction Order to reaffirm that in the context of the releases and the Sanction Order, "Applicant" does not include BCFC.

69 As for the Noteholders themselves, they are Unaffected Creditors under the *CCAA* Plan as a result of the no vote of their Class.

70 In essence, the main concern of the Noteholders as to the scope of the releases contemplated by the *CCAA* Plan and the Sanction Order is a mere issue of clarity. In the Court's opinion, this is sufficiently dealt with by the addition made to the wording of paragraph 15 of the Sanction Order.

71 Besides that, as explained earlier, any complaint by the Noteholders that the alleged inter company claims of BCFC are improperly compromised by the *CCAA* Plan has no merit. If their true objective is to indirectly protect their contentions to that end by challenging the wording of the releases, it is unjustified and without basis. The Court already said so.

72 Save for these arguments raised by the Noteholders that the Court rejects, it is worth noting that none of the stakeholders of Abitibi object to the scope of the releases of the *CCAA* Plan or their appropriateness given the global compromise reached through the debt to equity swap and the reorganization contemplated by the plan.

73 The *CCAA* permits the inclusion of releases (even ones involving third parties) in a plan of compromise or arrangement when there is a reasonable connection between the claims being released and compromised and the restructuring achieved by the plan. Amongst others, the broad nature of the terms "compromise or arrangement", the binding nature of a plan that has received creditors' approval, and the principles that parties should be able to put in a plan what could lawfully be incorporated into any other contract support the authority of the Court to approve these kind of releases¹¹. In accordance with these principles, the Quebec Superior Court has, in the past, sanctioned plans that included releases of parties making significant contribution to a restructuring¹².

74 The additional argument raised by the Noteholders with respect to the difference between the releases that could be approved by this Court as compared to those that the U.S. Bankruptcy Court may issue in respect of the Chapter 11 Plan is not convincing.

75 The fact that under the Chapter 11 Plan, creditors may elect not to provide releases to directors and officers of applicable entities does not render similar kind of releases granted under the *CCAA* Plan invalid or improper. That the result may be different in a jurisdiction as opposed to the other does not make the *CCAA* Plan unfair and unreasonable simply for that reason.

76 Third, the last objection of the Noteholders to the effect that the NAFTA Settlement Funds have not been properly allocated is simply a red herring. It is aimed at provoking a useless debate with respect to which the Noteholders have, in essence, no standing.

77 The Monitor testified that the NAFTA Settlement has no impact whatsoever upon BCFC. If it is at all relevant, all the assets involved in this settlement belonged to another of the Petitioners, ACCC, with respect to whom the Noteholders are not a creditor.

78 In addition, this apparent contestation of the allocation of the NAFTA Settlement Funds is a collateral attack on the Order granted by this Court on September 1, 2010, which approved the settlement of Abitibi's NAFTA claims against the Government of Canada, as well as the related payment to be made to the reorganised successor Canadian operating entity upon emergence. No one has appealed this NAFTA Settlement Order.

79 That said, in their oral argument, the Noteholders have finally argued that the Court should lift the Stay of Proceedings Order inasmuch as BCFC was concerned. The last extension of the Stay was granted on September 1, 2010, without objection; it expires on September 30, 2010. It is clear from the wording of this Sanction Order that any extension beyond September 30, 2010 will not apply to BCFC.

80 The Court considers this request made verbally by the Noteholders as unfounded.

81 No written motion was ever served in that regard to start with. In addition, the Stay remains in effect against BCFC up until September 30, 2010, that is, for about a week or so. The explanations offered by Abitibi's Counsel to leave it as such for the time being are reasonable under the circumstances. It appears proper to allow a few days to the interested parties to ascertain the impact, if any, of the Stay not being applicable anymore to BCFC, if alone to ascertain how this impacts upon the various charges created by the Initial Order and subsequent Orders issued by the Court during the course of these proceedings.

82 There is no support for the concern of the Noteholders as to an ulterior motive of Abitibi for maintaining in place this Stay of Proceedings against BCFC up until September 30, 2010.

83 All things considered, in the Court's opinion, it would be quite unfair and unreasonable to deny the sanction of the CCAA Plan for the benefit of all the stakeholders involved on the basis of the arguments raised by the Noteholders.

84 Their objections either reargue issues that have been heard, considered and decided, complain of a lack a clarity of the scope of releases that the addition of a few words to the Sanction Order properly addresses, or voice queries about the allocation of important funds to the Abitibi's emergence from the CCAA that simply do not concern the entities of which the Noteholders are allegedly creditors, be it in Canada or in the U.S.

85 When one remains mindful of the relative degrees of prejudice that would flow from granting or refusing the relief sought, it is obvious that the scales heavily tilt in favour of granting the Sanction Order sought.

3. The Contestations of the Provinces of Ontario and British Columbia

86 Following negotiations that the Provinces involved and Abitibi pursued, with the assistance of the Monitor, up to the very last minute, the interested parties have agreed upon a "carve-out" wording that is satisfactory to every one with respect to some potential environmental liabilities of Abitibi in the event future circumstances trigger a concrete dispute in that regard.

87 In the Court's view, this is, by far, the most preferred solution to adopt with respect to the disagreement that exists on their respective position as to potential proceedings that may arise in the future under environmental legislation. This approach facilitates the approval of the CCAA Plan and the successful restructuring of Abitibi, without affecting the right of any affected party in this respect.

88 The "carve-out" provisions agreed upon will be included in the Sanction Order.

4. The Contestation of NPower Cogen Limited

89 By its Contestation, NPower Cogen Limited sought to preserve its rights with respect to what it called the "Cogen Motion", namely a "*motion to be brought by Cogen before this Honourable Court to have various claims heard*" (para. 24(b) and 43 of NPower Cogen Limited Contestation).

90 Here again, Abitibi and NPower Cogen Limited have agreed on an acceptable "carve-out" wording to be included in the Sanction Order in that regard. As a result, there is no need to discuss the impact of this Contestation any further.

5. Abitibi's Reorganization

91 The Motion finally deals with the corporate reorganization of Abitibi and the Sanction Order includes declarations and orders dealing with it.

92 The test to be applied by the Court in determining whether to approve a reorganization under Section 191 of the CBCA is similar to the test applied in deciding whether to sanction a plan of arrangement under the CCAA, namely: (a)

there must be compliance with all statutory requirements; (b) the debtor company must be acting in good faith; and (c) the capital restructuring must be fair and reasonable¹³.

93 It is not disputed by anyone that these requirements have been fulfilled here.

6. The wording of the Sanction Order

94 In closing, the Court made numerous comments to Abitibi's Counsel on the wording of the Sanction Order initially sought in the Motion. These comments have been taken into account in the subsequent in depth revisions of the Sanction Order that the Court is now issuing. The Court is satisfied with the corrections, adjustments and deletions made to what was originally requested.

For these Reasons, The Court:

1 *GRANTS* the Motion.

Definitions

2 *DECLARES* that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the *CCAA* Plan¹⁴ and the Creditors' Meeting Order, as the case may be.

Service and Meeting

3 *DECLARES* that the notices given of the presentation of the Motion and related Sanction Hearing are proper and sufficient, and in accordance with the Creditors' Meeting Order.

4 *DECLARES* that there has been proper and sufficient service and notice of the Meeting Materials, including the *CCAA* Plan, the Circular and the Notice to Creditors in connection with the Creditors' Meeting, to all Affected Unsecured Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the *CCAA*, the Creditors' Meeting Order and all other applicable orders of the Court.

5 *DECLARES* that no meetings or votes of (i) holders of Equity Securities and/or (ii) holders of equity securities of ABH are required in connection with the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions as set out in the Restructuring Transactions Notice dated September 1, 2010, as amended on September 13, 2010.

CCAA Plan Sanction

6 *DECLARES* that:

a) the *CCAA* Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of Affected Unsecured Creditors in each of the following classes in conformity with the *CCAA*: ACI Affected Unsecured Creditor Class, the ACCC Affected Unsecured Creditor Class, the 15.5% Guarantor Applicant Affected Unsecured Creditor Classes, the Saguenay Forest Products Affected Unsecured Creditor Class, the BCFPI Affected Unsecured Creditor Class, the AbitibiBowater Canada Affected Unsecured Creditor Class, the Bowater Maritimes Affected Unsecured Creditor Class, the ACNSI Affected Unsecured Creditor Class, the Office Products Affected Unsecured Creditor Class and the Recycling Affected Unsecured Creditor Class;

b) the *CCAA* Plan was not approved by the Required Majority of Affected Unsecured Creditors in the BCFC Affected Unsecured Creditors Class and that the Holders of BCFC Affected Unsecured Claims are therefore deemed to be Unaffected Creditors holding Excluded Claims against BCFC for the purpose of the *CCAA* Plan and this Order, and that BCFC is therefore deemed not to be an Applicant for the purpose of this Order;

c) the Court is satisfied that the Petitioners and the Partnerships have complied with the provisions of the *CCAA* and all the orders made by this Court in the context of these *CCAA* Proceedings in all respects;

d) the Court is satisfied that no Petitioner or Partnership has either done or purported to do anything that is not authorized by the *CCAA*; and

e) the *CCAA* Plan (and its implementation, including the implementation of the Restructuring Transactions), is fair and reasonable, and in the best interests of the Applicants and the Partnerships, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

7 *ORDERS* that the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the *CCAA* and Section 191 of the *CBCA*, and, as at the Implementation Date, will be effective and will enure to the benefit of and be binding upon the Applicants, the Partnerships, the Reorganized Debtors, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

CCAA Plan Implementation

8 *DECLARES* that the Applicants, the Partnerships, the Reorganized Debtors and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Applicants, the Partnerships and the Reorganized Debtors in accordance with and subject to the terms of the *CCAA* Plan, to implement and effect the *CCAA* Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the *CCAA* Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

9 *AUTHORIZES* the Applicants, the Partnerships and the Reorganized Debtors to request, if need be, one or more order(s) from this Court, including *CCAA* Vesting Order(s), for the transfer and assignment of assets to the Applicants, the Partnerships, the Reorganized Debtors or other entities referred to in the Restructuring Transactions Notice, free and clear of any financial charges, as necessary or desirable to implement and effect the Restructuring Transactions as set forth in the Restructuring Transactions Notice.

10 *DECLARES* that, pursuant to Section 191 of the *CBCA*, the articles of AbitibiBowater Canada will be amended by new articles of reorganization in the manner and at the time set forth in the Restructuring Transactions Notice.

11 *DECLARES* that all Applicants and Partnerships to be dissolved pursuant to the Restructuring Transactions shall be deemed dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Applicants or the Partnerships or their respective securityholders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Applicants, the Partnerships and the Reorganized Debtors shall cause to be filed with the appropriate Governmental Entities articles, agreements or other documents of dissolution for the dissolved Applicants or Partnerships to the extent required by applicable Law.

12 *DECLARES* that, subject to the performance by the Applicants and the Partnerships of their obligations under the *CCAA* Plan, and in accordance with Section 8.1 of the *CCAA* Plan, all contracts, leases, Timber Supply and Forest Management Agreements ("TSFMA") and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements and other arrangements to which the Applicants or the Partnerships are a party and that have not been terminated including as part of the Restructuring Transactions or repudiated in accordance with the terms of the Initial Order will be and remain in full force and effect, unamended, as at the Implementation Date, and no Person who is a party to any such contract, lease, agreement or other arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such contract, lease, agreement or other arrangement and no automatic termination will have any validity or effect by reason of:

- a) any event that occurred on or prior to the Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Applicants and the Partnerships);
- b) the insolvency of the Applicants, the Partnerships or any affiliate thereof or the fact that the Applicants, the Partnerships or any affiliate thereof sought or obtained relief under the *CCAA*, the *CBCA* or the Bankruptcy Code or any other applicable legislation;
- c) any of the terms of the *CCAA* Plan, the U.S. Plan or any action contemplated therein, including the Restructuring Transactions Notice;
- d) any settlements, compromises or arrangements effected pursuant to the *CCAA* Plan or the U.S. Plan or any action taken or transaction effected pursuant to the *CCAA* Plan or the U.S. Plan; or
- e) any change in the control, transfer of equity interest or transfer of assets of the Applicants, the Partnerships, the joint ventures, or any affiliate thereof, or of any entity in which any of the Applicants or the Partnerships held an equity interest arising from the implementation of the *CCAA* Plan (including the Restructuring Transactions Notice) or the U.S. Plan, or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

13 *DECLARES* that any consent or authorization required from a third party, including any Governmental Entity, under any such contracts, leases, TSMAs and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements or other arrangements in respect of any change of control, transfer of equity interest, transfer of assets or transfer of any asset as part of or in connection with the Restructuring Transactions Notice be deemed satisfied or obtained, as applicable.

14 *DECLARES* that the determination of Proven Claims in accordance with the Claims Procedure Orders, the Cross-border Claims Protocol, the Cross-border Voting Protocol and the Creditors' Meeting Order shall be final and binding on the Applicants, the Partnerships, the Reorganized Debtors and all Affected Unsecured Creditors.

Releases and Discharges

15 *CONFIRMS* the releases contemplated by Section 6.10 of the *CCAA* Plan and *DECLARES* that the said releases constitute good faith compromises and settlements of the matters covered thereby, and that such compromises and settlements are in the best interests of the Applicants and its stakeholders, are fair, equitable, and are integral elements of the restructuring and resolution of these proceedings in accordance with the *CCAA* Plan, it being understood that for the purpose of these releases and/or this Order, the terms "Applicants" or "Applicant" are not meant to include Bowater Canada Finance Corporation ("*BCFC*").

16 *ORDERS* that, upon payment in full in cash of all BI DIP Claims and ULC DIP Claim in accordance with the *CCAA* Plan, the BI DIP Lenders and the BI DIP Agent or ULC, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the BI DIP Claims or the ULC DIP Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

17 *ORDERS* that, upon payment in full in cash of their Secured Claims in accordance with the *CCAA* Plan, the ACCC Administrative Agent, the ACCC Term Lenders, the BCFPI Administrative Agent, the BCFPI Lenders, the Canadian Secured Notes Indenture Trustee and any Holders of a Secured Claim, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the

Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the ACCC Term Loan Claim, BCFPI Secured Bank Claim, Canadian Secured Notes Claim or any other Secured Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

For the purposes of the present paragraph [17], in the event of any dispute as to the amount of any Secured Claim, the Applicants, Partnerships or Reorganized Debtors, as the case may be, shall be permitted to pay to the Monitor the full amount in dispute (as specified by the affected Secured Creditor or by this Court upon summary application) and, upon payment of the amount not in dispute, receive the releases, discharges, authorizations, directions, instruments notices or other documents as provided for therein. Any amount paid to the Monitor in accordance with this paragraph shall be held in trust by the Monitor for the holder of the Secured Claim and the payer as their interests shall be determined by agreement between the parties or, failing agreement, as directed by this Court after summary application.

18 *PRECLUDES* the prosecution against the Applicants, the Partnerships or the Reorganized Debtors, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged or terminated pursuant to the *CCAA* Plan.

Accounts with Financial Institutions

19 *ORDERS* that any and all financial institutions (the "Financial Institutions") with which the Applicants, the Partnerships and the Reorganized Debtors have or will have accounts (the "Accounts") shall process and/or facilitate the transfer of, or changes to, such Accounts in order to implement the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

20 *ORDERS* that Mr. Allen Dea, Vice-President and Treasurer of ABH, or any other officer or director of the Reorganized Debtors, is empowered to take all required acts with any of the Financial Institutions to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement CCAA Plan

21 *ORDERS* that, in the event that the Implementation Date does not occur, Affected Unsecured Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the *CCAA* Plan, the Claims Procedure Orders or the Creditors' Meeting Order. For greater certainty, nothing in the *CCAA* Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Applicants or the Partnerships, including in the *CCAA* Proceedings or any other proceeding or process, in the event that the Implementation Date does not occur.

Charges created in the CCAA Proceedings

22 *ORDERS* that, upon the Implementation Date, all *CCAA* Charges against the Applicants and the Partnerships or their property created by the *CCAA* Initial Order or any subsequent orders shall be determined, discharged and released, provided that the BI DIP Lenders Charge shall be cancelled on the condition that the BI DIP Claims are paid in full on the Implementation Date.

Fees and Disbursements

23 *ORDERS* and *DECLARES* that, on and after the Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants and the Partnerships, in

each case at their standard rates and charges and including any amounts outstanding as of the Implementation Date, in respect of the *CCAA* Plan, including the implementation of the Restructuring Transactions, shall become obligations of Reorganized ABH.

Exit Financing

24 *ORDERS* that the Applicants are authorized and empowered to execute, deliver and perform any credit agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents, as may be required in connection with the Exit Facilities.

Stay Extension

25 *EXTENDS* the Stay Period in respect of the Applicants until the Implementation Date.

26 *DECLARES* that all orders made in the *CCAA* Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor and Chief Restructuring Officer

27 *DECLARES* that the protections afforded to Ernst & Young Inc., as Monitor and as officer of this Court, and to the Chief Restructuring Officer pursuant to the terms of the Initial Order and the other Orders made in the *CCAA* Proceedings, shall not expire or terminate on the Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

28 *ORDERS* and *DECLARES* that any distributions under the *CCAA* Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants for the purposes of section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 14 of the Act Respecting the Ministère du Revenu (Québec), section 107 of the Corporations Tax Act (Ontario), section 22 of the Retail Sales Tax Act (Ontario), section 117 of the Taxation Act, 2007 (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a Disbursing Agent under the *CCAA* Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the *CCAA* Plan and this Order and any claims of this nature are hereby forever barred.

29 *ORDERS* and *DECLARES* that the Disbursing Agent, the Applicants and the Reorganized Debtors, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements, including withholding a number of shares of New ABH Common Stock equal in value to the amount required to comply with such withholding requirements from the shares of New ABH Common Stock to be distributed to current or former employees and making the necessary arrangements for the sale of such shares on the TSX or the New York Stock Exchange on behalf of the current or former employees to satisfy such withholding requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Unsecured Creditor in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Entity.

Claims Officers

30 *DECLARES* that, in accordance with paragraph [25] hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the *CCAA* Proceedings.

General

31 *ORDERS* that, notwithstanding any other provision in this Order, the *CCAA* Plan or these *CCAA* Proceedings, the rights of the public authorities of British Columbia, Ontario or New Brunswick to take the position in or with respect to any future proceedings under environmental legislation that this or any other Order does not affect such proceedings by reason that such proceedings are not in relation to a claim within the meaning of the *CCAA* or are otherwise beyond the jurisdiction of Parliament or a court under the *CCAA* to affect in any way is fully reserved; as is reserved the right of any affected party to take any position to the contrary.

32 *DECLARES* that nothing in this Order or the *CCAA* Plan shall preclude NPower Cogen Limited ("Cogen") from bringing a motion for, or this Court from granting, the relief sought in respect of the facts and issues set out in the Claims Submission of Cogen dated August 10, 2010 (the "Claim Submission"), and the Reply Submission of Cogen dated August 24, 2010, provided that such relief shall be limited to the following:

- a) a declaration that Cogen's claim against Abitibi Consolidated Inc. ("Abitibi") and its officers and directors, arising from the supply of electricity and steam to Bridgewater Paper Company Limited between November 1, 2009 and February 2, 2010 in the amount of £9,447,548 plus interest accruing at the rate of 3% *per annum* from February 2, 2010 onwards (the "Claim Amount") is (i) unaffected by the *CCAA* Plan or Sanction Order; (ii) is an Excluded Claim; or (iii) is a Secured Claim; (iv) is a D&O Claim; or (v) is a liability of Abitibi under its Guarantee;
- b) an Order directing Abitibi and its Directors and Officers to pay the Claim Amount to Cogen forthwith; or
- c) in the alternative to (b), an order granting leave, if leave be required, to commence proceedings for the payment of the Claim Amount under s. 241 of the *CBCA* and otherwise against Abitibi and its directors and officers in respect of same.

33 *DECLARES* that any of the Applicants, the Partnerships, the Reorganized Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice to the Service List.

34 *DECLARES* that this Order shall have full force and effect in all provinces and territories in Canada.

35 *REQUESTS* the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

36 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

37 *WITHOUT COSTS.*

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*
2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*
3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*
5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*
6. *3834328 CANADA INC.*
7. *6169678 CANADA INC.*
8. *4042140 CANADA INC.*
9. *DONOHUE RECYCLING INC.*
10. *1508756 ONTARIO INC.*
11. *3217925 NOVA SCOTIA COMPANY*
12. *LA TUQUE FOREST PRODUCTS INC.*
13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*
14. *SAGUENAY FOREST PRODUCTS INC.*
15. *TERRA NOVA EXPLORATIONS LTD.*
16. *THE JONQUIERE PULP COMPANY*
17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*
18. *SCRAMBLE MINING LTD.*
19. *9150-3383 QUÉBEC INC.*
20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*
2. *BOWATER CANADA FINANCE CORPORATION*
3. *BOWATER CANADIAN LIMITED*
4. *3231378 NOVA SCOTIA COMPANY*
5. *ABITIBIBOWATER CANADA INC.*
6. *BOWATER CANADA TREASURY CORPORATION*
7. *BOWATER CANADIAN FOREST PRODUCTS INC.*
8. *BOWATER SHELBURNE CORPORATION*
9. *BOWATER LAHAVE CORPORATION*
10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*
12. *CANEXEL HARDBOARD INC.*
13. *9068-9050 QUÉBEC INC.*
14. *ALLIANCE FOREST PRODUCTS (2001) INC.*
15. *BOWATER BELLEDUNE SAWMILL INC.*
16. *BOWATER MARITIMES INC.*
17. *BOWATER MITIS INC.*
18. *BOWATER GUÉRETTE INC.*
19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*
2. *ABITIBIBOWATER US HOLDING I CORP.*
3. *BOWATER VENTURES INC.*
4. *BOWATER INCORPORATED*
5. *BOWATER NUWAY INC.*
6. *BOWATER NUWAY MID-STATES INC.*
7. *CATAWBA PROPERTY HOLDINGS LLC*
8. *BOWATER FINANCE COMPANY INC.*
9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*
10. *BOWATER AMERICA INC.*
11. *LAKE SUPERIOR FOREST PRODUCTS INC.*
12. *BOWATER NEWSPRINT SOUTH LLC*
13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*
14. *BOWATER FINANCE II, LLC*
15. *BOWATER ALABAMA LLC*
16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Motion granted.

Footnotes

- 1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
- 2 See Monitor's Fifty-Seventh Report dated September 7, 2010, and Monitor's Fifty-Ninth Report dated September 17, 2010.
- 3 This Plan of Reorganisation and Compromise (as modified, amended or supplemented by CCAA Plan Supplements 3.2, 6.1(a) (i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, CCAA Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) (collectively, the "*CCAA Plan*") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.
- 4 Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief (the "*Motion*"), pursuant to Sections 6, 9 and 10 of the CCAA and Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (the "*CBCA*").
- 5 *Boutiques San Francisco Inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775 (S.C.); *Cable Satisfaction International Inc. v. Richter & Associés inc.*, J.E. 2004-907 (C.S. Que.) [2004 CarswellQue 810 (C.S. Que.)].
- 6 See Monitor's Fifty-Eight Report dated September 16, 2010.
- 7 *T. Eaton Co.*, Re (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]); *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]).
- 8 *Uniforêt inc.*, Re (C.S. Que.) [2003 CarswellQue 3404 (C.S. Que.)], *TQS inc., Re*, 2008 QCCS 2448 (C.S. Que.), B.E. 2008BE-834; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.).
- 9 *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Boutiques San Francisco inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed 73 C.B.R. (N.S.) 195 (B.C. C.A.).
- 10 The Indenture Trustee acting under the Unsecured Notes supports the Noteholders in their objections.
- 11 See, in this respect, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Charles-Auguste Fortier inc., Re* (2008), J.E. 2009-9, 2008 QCCS 5388 (C.S. Que.); *Hy Bloom inc. c. Banque Nationale du Canada*, [2010] R.J.Q. 912 (C.S. Que.).
- 12 *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, N° 500-11-032338-085, 2009-06-30, Mongeon J.
- 13 *Raymor Industries inc. (Proposition de)*, [2010] R.J.Q. 608, 2010 QCCS 376 (C.S. Que.); *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, N° 500-11-032338-085, 2009-06-30, Mongeon J., at para. 7-8; *MEI Computer Technology Group Inc., Re* [2005 CarswellQue 13408 (C.S. Que.)], (S.C., 2005-11-14), SOQUIJ AZ-50380254, 2005 CanLII 54083; *Doman Industries Ltd., Re*, 2003 BCSC 375 (B.C. S.C. [In Chambers]); *Laidlaw, Re* (Ont. S.C.J.).
- 14 It is understood that for the purposes of this Sanction Order, the CCAA Plan is the Plan of Reorganisation and Compromise (as modified, amended or supplemented by CCAA Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, CCAA Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

TAB 2

2008 CarswellOnt 3523
Ontario Superior Court of Justice [Commercial List]

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

2008 CarswellOnt 3523, [2008] O.J. No. 2265, 168 A.C.W.S. (3d) 244, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74

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

And In The Matter of a Plan of Compromise and Arrangement Involving Metcalfe & Mansfield
Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp.,
Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative
Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819
Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto

The Investors Represented on the Pan-Canadian Investors Committee for Third-Party Structured
Asset-Backed Commercial Paper Listed in Schedule "B" Hereto (Applicants) and Metcalfe & Mansfield
Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III, Corp., Metcalfe
& Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments
XI, Corp., Metcalfe & Mansfield Alternative Investments XII, Corp., 6932819 Canada Inc. and
4446372 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto (Respondents)

C. Campbell J.

Heard: May 12-13, 2008; June 3, 2008

Judgment: June 5, 2008

Docket: 08-CL-7440

Counsel: B. Zarnett, F. Myers, B. Empey, for Applicants

Donald Milner, Graham Phoenix, Xeno C. Martis, David Lemieux, Robert Girard, for Respondents, 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.

Aubrey Kauffman, Stuart Brotman, for Respondents, 4446372 Canada Inc., 6932819 Canada Inc., as Issuer Trustees

Subject: Insolvency; Corporate and Commercial

APPLICATION for approval of Plan of Compromise and Arrangement under *Companies' Creditors Arrangement Act*
to address liquidity crisis in market for Asset Backed Commercial Paper.

C. Campbell J.:

1 This decision follows a sanction hearing in parts in which applicants sought approval of a Plan under the *Companies
Creditors Arrangement Act* ("CCAA.") Approval of the Plan as filed and voted on by Noteholders was opposed by a
number of corporate and individual Noteholders, principally on the basis that this Court does not have the jurisdiction
under the CCAA or if it does should not exercise discretion to approve third party releases.

History of Proceedings

2 On Monday, March 17, 2008, two Orders were granted. The first, an Initial Order on essentially an *ex parte* basis and in a form that has become familiar to insolvency practitioners, granted a stay of proceedings, a limitation of rights and remedies, the appointment of a Monitor and for service and notice of the Order.

3 The second Order made dated March 17, 2008 provided for a meeting of Noteholders and notice thereof, including the sending of what by then had become the Amended Plan of Compromise and Arrangement. Reasons for Decision were issued on April 8, 2008 elaborating on the basis of the Initial Order.

4 No appeal was taken from either of the Orders of March 17, 2008. Indeed, on the return of a motion made on April 23, 2008 by certain Noteholders (the moving parties) to adjourn the meeting then scheduled for and held on April 25, 2008, no challenge was made to the Initial Order.

5 Information was sought and provided on the issue of classification of Noteholders. The thrust of the Motions was and has been the validity of the releases of various parties provided for in the Plan.

6 The cornerstone to the material filed in support of the Initial Order was the affidavit of Purdy Crawford, O.C., Q.C., Chairman of the Applicant Pan Canadian Investors Committee. There has been no challenge to Mr. Crawford's description of the Asset Backed Commercial Paper ("ABCP") market or in general terms the circumstances that led up to the liquidity crisis that occurred in the week of August 13, 2007, or to the formation of the Plan now before the Court.

7 The unchallenged evidence of Mr. Crawford with respect to the nature of the ABCP market and to the development of the Plan is a necessary part of the consideration of the fairness and indeed the jurisdiction, of the Court to approve the form of releases that are said to be integral to the Plan.

8 As will be noted in more detail below, the meeting of Noteholders (however classified) approved the Plan overwhelmingly at the meeting of April 25, 2008.

Background to the Plan

9 Much of the description of the parties and their relationship to the market are by now well known or referred to in the earlier reasons of March 17 or April 4, 2008.

10 The focus here will be on that portion of the background that is necessary for an understanding of and decision on, the issues raised in opposition to the Plan.

11 Not unlike a sporting event that is unfamiliar to some attending without a program, it is difficult to understand the role of various market participants without a description of it. Attached as Appendix 2 are some of the terms that describe the parties, which are from the Glossary that is part of the Information Statement, attached to various of the Monitor's Reports.

12 A list of these entities that fall into various definitional categories reveals that they comprise Canadian chartered banks, Canadian investment houses and foreign banks and financial institutions that may appear in one or more categories of conduits, dealers, liquidity providers, asset providers, sponsors or agents.

13 The following paragraphs from Mr. Crawford's affidavit succinctly summarize the proximate cause of the liquidity crisis, which since August 2007 has frozen the market for ABCP in Canada:

[7] Before the week of August 13, 2007, there was an operating market in ABCP. Various corporations (referred to below as "Sponsors") arranged for the Conduits to make ABCP available as an investment vehicle bearing interest at rates slightly higher than might be available on government or bank short-term paper.

[8] The ABCP represents debts owing by the trustees of the Conduits. Most of the ABCP is short-term commercial paper (usually 30 to 90 days). The balance of the ABCP is made up of commercial paper that is extendible for up to 364 days and longer-term floating rate notes. The money paid by investors to acquire ABCP was used to purchase a portfolio of financial assets to be held, directly or through subsidiary trusts, by the trustees of the Conduits. Repayment of each series of ABCP is supported by the assets held for that series, which serves as collateral for the payment obligations. ABCP is therefore said to be "asset-backed."

[9] Some of these supporting assets were mid-term, but most were long-term, such as pools of residential mortgages, credit card receivables or credit default swaps (which are sophisticated derivative products). Because of the generally long-term nature of the assets backing the ABCP, the cash flow they generated did not match the cash flow required to repay maturing ABCP. Before mid-August 2007, this timing mismatch was not a problem because many investors did not require repayment of ABCP on maturity; instead they reinvested or "rolled" their existing ABCP at maturity. As well, new ABCP was continually being sold, generating funds to repay maturing ABCP where investors required payment. Many of the trustees of the Conduits also entered into back-up liquidity arrangements with third-party lenders ("Liquidity Providers") who agreed to provide funds to repay maturing ABCP in certain circumstances.

[10] In the week of August 13, 2007, the ABCP market froze. The crisis was largely triggered by market sentiment, as news spread of significant defaults on U.S. sub-prime mortgages. In large part, investors in Canadian ABCP lost confidence because they did not know what assets or mix of assets backed their ABCP. Because of this lack of transparency, existing holders and potential new investors feared that the assets backing the ABCP might include sub-prime mortgages or other overvalued assets. Investors stopped buying new ABCP, and holders stopped "rolling" their existing ABCP. As ABCP became due, Conduits were unable to fund repayments through new issuances or replacement notes. Trustees of some Conduits made requests for advances under the back-up arrangements that were intended to provide liquidity; however, most Liquidity Providers took the position that the conditions to funding had not been met. With no new investment, no reinvestment, and no liquidity funding available, and with long-term underlying assets whose cash flows did not match maturing short-term ABCP, payments due on the ABCP could not be made — and no payments have been made since mid-August.

14 Between mid-August 2007 and the filing of the Plan, Mr. Crawford and the Applicant Committee have diligently pursued the object of restructuring not just the specific trusts that are part of this Plan, but faith in a market structure that has been a significant part of the broader Canadian financial market, which in turn is directly linked to global financial markets that are themselves in uncertain times.

15 The previous reasons of March 17, 2008 that approved for filing the Initial Plan, recognized not just the unique circumstances facing conduits and their sponsors, but the entire market in Canada for ABCP and the impact for financial markets generally of the liquidity crisis.

16 Unlike many CCAA situations, when at the time of the first appearance there is no plan in sight, much less negotiated, this rescue package has been the product of painstaking, complicated and difficult negotiations and eventually agreement.

17 The following five paragraphs from Mr. Crawford's affidavit crystallize the problem that developed in August 2007:

[45] Investors who bought ABCP often did not know the particular assets or mix of assets that backed their ABCP. In part, this was because ABCP was often issued and sold before or at about the same time the assets were acquired. In addition, many of the assets are extremely complex and parties to some underlying contracts took the position that the terms were confidential.

[46] Lack of transparency became a significant problem as general market fears about the credit quality of certain types of investment mounted during the summer of 2007. As long as investors were willing to roll their ABCP or buy new ABCP to replace maturing notes, the ABCP market was stable. However, beginning in the first half of 2007, the economy in the United States was shaken by what is referred to as the "sub-prime" lending crisis.

[47] U.S. sub-prime lending had an impact in Canada because ABCP investors became concerned that the assets underlying their ABCP either included U.S. sub-prime mortgages or were overvalued like the U.S. sub-prime mortgages. The lack of transparency into the pools of assets underlying ABCP made it difficult for investors to know if their ABCP investments included exposure to U.S. sub-prime mortgages or other similar products. In the week of August 13, that concern intensified to the point that investors stopped rolling their maturing ABCP, and instead demanded repayment, and new investors could not be found. Certain trustees of the Conduits then tried to draw on their Liquidity Agreements to repay ABCP. Most of the Liquidity Providers did not agree that the conditions for liquidity funding had occurred and did not provide funding, so the ABCP could not be repaid. Deteriorating conditions in the credit market affected all the ABCP, including ABCP backed by traditional assets not linked to sub-prime lending.

[48] Some of the Asset Providers made margin calls under LSS swaps on certain of the Conduits, requiring them to post additional collateral. Since they could not issue new ABCP, roll over existing ABCP or draw on their Liquidity Agreements, those Conduits were not able to post the additional collateral. Had there been no standstill arrangement, as described below, these Asset Providers could have unwound the swaps and ultimately could have liquidated the collateral posted by the Conduits.

[49] Any liquidation of assets under an LSS swap would likely have further depressed the LSS market, creating a domino effect under the remaining LSS swaps by triggering their "mark-to-market" triggers for additional margin calls, ultimately leading to the sale of more assets, at very depressed prices. The standstill arrangement has, to date, through successive extensions, prevented this from occurring, in anticipation of the restructuring.

18 The "Montreal Accord," as it has been called, brought together various industry representatives, Asset Providers and Liquidity Providers who entered into a "Standstill Agreement," which committed to the framework for restructuring the ABCP such that (a) all outstanding ABCP would be converted into term floating rate notes maturing at the same time as the corresponding underlying assets. This was intended to correct the mismatch between the long-term nature of the financial assets and the short-term nature of the ABCP; and (b) margin provisions under certain swaps would be changed to create renewed stability, reducing the likelihood of margin calls. This contract was intended to reduce the risk that the Conduits would have to post additional collateral for the swap obligations or be subject to having their assets seized and sold, thereby preserving the value of the assets and of the ABCP.

19 The Investors Committee of which Mr. Crawford is the Chair has been at work since September to develop a Plan that could be implemented to restore viability to the notes that have been frozen and restore liquidity so there can be a market for them.

20 Since the Plan itself is not in issue at this hearing (apart from the issue of the releases), it is not necessary to deal with the particulars of the Plan. Suffice to say I am satisfied that as the Information to Noteholders states at p. 69, "The value of the Notes if the Plan does not go forward is highly uncertain."

The Vote

21 A motion was held on April 25, 2008, brought by various corporate and individual Noteholders seeking:

- a) changing classification each in particular circumstances from the one vote per Noteholder regime;

- b) provision of information of various kinds;
- c) adjourning the vote of April 25, 2008 until issues of classification and information were fully dealt with;
- d) amending the Plan to delete various parties from release.

22 By endorsement of April 24, 2008 [2008 CarswellOnt 2653 (Ont. S.C.J. [Commercial List])] the issue of releases was in effect adjourned for determination later. The vote was not postponed, as I was satisfied that the Monitor would be able to tally the votes in such a way that any issue of classification could be dealt with at this hearing.

23 I was also satisfied that the Applicants and the Monitor had or would make available any and all information that was in existence and pertinent to the issue of voting. Of understandable concern to those identified as the moving parties are the developments outside the Plan affecting Noteholders holding less than \$1 million of Notes. Certain dealers, Canaccord and National Bank being the most prominent, agreed in the first case to buy their customers' ABCP and in the second to extend financing assistance.

24 A logical conclusion from these developments outside the Plan is that they were designed (with apparent success) to obtain votes in favour of the Plan from various Noteholders.

25 On a one vote per Noteholder basis, the vote was overwhelmingly in favour of the Plan approximately 96%. At a case conference held on April 29, 2008, the Monitor was asked to tabulate votes that would isolate into Class A all those entities in any way associated with the formulation of the Plan, whether or not they were Noteholders or sold or advised on notes, and into Class B all other Noteholders.

26 The results of the vote on the Restructuring Resolution, tabulated on the basis set out in paragraph 30 of the Monitor's 7th Report and using the Class structure referred to in the preceding paragraph, are summarized below:

	Number	Dollar Value
Class A		
Votes FOR the Restructuring Resolution	1,572 99.4%	\$23,898, 232,639 100.0%
Votes AGAINST the Restructuring—Resolution	9 0.6%	\$867,666 0.0%
CLASS B		
Votes FOR the Restructuring Resolution	289 80.5%	\$5,046, 951,989 81.2%
Votes AGAINST the Restructuring—Resolution	70 19.5%	\$1,168, 136,123 18.8%

27 I am satisfied that reclassification would not alter the strong majority supporting the Restructuring. The second request made at the case conference on April 29 was that the moving parties provide the Monitor with information that would permit a summary to be compiled of the claims that would have been made or anticipated to be made against so-called third parties, including Conduits and their trustees.

28 The information compiled by the Monitor reveals that the primary defendants are or are anticipated to be banks, including four Canadian chartered banks and dealers (many associated with Canadian banks). In the case of banks, they and their employees may be sued in more than one capacity.

29 The claims against proposed defendants are for the most part claims in tort, and include negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/adviser, acting in conflict of interest and in a few instances, fraud or potential fraud.

30 Again in general terms, the claims for damages include the face value of notes plus interest and additional penalties and damages that may be allowable at law. It is noteworthy that the moving parties assume that they would be able to mitigate their claim for damages by taking advantage of the Plan offer without the need to provide releases.

31 The information provided by the potential defendants indicates the likelihood of claims over against parties such that no entity, institution or party involved in the Restructuring Plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

32 The chart prepared by the Monitor that is Appendix 3 to these Reasons shows graphically the extent of those entities that would be involved in future litigation.

Law and Analysis

33 Some of the moving parties in their written and oral submissions assumed that this Court has the power to amend the Plan to allow for the proposed lawsuits, whether in negligence or fraud. The position of the Applicants and supporting parties is that the Plan is to be accepted on the basis that it satisfies the criteria established under the CCAA, or it will be rejected on the basis that it does not.

34 I am satisfied that the Court does not have the power to amend the Plan. The Plan is that of the Applicants and their supporters. They have made it clear that the Plan is a package that allows only for acceptance or rejection by the Court. The Plan has been amended to address the concerns expressed by the Court in the May 16, 2008 [2008 CarswellOnt 2820 (Ont. S.C.J. [Commercial List])] endorsement.

35 I am satisfied and understand that if the Plan is rejected by the Court, either on the basis of fairness (i.e., that claims should be allowed to proceed beyond those provided for in the Plan) or lack of jurisdiction to compel compromise of claims, there is no reliable prospect that the Plan would be revised.

36 I do not consider that the Applicants or those supporting them are bluffing or simply trying to bargain for the best position for themselves possible. The position has been consistent throughout and for what I consider to be good and logical reasons. Those parties described as Asset or Liquidity Providers have a first secured interest in the underlying assets of the Trusts. To say that the value of the underlying assets is uncertain is an understatement after the secured interest of Asset Providers is taken into account.

37 When one looks at the Plan in detail, its intent is to benefit ALL Noteholders. Given the contribution to be made by those supporting the Plan, one can understand why they have said forcefully in effect to the Court, 'We have taken this as far as we can, particularly given the revisions. If it is not accepted by the Court as it has been overwhelmingly by Noteholders, we hold no prospect of another Plan coming forward.'

38 I have carefully considered the submissions of all parties with respect to the issue of releases. I recognize that to a certain extent the issues raised chart new territory. I also recognize that there are legitimate principle-based arguments on both sides.

39 As noted in the Reasons of April 8, 2008 and as reflected in the March 17, 2008 Order and May 16 Endorsement, the Plan represents a highly complex unique situation.

40 The vehicles for the Initial Order are corporations acting in the place of trusts that are insolvent. The trusts and the respondent corporations are not directly related except in the sense that they are all participants in the Canadian market for ABCP. They are each what have been referred to as issuer trustees.

41 There are a great number of other participants in the ABCP market in Canada who are themselves intimately connected with the Plan, either as Sponsors, Asset Providers, Liquidity Providers, participating banks or dealers.

42 I am satisfied that what is sought in this Plan is the restructuring of the ABCP market in Canada and not just the insolvent corporations that are issuer trustees.

43 The impetus for this market restructuring is the Investors Committee chaired by Mr. Crawford. It is important to note that all of the members of the Investors Committee, which comprise 17 financial and investment institutions (see Schedule B, attached), are themselves Noteholders with no other involvement. Three of the members of that Committee act as participants in other capacities.

44 The Initial Order, which no party has appealed or sought to vary or set aside, accepts for the purpose of placing before all Noteholders the revised Plan that is currently before the Court.

45 Those parties who now seek to exclude only some of the Release portions of the Plan do not take issue with the legal or practical basis for the goal of the Plan. Indeed, the statement in the Information to Noteholders, which states that

...as of August 31, 2007, of the total amount of Canadian ABCP outstanding of approximately \$116.8 billion (excluding medium-term and floating rate notes), approximately \$83.8 billion was issued by Canadian Schedule I bank-administered Conduits and approximately \$33 billion was issued by non-bank administered conduits)¹

is unchallenged.

46 The further description of the ABCP market is also not questioned:

ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling". Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption", ABCP would readily be saleable without the need for extraordinary funding measures. However, to protect investors in case of a market disruption, ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP outstanding. In the event that an ABCP issuer is unable to issue new ABCP, it may be able to draw down on the liquidity facility to ensure that proceeds are available to repay any maturing ABCP. As discussed below, there have been important distinctions between different kinds of liquidity agreements as to the nature and scope of drawing conditions which give rise to an obligation of a liquidity provider to fund²

47 The activities of the Investors Committee, most of whom are themselves Noteholders without other involvement, have been lauded as innovative, pioneering and essential to the success of the Plan. In my view, it is entirely inappropriate to classify the vast majority of the Investors Committee, and indeed other participants who were not directly engaged in the sale of Notes, as third parties.

48 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.

49 In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of 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.

50 The insolvency is of the ABCP market itself, the restructuring is that of the market for such paper - restructuring that involves the commitment and participation of all parties. The Latin words *sui generis* are used to mean something that is "one off" or "unique." That is certainly the case with this Plan.

51 The Plan, including all of its constituent parts, has been overwhelmingly accepted by Noteholders no matter how they are classified. In the sense of their involvement I do not think it appropriate to label any of the participants as Third Parties. Indeed, as this matter has progressed, additions to the supporter side have included for the proposed releases the members of the Ad Hoc Investors' Committee. The Ad Hoc group had initially opposed the release provisions. The Committee members account for some two billion dollars' worth of Notes.

52 It is more appropriate to consider all participants part of the market for the restructuring of ABCP and therefore not merely third parties to those Noteholders who may wish to sue some or all of them.

53 The benefit of the restructuring is only available to the debtor corporations with the input, contribution and direct assistance of the Applicant Noteholders and those associated with them who similarly contribute. Restructuring of the ABCP market cannot take place without restructuring of the Notes themselves. Restructuring of the Notes cannot take place without the input and capital to the insolvent corporations that replace the trusts.

54 A hearing was held on May 12 and 13 to hear the objections of various Noteholders to approval of the Plan insofar as it provided for comprehensive releases.

55 On May 16, 2008, by way of endorsement the issue of scope of the proposed releases was addressed. The following paragraphs from the endorsement capsulize the adjournment that was granted on the issue of releases:

[10] I am not satisfied that the release proposed as part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or another.

[11] I have also reached the conclusion that in the circumstances of this Plan, at this time, it may well be appropriate to approve releases that would circumscribe claims for negligence. I recognize the different legal positions but am satisfied that this Plan will not proceed unless negligence claims are released.

56 The endorsement went on to elaborate on the particular concerns that I had with releases sought by the Applicants that could in effect exonerate fraud. As well, concern was expressed that the Plan might unduly bring hardship to some Noteholders over others.

57 I am satisfied that based on Mr. Crawford's affidavit and the statements commencing at p. 126 of the Information to Noteholders, a compelling case for the need for comprehensive releases, with the exception of certain fraud claims, has been made out.

The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forbearing from making collateral calls since August 15, 2007, participating in the MAV2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at par with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, co-operated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. The Original Issuer Trustees, the Issuer Trustees, the Existing Note Indenture Trustees and the Rating Agency have assisted in the restructuring process as needed and have co-operated

with the Investors Committee in facilitating an essential aspect of the court proceedings required to complete the restructuring of the ABCP Conduits through the replacement of the Original Issuer Trustees where required.

In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impracticable to identify and/or quantify any individual Released Party's contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not released by the Noteholders is unable to make a claim-over for contribution from a Released Party and thereby defeat the effectiveness of the releases. Certain entities represented on the Investors Committee have also participated in the Third-Party ABCP market in a variety of capacities other than as Noteholders and, accordingly, are also expected to benefit from these releases.

The evidence is unchallenged.

58 The questions raised by moving parties are (a) does the Court have jurisdiction to approve a Plan under the CCAA that provides for the releases in question?; and if so, (b) is it fair and reasonable that certain identified dealers and others be released?

59 I am also satisfied that those parties and institutions who were involved in the ABCP market directly at issue and those additional parties who have agreed solely to assist in the restructuring have valid and legitimate reasons for seeking such releases. To exempt some Noteholders from release provisions not only leads to the failure of the Plan, it does likely result in many Noteholders having to pursue fraud or negligence claims to obtain any redress, since the value of the assets underlying the Notes may, after first security interests be negligible.

Restructuring under the CCAA

60 This Application has brought into sharp focus the purpose and scope of the CCAA. It has been accepted for the last 15 years that the issue of releases beyond directors of insolvent corporations dates from the decision in *Canadian Airlines Corp., Re*³ where Paperny J. said:

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

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

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

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

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

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

61 The following paragraphs from that decision are reproduced at some length, since, in the submission principally of Mr. Woods, the releases represent an illegal or improper extension of the wording of the CCAA. Mr. Woods takes issue with the reasoning in the *Canadian Airlines* decision, which has been widely referred to in many cases since. Mme Justice Paperny continued:

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly.

...

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

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

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.*⁴ at page 9:

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

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood 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.).

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

- a. The composition of the unsecured vote;
- b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
- c. Alternatives available to the Plan and bankruptcy;

- d. Oppression;
- e. Unfairness to Shareholders of CAC; and
- f. The public interest.

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

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

62 The liberal interpretation to be given to the CCAA was and has been accepted in Ontario. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*⁵, Blair J. (as he then was) has been referred to with approval in later cases:

[45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* *supra* (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[Emphasis added]

63 In a 2006 decision in *Muscletech Research & Development Inc., Re*⁶, which adopted the *Canadian Airlines* test, Ground J. said:

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

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

64 This decision is also said to be beyond the Court's jurisdiction to follow.

65 In a later decision⁷ in the same matter, Ground J. said in 2007:

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

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

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

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

66 I recognize that in *Muscletech*, as in other cases such as *Vicwest, Re*,⁸, there has been no direct opposition to the releases in those cases. The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.⁹

67 The moving parties rely on the decision of the Ontario Court of Appeal in *NBD Bank, Canada v. Dofasco Inc.*¹⁰ for the proposition that compromise of claims in negligence against those associated with a debtor corporation within a CCAA context is not permitted.

68 The claim in that case was by NBD as a creditor of Algoma Steel, then under CCAA protection against its parent Dofasco and an officer of both Algoma and Dofasco. The claim was for negligent misrepresentation by which NBD was induced to advance funds to Algoma shortly before the CCAA filing.

69 In the approved CCAA order only the debtor Algoma was released. The Court of Appeal held that the benefit of the release did not extend to officers of Algoma or to the parent corporation Dofasco or its officers.

70 Rosenberg J.A. writing for the Court said:

[51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the Plan of Arrangement was approved by Farley J. in April 1992. The Plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The Plan of Arrangement included the following term:

6.03 Releases

From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors. [Emphasis added.]

...

[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. [Reference omitted]

71 In my view, there is little factual similarity in *NBD* to the facts now before the Court. In this case, I am not aware of any claims sought to be advanced against directors of Issuer Trustees. The release of Algoma in the *NBD* case did not on its face extend to Dofasco, the third party. Accordingly, I do not find the decision helpful to the issue now before the Court. The moving parties also rely on decisions involving another steel company, Stelco, in support of the proposition that a CCAA Plan cannot be used to compromise claims as between creditors of the debtor company.

72 In *Stelco Inc., Re*,¹¹ Farley J., dealing with classification, said in November 2005:

[7] The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

73 The Ontario Court of Appeal dismissed the appeal from that decision.¹² Blair J.A., quoting Paperny J. in *Canadian Airlines Corp., Re, supra*, said:

[23] In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

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

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S.T.D.); *Re Woodward's Ltd.* 1993 CanLII 870 (BC S.C.), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.)

166 (B.C.S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, (*sub nom. Amoco Acquisition Co. v. Savage*) (Alta. C.A.); *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines decision: Re Canadian Airlines Corp.* 2000 ABCA 149 (CanLII), (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 27.

.....

[32] First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoc J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24 (after referring to the full style of the legislation):

[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.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

[35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association - Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, *supra*; *Sklar-Peppler*, *supra*; *Re Woodward Ltd.*, *supra*.

[36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Re Canadian Airlines*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

74 In 2007, in *Stelco Inc.*, *Re*¹³, the Ontario Court of Appeal dismissed a further appeal and held:

[44] We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the CCAA. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at 15 C.B.R. (5th) 297, Farley J. expressed this point (at para. 7) as follows:

The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.

[45] Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

75 I have quoted from the above decisions at length since they support rather than detract from the basic principle that in my view is operative in this instance.

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. The only contract between creditors in this case relates directly to the Notes.

U.S. Law

78 Issue was taken by some counsel for parties opposing the Plan with the comments of Justice Ground in *Muscletech* [2007]¹⁴ at paragraph 26, to the effect that third party creditor Releases have been recognized under United States bankruptcy law. I accept the comment of Mr. Woods that the U.S. provisions involve a different statute with different language and therefore different considerations.

79 That does not mean that the U.S. law is to be completely ignored. It is instructive to consideration of the release issue under the *CCAA* to know that there has been a principled debate within judicial circles in the United States on the issue of releases in a bankruptcy proceeding of those who are not themselves directly parties in bankruptcy.

80 A very comprehensive article authored by Joshua M. Silverstein of Emory University School of Law in 2006, 23 *Bank. Dev. J.* 13, outlines both the line of U.S. decisions that hold that bankruptcy courts may not use their general equitable powers to modify non-bankruptcy rights, and those that hold that non-bankruptcy law is not an absolute bar to the exercise of equitable powers, particularly with respect to third party releases.

81 The author concludes at paragraph 137 that a decision of the Supreme Court of the United States in *U.S. v. Energy Resources Co.*, 495 U.S. 545 (U.S. Sup. Ct. 1990) offers crucial support for the pro-release position.

82 I do not take any of the statements to referencing U.S. law on this topic as being directly applicable to the case now before this Court, except to say that in resolving a very legitimate debate, it is appropriate to do so in a purposive way but also very much within a case-specific fact-contextual approach, which seems to be supported by the United States Supreme Court decision above.

Steinberg Decision

83 Against the authorities referred to above, those opposed to the Plan releases rely on the June 16, 1993 decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*¹⁵

84 Mr. Woods for some of the moving parties urges that the decision, which he asserts makes third party releases illegal, is still good law and binding on this Court, since no other Court of Appeal in Canada has directly considered or derogated from the result. (It appears that the decision has not been reported in English, which may explain some of the absence of comment.)

85 The Applicants not surprisingly take an opposite view. Counsel submits that undoubtedly in direct response to the *Steinberg* decision, Parliament added s. 5.1 (see above paragraph [60]) thereby opening the door for the analysis that has followed with the decisions of *Canadian Airlines*, *Muscletech* and others. In other words, it is urged the caselaw that has developed in the 15 years since *Steinberg* now provide a basis for recognition of third party releases in appropriate circumstances.

86 The *Steinberg* decision dealt directly with releases proposed for acts of directors. The decision appears to have focused on the nature of the contract created and binding between creditors and the company when the plan is approved. I accept that the effect of a Court-approved CCAA Plan is to impose a contract on creditors.

87 Reliance is placed on the decision of Deschamps J.A. (as she then was) at the following paragraphs of the *Steinberg* decision:

[54] 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.

[57] If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.

[59] Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.

[68] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

[74] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

88 If it were necessary to do so, I would accept the position of the Applicants that the history of judicial interpretation of the CCAA at both the appellate and trial levels in Canada, along with the change to s. 5.1, leaves the decision in *Steinberg* applicable to a prior era only.

89 I do not think it necessary to go that far, however. One must remember that *Steinberg* dealt with release of claims against directors. As Mine. Justice Deschamps said at paragraph 54, "[A] plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement."

90 In this case, all the Noteholders have a common claim, namely to maximize the value obtainable under their notes. The anticipated increase in the value of the notes is directly affected by the risk and contribution that will be made by asset and liquidity providers.

91 In my view, depriving all Noteholders from achieving enhanced value of their notes to permit a few to pursue negligence claims that do not affect note value is quite a different set of circumstances from what was before the Court in *Steinberg*. Different in kind and quality.

92 The sponsoring parties have accepted the policy concern that exempting serious claims such as some frauds could not be regarded as fair and reasonable within the context of the spirit and purpose of the CCAA.

93 The sponsoring parties have worked diligently to respond to that concern and have developed an exemption to the release that in my view fairly balances the rights of Noteholders with serious claims, with the risk to the Plan as a Whole.

Statutory Interpretation of the CCAA

94 Reference was made during argument by counsel to some of the moving parties to rules of statutory interpretation that would suggest that the Court should not go beyond the plain and ordinary words used in the statute.

95 Various of the authorities referred to above emphasize the remedial nature of the legislation, which leaves to the greatest extent possible the stakeholders of the debtor corporation to decide what Plan will or will not be accepted with the scope of the statute.

96 The nature and extent of judicial interpretation and innovation in insolvency matters has been the subject of recent academic and judicial comment.

97 Most recently, Madam Justice Georgina R. Jackson and Dr. Janis Sarra in "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"¹⁶ wrote:

The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that 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 tool box. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length.¹⁷

Second, we suggest that inherent jurisdiction is a misnomer for much of what has occurred in decision making under the CCAA. Appeal court judgments in cases such as *Skeena Cellulose Inc.* and *Stelco* discussed below, have begun to articulate this view. As part of this observation, we suggest that for the most part, the exercise of the court's authority is frequently, although not exclusively, made on the basis of statutory interpretation.¹⁸

Third, in the context of commercial law, a driving principle of the courts is that they are on a quest to do what makes sense commercially in the context of what is the fairest and most equitable in the circumstances. The establishment of specialized commercial lists or rosters in jurisdictions such as Ontario, Quebec, British Columbia, Alberta and Saskatchewan are aimed at the same goal, creating an expeditious and efficient forum for the fair resolution of commercial disputes effectively and on a timely basis. Similarly, the standards of review applied by appellate courts, in the context of commercial matters, have regard to the specialized expertise of the court of first instance and demonstrate a commitment to effective processes for the resolution of commercial disputes.¹⁹ [cities omitted]

98 The case now before the Court does not involve confiscation of any rights in Notes themselves; rather the opposite: the opportunity in the business circumstances to maximize the value of the Notes. The authors go on to say at p. 45:

Iacobucci J., writing for the Court in *Rizzo Shoes*, reaffirmed Driedger's Modern Principle as the best approach to interpretation of the legislation and stated that "statutory interpretation cannot be founded on the wording of the legislation alone". He considered the history of the legislation and the benefit-conferring nature of the legislation and examined the purpose and object of the Act, the nature of the legislation and the consequences of a contrary finding, which he labeled an absurd result. Iacobucci J. also relied on s. 10 of the *Interpretation Act*, which provides that every Act "shall be deemed to be remedial" and directs that every Act "shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". The Court held:

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

...

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction.

Thus, in *Rizzo Shoes* we see the Court extending the legislation or making explicit that which was implicit only, as it were, by reference to the Modern Principle, the purpose and object of the Act and the consequences of a contrary result. No reference is made to filling the legislative gap, but rather, the Court is addressing a fact pattern not explicitly contemplated by the legislation and extending the legislation to that fact pattern.

Professor Cote also sees the issue of legislative gaps as part of the discussion of "legislative purpose", which finds expression in the codification of the mischief rule by the various Canadian interpretation statutes. The ability to extend the meaning of the provision finds particular expression when one considers the question posed by him: "can the purposive method make up for lacunae in the legislation". He points out, as does Professor Sullivan, that the courts have not provided a definitive answer, but that for him there are two schools of thought. One draws on the "literal rule" which favours judicial restraint, whereas the other, the "mischief rule", "posits correction of the text to make up for lacunae." To temper the extent of the literal rule, Professor Cote states:

First, the judge is not legislating by adding what is already implicit. The issue is not the judge's power to actually add terms to a statute, but rather whether a particular concept is sufficiently implicit in the words of an enactment for the judge to allow it to produce effect, and if so, whether there is any principle preventing the

judge from making explicit what is already implicit. Parliament is required to be particularly explicit with some types of legislation such as expropriation statutes, for example.

Second, the Literal Rule suggests that as soon as the courts play any creative role in settling a dispute rather than merely administering the law, they assume the duties of Parliament. But by their very nature, judicial functions have a certain creative component. If the law is silent or unclear, the judge is still required to arrive at a decision. In doing so, he [she] may quite possibly be required to define rules which go beyond the written expression of the statute, but which in no way violate its spirit.

In certain situations, the courts may refuse to correct lacunae in legislation. This is not necessarily because of a narrow definition of their role, but rather because general principles of interpretation require the judge, in some areas, to insist on explicit indications of legislative intent. It is common, for example, for judges to refuse to fill in the gaps in a tax statute, a retroactive law, or legislation that severely affects property rights. [Emphasis added. Footnotes omitted.]²⁰

99 The modern purposive approach is now well established in interpreting CCAA provisions, as the authors note. The phrase more than any other with which issue is taken by the moving parties is that of Paperny J. that s. 5 of the CCAA does not preclude releases other than those specified in s. 5.1.

100 In this analysis, I adopt the purposive language of the authors at pp 55-56:

It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.

The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights- based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress.

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 *Quebec* 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.

101 I accept the hierarchy suggested by the authors, namely statutory interpretation (which in the case of the CCAA has inherent in it "gap filling"), judicial discretion and thirdly inherent jurisdiction.

102 It simply does not make either commercial, business or practical common sense to say a CCAA plan must inevitably fail because one creditor cannot sue another for a claim that is over and above entitlement in the security that is the subject of the restructuring, and which becomes significantly greater than the value of the security (in this case the Notes) that would be available in bankruptcy. In CCAA situations, factual context is everything. Here, if the moving parties are correct, some creditors would recover much more than others on their security.

103 There may well be many situations in which compromise of some tort claims as between creditors is not directly related to success of the Plan and therefore should not be released; that is not the case here.

104 I have been satisfied the Plan cannot succeed without the compromise. In my view, given the purpose of the statute and the fact that this Plan is accepted by all appearing parties in principle, it is a reasonable gap-filling function to compromise certain claims necessary to complete restructuring by the parties. Those contributing to the Plan are directly related to the value of the notes themselves within the Plan.

105 I adopt the authors' conclusion at p. 94:

On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act 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, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

Fraud Claims

106 I have concluded that claims of fraud do fall into a category distinct from negligence. The concern expressed by the Court in the endorsement of May 16, 2008 resulted in an amendment to the Plan by those supporting it. The Applicants amended the release provisions of the Plan to in effect "carve out" some fraud claims.

107 The concern expressed by those parties opposed to the Plan — that the fraud exemption from the release was not sufficiently broad — resulted in a further hearing on the issue on June 3, 2008. Those opposed continue to object to the amended release provisions.

108 The definition of fraud in a corporate context in the common law of Canada starts with the proposition that it must be made (1) knowingly; (2) without belief in its truth; (3) recklessly, careless whether it be true or false.²¹ It is my understanding that while expressed somewhat differently, the above-noted ingredients form the basis of fraud claims in the civil law of Quebec, although there are differences.

109 The more serious nature of a civil fraud allegation, as opposed to a negligence allegation, has an effect on the degree of probability required for the plaintiff to succeed. In *Continental Insurance Co. v. Dalton Cartage Co.*²², Laskin J. wrote:

There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater, supra*, at p. 459, as follows:

It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

110 The distinction between civil fraud and negligence was further explained by Finch J.A. in *Kripps v. Touche Ross & Co.*:²³

[101] Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many cases however, as the authorities point out, it would be reasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. This is such a case.

[102] The distinction between cases of negligent and fraudulent misrepresentation is that proof of a dishonest or fraudulent frame of mind on the defendant's part is required in actions of deceit. That, too, is an issue of fact and one which may also, of necessity, fall to be resolved by way of inference. There is, however, nothing in that which touches on the issue of the plaintiff's reliance. I can see no reason why the burden of proving reliance by the plaintiff, and the drawing of inferences with respect to the plaintiff's state of mind, should be any different in cases of negligent misrepresentation than it is in cases of fraud.

111 In *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*²⁴, Winkler J. (as he then was) reviewed the leading common law cases:

[477] Fraud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved. The main distinction between the elements of fraudulent misrepresentation and negligent misrepresentation has been touched upon above, namely the dishonest state of mind of the representor. The state of mind was described in the seminal case *Derry v. Peek (1889)*, 14 App. Cas. 337 (H.L.) which held fraud is proved where it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false. The intention to deceive, or reckless disregard for the truth is critical.

[478] Where fraudulent misrepresentation is alleged against a corporation, the intention to deceive must still be strictly proved. Further, in order to attach liability to a corporation for fraud, the fraudulent intent must have been held by an individual person who is either a directing mind of the corporation, or who is acting in the course of their employment through the principle of *respondeat superior* or vicarious liability. In *B. G. Checo v. B. C. Hydro* (1990), 4 C.C.L.T. (2d) 161 at 223 (Aff'd, [1993] 1 S.C.R. 12), Hinkson J.A., writing for the majority, traced the jurisprudence on corporate responsibility in the context of a claim in fraudulent misrepresentation at 222-223:

Subsequently, in *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 (C.A.), Denning L.J. said at p. 172:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear by Lord Haldane's speech in *Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*

It is apparent that the law in Canada dealing with the responsibility of a corporation for the tort of deceit is still evolving. In view of the English decisions and the decision of the Supreme Court of Canada in the *Dredging* case, supra, it would appear that the concept of vicarious responsibility based upon *respondeat superior* is too narrow a basis to determine the liability of a corporation. The structure and operations of corporations are becoming more complex. However, the fundamental proposition that the plaintiff must establish an intention to deceive on the part of the defendant still applies.

See also: *Standard Investments Ltd. et al. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.) (Leave to appeal to Supreme Court of Canada refused Feb. 3, 1986).

[479] In the case of fraudulent misrepresentation, there are circumstances where silence may attract liability. If a material fact which was true at the time a contract was executed becomes false while the contract remains executory, or if a statement believed to be true at the time it was made is discovered to be false, then the representor has a duty to disclose the change in circumstances. The failure to do so may amount to a fraudulent misrepresentation. See: P. Perell, "False Statements" (1996), 18 *Advocates' Quarterly* 232 at 242.

[480] In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 54 D.L.R. (4th) 43 (B.C.C.A.) (Aff'd on other grounds [1991] 3 S.C.R. 3), the British Columbia Court of Appeal overturned the trial judge's finding of fraud through non-disclosure on the basis that the defendant did not remain silent as to the changed fact but was simply slow to respond to the change and could only be criticized for its "communications arrangements." In so doing, the court adopted the approach to fraud through silence established by the House of Lords in *Brownlie v. Campbell* (1880), 5 App. Cas. 925 at 950. Esson J.A. stated at 67-68:

There is much emphasis in the plaintiffs submissions and in the reasons of the trial judge on the circumstance that this is not a case of fraud "of the usual kind" involving positive representations of fact but is, rather, one concerned only with non-disclosure by a party which has become aware of an altered set of circumstances. It is, I think, potentially misleading to regard these as different categories of fraud rather than as a different factual basis for a finding of fraud. Where the fraud is alleged to arise from failure

to disclose, the plaintiff remains subject to all of the stringent requirements which the law imposes upon those who allege fraud. The authority relied upon by the trial judge was the speech of Lord Blackburn in *Brownlie v. Campbell*.... The trial judge quoted this excerpt:

... when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time at which it was made, but which he has not now retracted when he has become aware that it can be no long honestly perserved [sic] in.

The relationship between the two bases for fraud appears clearly enough if one reads that passage in the context of the passage which immediately precedes it:

I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such. I further agree in this: that when a statement or representation...

[481] Fraud through "active non-disclosure" was considered by the Court of Appeal for Ontario in *Abel v. McDonald*, [1964] 2 O.R. 256 (C.A.) in which the court held at 259: "By active non-disclosure is meant that the defendants, with knowledge that the damage to the premises had occurred actively prevented as far as they could that knowledge from coming to the notice of the appellants.

112 I agree with the comment of Winkler J. in *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) supra*, that the law in Canada for corporate responsibility for the tort of deceit is evolving. Hence the concern expressed by counsel for Asset Providers that a finding as a result of fraud (an intentional tort) could give rise to claims under the *Negligence Act* to extend to all who may be said to have contributed to the "fault."²⁵

113 I understand the reasoning of the Plan supporters for drawing the fraud "carve out" in a narrow fashion. It is to avoid the potential cascade of litigation that they fear would result if a broader "carve out" were to be allowed. Those opposed urged that quite simply to allow the restrictive fraud claim only would be to deprive them of a right at law.

114 The fraud issue was put in simplistic terms during the oral argument on June 3, 2008. Those parties who oppose the restrictions in the amended Release to deal with only some claims of fraud, argue that the amendments are merely cosmetic and are meaningless and would operate to insulate many individuals and corporations who *may* have committed fraud.

115 Mr. Woods, whose clients include some corporations resident in Quebec, submitted that the "carve out," as it has been called, falls short of what would be allowable under the civil law of Quebec as claims of fraud. In addition, he pointed out that under Quebec law, security for costs on a full indemnity basis would not be permitted.

116 I accept the submission of Mr. Woods that while there is similarity, there is no precise equivalence between the civil law of Quebec and the common law of Ontario and other provinces as applied to fraud.

117 Indeed, counsel for other opposing parties complain that the fraud carve out is unduly restrictive of claims of fraud that lie at common law, which their clients should be permitted in fairness to pursue.

118 The particular carve out concern, which is applicable to both the civil and common law jurisdictions, would limit causes of actions to authorized representatives of ABCP dealers. "ABCP dealers" is a defined term within the Plan. Those actions would proceed in the home province of the plaintiffs.

119 The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

120 That may well be the result of the effect of the Releases as drafted. Assuming that to be the case, I am not satisfied that the Plan should be rejected on the basis that the release covenant for fraud is not as broad as it could be.

121 The Applicants and supporters have responded to the Court's concern that as initially drafted, the initial release provisions would have compromised all fraud claims. I was aware when the further request for release consideration was made that any "carve out" would unlikely be sufficiently broad to include any possibility of all deceit or fraud claims being made in the future.

122 The particular concern was to allow for those claims that might arise from knowingly false representations being made directly to Noteholders, who relied on the fraudulent misrepresentation and suffered damage as a result.

123 The Release as drafted accomplishes that purpose. It does not go as far as to permit all possible fraud claims. I accept the position of the Applicants and supporters that as drafted, the Releases are in the circumstances of this Plan fair and reasonable. I reach this conclusion for the following reasons:

1. I am satisfied that the Applicants and supporters will not bring forward a Plan that is as broad in permitting fraud claims as those opposing urge should be permitted.
2. None of the Plan opponents have brought forward particulars of claims against persons or parties that would fall outside those envisaged within the carve out. Without at least some particulars, expanded fraud claims can only be regarded as hypothetical or speculative.
3. I understand and accept the position of the Plan supporters that to broaden fraud claim relief does risk extensive complex litigation, the prevention of which is at the heart of the Plan. The likelihood of expanded claims against many parties is most likely if the fraud issue were open-ended.
4. Those who wish to claim fraud within the Plan can do so in addition to the remedies on the Notes that are available to them and to all other Noteholders. In other words, those Noteholders claiming fraud also obtain the other Plan benefits.

124 Mr. Sternberg on behalf of Hy Bloom did refer to the claims of his clients particularized in the Claim commenced in the Superior Court of Quebec. The Claim particularizes statements attributed to various National Bank representatives both before and after the August 2007 freeze of the Notes. Mr. Sternberg asked rhetorically how could the Court countenance the compromise of what in the future might be found to be fraud perpetrated at the highest levels of the Canadian and foreign banks.

125 The response to Mr. Sternberg and others is that for the moment, what is at issue is a liquidity crisis that affects the ABCP market in Canada. The Applicants and supporters have brought forward a Plan to alleviate and attempt to fix that liquidity crisis.

126 The Plan does in my view represent a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud.

127 I leave to others the questions of all the underlying causes of the liquidity crisis that prompted the Note freeze in August 2007. If by some chance there is an organized fraudulent scheme, I leave it to others to deal with. At the moment, the Plan as proposed represents the best contract for recovery for the vast majority of Noteholders and hopefully restoration of the ABCP market in Canada.

Hardship

128 As to the hardship issue, the Court was apprised in the course of submissions that the Plan was said by some to act unfairly in respect of certain Noteholders, in particular those who hold Ironstone Series B notes. It was submitted that unlike other trusts for which underlying assets will be pooled to spread risk, the underlying assets of Ironstone Trust are being "siloeed" and will bear the same risk as they currently bear.

129 Unfortunately, this will be the case but the result is not due to any particular directive purpose of the Plan itself, but rather because the assets that underlie the trust have been determined to be totally "Ineligible Assets," which apparently have exposure to the U.S. residential sub-prime mortgage market.

130 I have concluded that within the context of the Plan as a whole it does not unfairly treat the Ironstone Noteholders (although their replacement notes may not be worth as much as others'.) The Ironstone Noteholders have still voted by a wide majority in favour of the Plan.

131 Since the Initial Order of March 17, there have been a number of developments (settlements) by parties outside the Plan itself of which the Court was not fully apprised until recently, which were intended to address the issue of hardship to certain investors. These efforts are summarized in paragraphs 10 to 33 of the Eighth Report of the Monitor.

132 I have reviewed the efforts made by various parties supporting the Plan to deal with hardship issues. I am satisfied that they represent a fair and reasonable attempt to deal with issues that result in differential impact among Noteholders. The pleas of certain Noteholders to have their individual concerns addressed have through the Monitor been passed on to those necessary for a response.

133 Counsel for one affected Noteholder, the Avrith family, which opposes the Plan, drew the Court's attention to their particular plight. In response, counsel for National Bank noted the steps it had taken to provide at least some hardship redress.

134 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.

135 The information available satisfies me that business judgment by a number of supporting parties has been applied to deal with a number of inequities. The Plan cannot provide complete redress to all Noteholders. The parties have addressed the concerns raised. In my view, the Court can ask nothing more.

Conclusion

136 I noted in the endorsement of May 16, 2008 my acceptance and understanding of why the Plan Applicants and sponsors required comprehensive releases of negligence. I was and am satisfied that there would be the third and fourth claims they anticipated if the Plan fails. If negligence claims were not released, any Noteholder who believed that there was value to a tort claim would be entitled to pursue the same. There is no way to anticipate the impact on those who support the Plan. As a result, I accept the Applicants' position that the Plan would be withdrawn if this were to occur.

137 The CCAA has now been accepted as a statute that allows for judicial flexibility to enable business people by the exercise of majority vote to restructure insolvent entities.

138 It would defeat the purpose of the statute if a single creditor could hold a restructuring Plan hostage by insisting on the ability to sue another creditor whose participation in and contribution to the restructuring was essential to its success. Tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA.

139 One can only speculate on what response might be made by any one of the significant corporations that are moving parties and now oppose confirmation of this Plan, if any of those entities were undergoing restructuring and had their Plans in jeopardy because a single creditor sought to sue a financing creditor, which required a release as part of its participation.

140 There are a variety of underlying causes for the liquidity crisis that has given rise to this restructuring.

141 The following quotation from the May 23, 2008 issue of The Economist magazine succinctly describes the problem:

If the crisis were simply about the creditworthiness of underlying assets, that question would be simpler to answer. The problem has been as much about confidence as about money. Modern financial systems contain a mass of amplifiers that multiply the impact of both losses and gains, creating huge uncertainty.

142 The above quote is not directly about the ABCP market in Canada, but about the potential crisis to the worldwide banking system at this time. In my view it is applicable to the ABCP situation at this time. 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.

143 I have as a result addressed a number of questions in order to be satisfied that in the specific context of this case, a Plan that includes third party releases is justified within CCAA jurisdiction. I have concluded that all of the following questions can be answered in the affirmative.

1. Are the parties to be released necessary and essential to the restructuring of the debtor?
2. Are the claims to be released rationally related to the purpose of the Plan and necessary for it?
3. Can the Court be satisfied that without the releases the Plan cannot succeed?
4. Are the parties who will have claims against them released contributing in a tangible and realistic way to the Plan?
5. Is the Plan one that will benefit not only the debtor but creditor Noteholders generally?
6. Have the voting creditors approved the Plan with knowledge of the nature and effect of the releases?
7. Is the Court satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy?

144 I have concluded on the facts of this Application that the releases sought as part of the Plan, including the language exempting fraud, to be permissible under the CCAA and are fair and reasonable.

145 The motion to approve the Plan of Arrangement sought by the Application is hereby granted on the terms of the draft Order filed and signed.

146 One of the unfortunate aspects of CCAA real time litigation is that it produces a tension between well-represented parties who would not be present if time were not of the essence.

147 Counsel for some of those opposing the Plan complain that they were not consulted by Plan supporters to "negotiate" the release terms. On the other side, Plan supporters note that with the exception of general assertions in the action on behalf of Hy Bloom (who claims negligence as well), there is no articulation by those opposing of against whom claims would be made and the particulars of those claims.

148 It was submitted on behalf of one Plan opponent that the limitation provisions are unduly restrictive and should extend to at least two years from the date a potential plaintiff becomes aware of an Expected Claim.

149 The open-ended claim potential is rejected by the Plan supporters on the basis that what is needed now, since Notes have been frozen for almost one year, is certainty of claims and that those who allege fraud surely have had plenty of opportunity to know the basis of their evidence.

150 Other opponents seek to continue a negotiation with Plan supporters to achieve a resolution with respect to releases satisfactory to each opponent.

151 I recognize that the time for negotiation has been short. The opponents' main opposition to the Plan has been the elimination of negligence claims and the Court has been advised that an appeal on that issue will proceed.

152 I can appreciate the desire for opponents to negotiate for any advantage possible. I can also understand the limitation on the patience of the variety of parties who are Plan supporters, to get on with the Plan or abandon it.

153 I am satisfied that the Plan supporters have listened to some of the concerns of the opponents and have incorporated those concerns to the extent they are willing in the revised release form. I agreed that it is time to move on.

154 I wish to thank all counsel for their cooperation and assistance. There would be no Plan except for the sustained and significant effort of Mr. Crawford and the committee he chairs.

155 This is indeed hopefully a unique situation in which it is necessary to look at larger issues than those affecting those who feel strongly that personal redress should predominate.

156 If I am correct, the CCAA is indeed a vehicle that can adequately balance the issues of all those concerned.

157 The Plan is a business proposal and that includes the releases. The Plan has received overwhelming creditor support. I have concluded that the releases that are part of the Plan are fair and reasonable in all the circumstances.

158 The form of Order that was circulated to the Service List for comment will issue as signed with the release of this decision.

Schedule "A"

Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule "B"

Applicants

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Application granted.

APPENDIX 1

Parties & Their Counsel

<i>Counsel</i>	<i>Party Represented</i>
Benjamin Zarnett Fred Myers	Applicants: Pan-Canadian Investors Committee for Third-Party Structured
Brian Empey	Asset-Backed Commercial Paper
Donald Milner Graham Phoenix,	Respondents: Metcalfe & Mansfield Alternative Investments II Corp.,
Xeno C. Martis David Lemieux	Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield
Robert Girard	Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments
	XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp.
Aubrey Kauffman Stuart	Respondents: 4446372 Canada Inc. and 6932819 Canada Inc., as Issuer Trustees
Brotman	
Craig J. Hill Sam P. Rappos	Monitor: Ernst & Young Inc.
Marc Duchesne	
Jeffrey Carhart Joseph Marin Jay	Ad Hoc Committee and PricewaterhouseCoopers Inc., in its capacity as
Hoffman	Financial Advisor
Arthur O. Jacques Thomas	Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
McRae	
Henry Juroviesky Eliezer Karp	Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Jay A. Swartz Nathasha	Administrator of Aria Trust, Encore Trust, Newshore Canadian Trust and
MacParland	Symphony Trust
James A. Woods Mathieu	Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC)
Giguere Sébastien Richemont	Inc., Aéroports de Montreal Inc., Aéroports de Montréal Capital Inc., Pomerleau
Marie-Anne Paquette	Ontario Inc., Pomerleau Inc., Labopharm Inc., L'Agence Métropolitaine de
	Transport (AMT), Domtar Inc., Domtar Pulp and Paper Products Inc., Giro
	Inc., Vetements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold
	Inc., Services Hypothécaires La Patremoniale Inc. and Jazz Air LLP
Peter F.C. Howard Samaneh	Asset Providers/Liquidity Suppliers: Bank of America, N.A.; Citibank, N.A.;
Hosseini William Scott	Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and
	not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank
	USA, National Association; Merrill Lynch International; Merrill Lynch Capital
	Services Inc.; Swiss Re Financial Products Corporation; and UBS AG
George S. Glezos Lisa C. Munro	Becmar Investments Ltd, Dadrex Holdings Inc. and JTI-Macdonald Corp.
Jeremy E. Dacks	Blackrock Financial Management, Inc.
Virginie Gauthier Mario Forte	Caisse de Dépôt et Placement du Québec
Kevin P. McElcheran Malcolm	Canadian Banks: Bank of Montreal, Canadian Imperial Bank of Commerce,
M. Mercer Geoff R. Hall	Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion
	Bank
Harvey Chaiton	Canadian Imperial Bank of Commerce
S. Richard Orzy Jeffrey S. Leon	CIBC Mellon Trust Company, Computershare Trust Company of Canada and
	BNY Trust Company of Canada, as Indenture Trustees
Margaret L. Waddell	Cinar Corporation, Cinar Productions (2004) and Cookie Jar Animation Inc.,
	ADR Capital Inc. and GMAC Leaseco Corporation
Robin B. Schwill James Rumball	Coventree Capital Inc. and Nereus Financial Inc.
J. Thomas Curry Usman M.	Coventree Capital Inc.
Sheikh	
Kenneth Kraft	DBRS Limited
David E. Baird, Q.C. Edmond	Desjardins Group
Lamek Ian D. Collins	
Allan Sternberg Sam R. Sasso	Hy Bloom Inc. and Cardacian Mortgages Services Inc.
Catherine Francis Phillip Bevans	Individual Noteholder
Howard Shapray, Q.C. Stephen	Ivanhoe Mines Inc.
Fitterman	

Kenneth T. Rosenberg Lily	Jura Energy Corporation, Redcorp Ventures Ltd. and as agent to Ivanhoe Mines Inc.
Harmer Massimo Starnino	
Joel Vale	I. Mucher Family
John Salmas	Natcan Trust Company, as Note Indenture Trustee
John B. Laskin Scott Bomhof	National Bank Financial Inc. and National Bank of Canada
Robin D. Walker Clifton Prophet	NAV Canada
Junior Sirivar	
Timothy Pinos	Northern Orion Canada Pampas Ltd.
Murray E. Stieber	Paquette & Associés Huissiers en Justice, s.e.n.c. and André Perron
Susan Grundy	Public Sector Pension Investment Board
Dan Dowdall	Royal Bank of Canada
Thomas N.T. Sutton	Securitus Capital Corp.
Daniel V. MacDonald Andrew	The Bank of Nova Scotia
Kent	
James H. Grout	The Goldfarb Corporation
Tamara Brooks	The Investment Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada
	Travelers Transportation Services Inc.
Sam R. Sasso	WebTech Wireless Inc. and Wynn Capital Corporation Inc.
Scott A. Turner	West Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., UTS
Peter T. Linder, Q.C. Edward H.	Energy Corporation, Nexstar Energy Ltd., Sabre Tooth Energy Ltd., Sabre
Halt, Q.C.	Energy Ltd., Alliance Pipeline Ltd., Standard Energy Inc. and Power Play
	Resources Limited
Steven L. Graff	Woods LLP
Gordon Capern Megan E.	Xceed Mortgage Corporation
Shortreed	

APPENDIX 2

Terms

"*ABCP Conduits*" means, collectively, the trusts that are subject to the Plan, namely the following: 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, SAT, Selkirk Funding Trust, Silverstone Trust, SIT III, Slate Trust, Symphony Trust and Whitehall Trust, and their respective satellite trusts, where applicable.

"*ABCP Sponsors*" means, collectively, the Sponsors of the ABCP Conduits (and, where applicable, such Sponsors' affiliates) that have issued the Affected ABCP, namely, Coventree Capital Inc., Quanto Financial Corporation, National Bank Financial Inc., Nereus Financial Inc., Newshore Financial Services Inc. and Securitus Capital Corp.

"*Ad Hoc Committee*" means those Noteholders, represented by the law firm of Miller Thomson LLP, who sought funding from the Investors Committee to retain Miller Thomson and PricewaterhouseCoopers Inc., to assist it in starting to form a view on the restructuring. The Investors Committee agreed to fund up to \$1 million in fees and facilitated the entering into of confidentiality agreements among Miller Thomson, PwC, the Asset Providers, the Sponsors, JPMorgan and E&Y so that Miller Thomson and PwC, could carry out their mandate. Chairman Crawford met with representatives of Miller Thomson and PwC, and the Committee's advisors answered questions and discussed the proposed restructuring with them.

"*Applicants*" means, collectively, the 17 member institutions of the Investors Committee in their respective capacities as Noteholders.

"*CCAA Parties*" means, collectively, the Issuer Trustees in respect of the Affected ABCP, namely 4446372 Canada Inc., 6932819 Canada Inc., 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. and the ABCP Conduits.

"*Conduit*" means a special purpose entity, typically in the form of a trust, used in an ABCP program that purchases assets and funds these purchases either through term securitizations or through the issuance of commercial paper.

"*Issuer Trustees*" means, collectively, the issuer trustees of each of the ABCP Conduits, namely, 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp. and Metcalfe & Mansfield Alternative Investments XII Corp. and "*Issuer Trustee*" means any one of them. The Issuer Trustees, together with the ABCP Conduits, are sometimes referred to, collectively, as the "*CCAA Parties*".

"*Liquidity Provider*" means like asset providers, dealer banks, commercial banks and other entities often the same as the asset providers who provide liquidity to ABCP, or a party that agreed to provide liquidity funding upon the terms and subject to the conditions of a liquidity agreement in respect of an ABCP program. The Liquidity Providers in respect of the Affected ABCP include, without limitation: ABN AMRO Bank N.V., Canada Branch; Bank of America N.A., Canada Branch; Canadian Imperial Bank of Commerce; Citibank Canada; Citibank, N.A.; Danske Bank A/S; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA National Association; Merrill Lynch Capital Services, Inc.; Merrill Lynch International; Royal Bank of Canada; Swiss Re Financial Products Corporation; The Bank of Nova Scotia; The Royal Bank of Scotland plc and UBS AG.

"*Noteholder*" means a holder of Affected ABCP.

"*Sponsors*" means, generally, the entities that initiate the establishment of an ABCP program in respect of a Conduit. Sponsors are effectively management companies for the ABCP program that arrange deals with Asset Providers and capture the excess spread on these transactions. The Sponsor approves the terms of an ABCP program and serves as administrative agent and/or financial services (or securitization) agent for the ABCP program directly or through its affiliates.

"*Traditional Assets*" means those assets held by the ABCP Conduits in non-synthetic securitization structures such as trade receivables, credit card receivables, RMBS and CMBS and investments in CDOs entered into by third-parties.

APPENDIX 3

[Missing text]

Footnotes

- 1 Information Statement, p. 18
- 2 Information Statement, p. 18
- 3 *Canadian Airlines Corp., Re*, [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Alta. Q.B.).
- 4 *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)
- 5 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Ont. Gen. Div. [Commercial List])
- 6 *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16, 2006 CarswellOnt 6230 (Ont. S.C.J.)

- 7 *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List])
- 8 *Vicwest, Re* (Ont. S.C.J. [Commercial List]) per Pepall J. at paragraph 23
- 9 The Court was provided with copies of 12 Plan approvals under the CCAA in which releases were granted. In various instances these included officers, directors and creditors. The moving parties note that no objection to the nature or extent of release was taken.
- 10 *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. No. 4749, 46 O.R. (3d) 514, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (Ont. C.A.)
- 11 *Stelco Inc., Re*, [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623, 2005 CarswellOnt 6483 (Ont. S.C.J. [Commercial List])
- 12 *Stelco Inc., Re*, [2005] O.J. No. 4883 (Ont. C.A.)
- 13 *Stelco Inc., Re*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, 2007 CarswellOnt 4108 (Ont. C.A.)
- 14 *Muscletech Research & Development Inc., Re*, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List])
- 15 *Steinberg Inc. c. Michaud*, 1993 CanLII 3991, [1993 CarswellQue 229 (Que. C.A.)]
- 16 Annual Review of Insolvency Law, 2007 Thomson, Carswell. Janis Sarra edition
- 17 Ibid, p. 42
- 18 Ibid, pp. 44-45
- 19 Ibid, p. 45
- 20 Ibid pp 49-51
- 21 *Peek v. Derry* (1889), 14 A.C. 337 (U.K. H.L.)
- 22 *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559 (S.C.C.)
- 23 *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, 89 B.C.A.C. 288 (B.C. C.A.)
- 24 *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 40 B.L.R. (2d) 1, 63 O.T.C. 1 (Ont. Gen. Div. [Commercial List]).
- 25 See *Ecolab Ltd. v. Greenspace Services Ltd.*, [1996] O.J. No. 3528 (Ont. Gen. Div.) per Ground J.

TAB 3

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J.
No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

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

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

Paperny J.

Heard: June 5-19, 2000

Judgment: June 27, 2000 *

Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C., H.M. Kay, Q.C., R.B. Low, Q.C., and L. Goldbach*, for Petitioners.

S.F. Dunphy, P. O'Kelly, and E. Kolars, for Air Canada and 853350 Alberta Ltd.

D.R. Haigh, Q.C., D.N. Nishimura, A.Z.A. Campbell and D. Tay, for Resurgence Asset Management LLC.

L.R. Duncan, Q.C., and G. McCue, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.

F.R. Foran, Q.C., and P.T. McCarthy, Q.C., for Monitor, PwC.

G.B. Morawetz, R.J. Chadwick and A. McConnell, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.

C.J. Shaw, Q.C., for Unionized Employees.

T. Mallett and C. Feasby, for Amex Bank of Canada.

E.W. Halt, for J. Stephens Allan, Claims Officer.

M. Hollins, for Pacific Coastal Airlines.

P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.

J. Thom, for Royal Bank of Canada.

J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.

R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency

APPLICATION by airline for approval of plan of arrangement; COUNTER-APPLICATION by investment corporation for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

Paperny J.:

I. Introduction

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of

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

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

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

II. Background

Canadian Airlines and its Subsidiaries

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

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

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

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

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

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

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

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

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

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

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

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

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

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

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

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

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

Initial Discussions with Air Canada

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

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

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

Offer by Onex

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

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

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

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

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

Offer by 853350

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

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately \$500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of \$500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

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

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services

provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

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

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

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

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

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

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

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

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

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

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

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

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

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

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

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

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

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

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

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

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

51 The proposed treatment of stakeholders is as follows:

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

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

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

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US\$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a \$53 million note payable by CRAL to CAIL.

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

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

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

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

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

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

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

The Affected Unsecured Creditors fall into the following categories:

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

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

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

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

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold \$58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the

repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

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

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

III. Analysis

59 Section 6 of the CCAA provides that:

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

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

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

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

(1) there must be compliance with all statutory requirements;

(2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 172 and *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 7. Each of these criteria are reviewed in turn below.

I. Statutory Requirements

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

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

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

- (a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.
- (b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of \$5,000,000.
- (c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.
- (d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.
- (e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

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

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

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

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

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

(a) consolidating all of the issued and outstanding common shares into one common share;

(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;

(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;

(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;

(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and

(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

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

a. The corporation must be "subject to an order for re-organization"; and

b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

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

71 The relevant portions of section 167 provide as follows:

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

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,

(g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

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

Proposed Amendment in Schedule "D"

- (a) — consolidation of Common Shares
- (b) — change of designation and rights
- (c) — cancellation
- (d) — change in shares
- (e) — change of designation and rights
- (f) — cancellation

Subsection 167(1), ABCA

- 167(1)(f)
- 167(1)(e)
- 167(1)(g.1)
- 167(1)(f)
- 167(1)(e)
- 167(1)(g.1)

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

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

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

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

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

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co.*, *supra* in which Farley J. of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

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

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

Section 183 of the ABCA

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

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

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

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

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

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

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

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

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

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "*excluding the claims excepted by s. 5.1(2) of the CCAA*" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

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

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

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

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

3. Fair and Reasonable

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

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

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

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

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

a. Composition of the unsecured vote

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

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

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

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

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

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

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

102 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 192-3 *aff'd* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

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

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

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

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

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

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

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities "feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.)). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect to the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

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

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

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from \$673 million to \$1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

- 1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
- 2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;

3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and

4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

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

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

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

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

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

CRAL

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

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

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

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

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

International Routes

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

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

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

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

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

Tax Pools

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

Capital Loss Pools

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

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

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

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

d. Oppression

Oppression and the CCAA

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

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

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

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

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd.*, *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

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

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

Oppression allegations by Resurgence

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

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

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

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

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

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

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

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

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

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

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

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

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

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350,

without any compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

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

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

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

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

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

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

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

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

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

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

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

e. The Public Interest

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

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

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

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C. S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd.*, *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Algoma Steel Corp. v. Royal Bank* (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.)

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

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

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

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

Application granted; counter-applications dismissed.

Footnotes

* Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

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TAB 4

2010 ONSC 4209
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5510, 2010 ONSC 4209, 191 A.C.W.S. (3d) 378, 70 C.B.R. (5th) 1

**IN THE MATTER OF SECTION 11 OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities
David Byers, Marie Konyukhova for Monitor
Robin B. Schwill, Vince Mercier for Shaw Communications Inc.
Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for Special Committee of the Board of Directors
Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for related relief.

Pepall J.:

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

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

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries

and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US \$440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US \$2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional \$38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

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

(a) the Noteholders; and

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

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

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

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

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

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

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

of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

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

Creditor Meetings

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

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

Sanction Test

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

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

See *Canadian Airlines Corp., Re*²

(a) Statutory Requirements

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

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

(b) Unauthorized Steps

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

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

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

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

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

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

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

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

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

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

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

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

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

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

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

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

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

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

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

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

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

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

(e) create new classes of shares;

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

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

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

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

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

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

Application granted.

Footnotes

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

2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

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

4 *Ibid*, at para. 3.

5 (1993), 22 C.B.R. (3d) 80 (Ont. Bkcty.).

6 *Ibid*, at para. 6.

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

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

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

- 10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).
- 11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).
- 12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).
- 13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).
- 14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/
- 15 [2005] Q.J. No. 22993 (C.S. Que.) at para. 9.

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TAB 5

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below,

the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings*

and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the

time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna

in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation.

Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a *CCAA* Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of *CCAA* law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary

for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd.*, Re (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

227 (4) Trust for moneys deducted — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*...

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*...

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) **Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property

held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11¹ of the *CCAA* stated:

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.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

222 (3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails;

and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the *CCAA*, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the *CCAA*.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) **Powers of court** — 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.

...

(3) **Initial application court orders** — 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,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

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

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

(4) **Other than initial application court orders** — 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,

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

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

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

...

(6) **Burden of proof on application** — The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) **Her Majesty affected** — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

- (iii) six months following the court sanction of a compromise or arrangement,
- (iv) the default by the company on any term of a compromise or arrangement, or
- (v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

...

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

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

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

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

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

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

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

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

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that

subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

- 1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
- 2 The amendments did not come into force until September 18, 2009.

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TAB 6

2015 ONSC 622
Ontario Superior Court of Justice

Cline Mining Corp., Re

2015 CarswellOnt 3285, 2015 ONSC 622, 23 C.B.R. (6th) 194, 252 A.C.W.S. (3d) 8

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

In the Matter of a Plan of Compromise and Arrangement of Cline Mining
Corporation, New ELK Coal Company LLC and North Central Energy Company

G.B. Morawetz R.S.J.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: CV-14-10781-00CL

Counsel: Robert J. Chadwick, Logan Willis for Applicants, Cline Mining Corporation et al.
Michael DeLellis, David Rosenblatt for FTI Consulting Canada Inc., Monitor of the Applicants
Jay Swartz for Secured Noteholders

Subject: Insolvency

MOTION by insolvent companies for approval or plan of arrangement and other relief.

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

1 Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and

b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

2 Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

3 Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

4 The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

5 The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

6 The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corp., Re*, 2014 ONSC 6998 (Ont. S.C.J.) and need not be repeated.

7 The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. \$3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of \$210,000 (with \$90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of \$100,000 payable in eight years from the Plan implementation date.

8 As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

9 The Applicants served the Amended Plan on the Service List on January 20, 2015.

10 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

11 Equity claimants will not receive any consideration or distributions under the Plan.

12 The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

13 The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

14 The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

15 The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

16 The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

17 None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

18 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

19 The general requirements for court approval of the CCAA Plan are well established:

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

(see *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]))

20 Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

21 In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

- a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;
- b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;
- c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;
- d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;
- e. all Affected Creditors that voted on the Plan voted for its approval;
- f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;
- g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;
- h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

22 The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *SkyLink, supra*; and *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), leave to appeal denied, 2013 ONCA 456 (Ont. C.A.)).

23 The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

24 I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

25 Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

26 The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

27 The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

28 I am satisfied that in these circumstances, it is appropriate to grant the releases.

29 The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

30 The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

31 The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

32 Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

33 For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

Motion granted.

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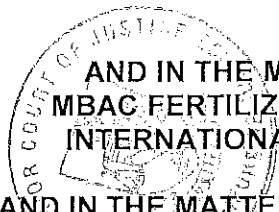
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TAB 7

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.) MONDAY, THE 3rd
)
JUSTICE NEWBOULD) DAY OF OCTOBER, 2016
)

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
MBAC FERTILIZER CORP., MBAC OPPORTUNITIES AND FINANCING INC., MBAC
INTERNATIONAL HOLDINGS COÖPERATIE U.A. AND MBAC (BARBADOS) INC.

AND IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c.
C-44 AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 9913670
CANADA INC. AND INVOLVING MBAC FERTILIZER CORP. AND MBAC OPPORTUNITIES
AND FINANCING INC.

Applicants

SANCTION ORDER

THIS MOTION made by MBAC Fertilizer Corp. ("MBAC") for an Order (the "**Sanction Order**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 (the "**CBCA**"), sanctioning the Amended and Restated Plan of Compromise and Arrangement dated September 14, 2016, which is attached as Schedule "A" hereto (and as it may be further amended, varied or supplemented from time to time in accordance with the terms thereof, the "**CCAA Plan**") and approving the Plan of Arrangement dated September 14, 2016, which is attached as Schedule "B" hereto (and as it may be further amended, varied or supplemented from time to time in accordance with the terms thereof, the "**CBCA Plan**") was heard on October 3, 2016 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Cristiano Melcher sworn September 23, 2016, filed, the Affidavit of Anthony Cina, sworn August 3, 2016, filed, the second report (the "**Second Report**") and the third report (the "**Third Report**") of Ernst & Young Inc., in its capacity

as monitor of, among others, MBAC (the "**Monitor**"), filed, and on hearing the submissions of counsel for each of MBAC, the Monitor, the Plan Sponsor, and such other counsel as were present and wished to be heard, no one else appearing although duly served as appears from the affidavit of service of Evan Cobb, sworn September 28, 2016, filed, and upon being advised by counsel to MBAC prior to this motion that the Sanction Order will be relied upon by MBAC as an approval of the CCAA Plan and the CBCA Plan for the purpose of relying on the exemption from the registration requirements of the *United States Securities Act of 1933*, as amended, pursuant to section 3(a)(10) thereof for the issuance of the New Common Shares to the extent they may be deemed to be securities,

DEFINED TERMS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Sanction Order shall have the meanings ascribed to such terms in the CCAA Plan or the Meeting Order granted by this Court on August 4, 2016 (the "**Meeting Order**"), as applicable, and that any capitalized terms not otherwise defined in paragraph 15 of this Sanction Order shall have the meanings ascribed to such terms in the Claims Procedure Order granted by this Court on August 4, 2016 (the "**Claims Procedure Order**"). All references herein to MBAC shall be deemed to include MBAC Amalco where this Order refers to matters occurring after the completion of the Amalgamation.

SERVICE, NOTICE AND MEETING

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record in support of this motion and the Third Report be and are hereby abridged and validated so that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.
3. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Meeting Order and the Information Package, including the CCAA Plan and the Notice of Meeting to all Affected Unsecured Creditors.
4. **THIS COURT ORDERS AND DECLARES** that the Meeting was duly convened and held on September 20, 2016 in conformity with the CCAA and the Meeting Order.

SANCTION OF THE PLAN

5. **THIS COURT ORDERS AND DECLARES** that:
- (a) the CCAA Plan has been approved by the Required Majority of Affected Unsecured Creditors, as required by the Meeting Order and in conformity with the CCAA;
 - (b) the activities of MBAC have been in compliance with the provisions of the CCAA and the Orders of this Court granted in these CCAA proceedings (the “Orders”) in all respects;
 - (c) the Court is satisfied that MBAC has acted and continues to act in good faith and with due diligence and has not done or purported to do anything that is not authorized by the CCAA; and
 - (d) the CCAA Plan and all terms and conditions of and matters and transactions contemplated thereby are fair and reasonable.
6. **THIS COURT ORDERS AND DECLARES** that the CCAA Plan, including without limitation the compromises, arrangements and releases (including, without limitation, in favour of the Applicants, the Non-Applicant Entities, the Directors and Officers, the Plan Sponsor and the Monitor) set out therein and the transactions contemplated thereby, is hereby sanctioned and approved pursuant to section 6 of the CCAA.

PLAN IMPLEMENTATION

7. **THIS COURT ORDERS** that each of MBAC and the Monitor are authorized and directed to take all steps and actions, and do all things, necessary or appropriate to implement the CCAA Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, deliveries, allocations and agreements contemplated by the CCAA Plan, and such steps and actions are hereby authorized, ratified and approved.
8. **THIS COURT ORDERS** that all payments and distributions to be made on behalf of MBAC to the Affected Unsecured Creditors pursuant to the CCAA Plan shall be made by the Monitor, specifically on behalf of MBAC, and the Monitor shall allocate and distribute

such payments in accordance with the CCAA Plan. Neither MBAC nor the Monitor shall incur any liability as a result of acting in accordance with the terms of the CCAA Plan and the Sanction Order.

9. **THIS COURT ORDERS AND DECLARES** that, on the Implementation Date, the CCAA Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby shall be deemed to be implemented, binding and effective in accordance with the provisions of the CCAA Plan, and the steps required to implement the CCAA Plan, including, without limitation, the release (including, without limitation, in favour of the Applicants, the Non-Applicant Entities, the Directors and Officers, the Plan Sponsor and the Monitor) of all Released Claims in accordance with the terms of the CCAA Plan, shall be deemed to occur and to take effect in the sequential order and at the times contemplated in the CCAA Plan, without any further act or formality, beginning at the Implementation Time on the Implementation Date.
10. **THIS COURT ORDERS** that upon the satisfaction or waiver of the conditions precedent set out in Article 10 of the CCAA Plan in accordance with the terms of the CCAA Plan, as confirmed by MBAC (or counsel on their behalf) and the Plan Sponsor in writing, the Monitor is authorized and directed to deliver to MBAC a certificate substantially in the form attached as Schedule "C" to the CCAA Plan (the "**Monitor's Implementation Certificate**") signed by the Monitor, certifying that all conditions precedent set out in Article 10 of the CCAA Plan have been satisfied or waived, as applicable, and that with the filing of the Monitor's Implementation Certificate, the Implementation Date shall have occurred. The Monitor shall file the Monitor's Implementation Certificate with this Court as soon as practicable following the Implementation Date.
11. **THIS COURT ORDERS** that, in accordance with the provisions of the CCAA Plan, each of the Charges shall be terminated, discharged and released on the Implementation Date.
12. **THIS COURT ORDERS** that:
 - (a) other than as expressly set out herein, the provisions of the Initial Order shall terminate, including the Stay Period (as defined in the Initial Order), on the Implementation Date except to the extent of the protections granted therein in favour of the Monitor; and

- (b) all other Orders made in these CCAA proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by or are inconsistent with this Sanction Order or any further Order of this Court.
13. **THIS COURT ORDERS** that from and after the Implementation Date, all Persons with an Affected Unsecured Claim shall be deemed to have consented and agreed to all of the provisions of the CCAA Plan as an entirety; and each Affected Unsecured Creditor shall be deemed to have granted, and executed and delivered all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the CCAA Plan in its entirety.

EFFECT OF CCAA PLAN AND CCAA ORDERS

14. **THIS COURT ORDERS** that, from and after the Implementation Date, the CCAA Plan shall inure to the benefit of and be binding upon MBAC, any Person with a Released Claim, and all other Persons and parties named or referred to in or affected by the CCAA Plan, including, without limitation, their respective heirs, administrators, executors, legal representatives, successors, and assigns.
15. **THIS COURT ORDERS** that, save and except for any Claim that MBAC, in consultation with the Monitor, has allowed in these CCAA proceedings, and without limiting the provisions of the Claims Procedure Order, any Person that did not file a Proof of Claim or a Notice of Dispute, as applicable, by the Claims Bar Date, the Restructuring Period Claims Bar Date or such other bar date provided for in the Claims Procedure Order, as applicable, against an Applicant or a Non-Applicant Entity or a Director or Officer, whether or not such Person received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim or Non-Applicant Entity Claim against such Applicant, Non-Applicant Entity or Director or Officer, as applicable, and shall not be entitled to any consideration under the CCAA Plan, and such Person's Claim or Non-Applicant Entity Claim shall be and is hereby forever barred and extinguished.
16. **THIS COURT ORDERS AND DECLARES** that, subject to the performance by MBAC of its obligations under the CCAA Plan and except as provided in the CCAA Plan, all obligations or agreements to which MBAC is a party immediately prior to the

Implementation Time, will be and shall remain in full force and effect as at the Implementation Date in respect of MBAC, unamended except as they may have been amended by agreement of the parties subsequent to the Filing Date, and no Person who is a party to any such obligations or agreements shall, following the Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, option, dilution or other remedy) or make any demand under or in respect of any such obligation or agreement, by reason of:

- (i) any defaults or events of default arising as a result of the insolvency of any of the Applicants prior to the Implementation Date;
- (ii) any change of control of any of the Applicants arising from implementation of this CCAA Plan;
- (iii) the fact that any of the Applicants has sought or obtained relief under the CCAA or that this CCAA Plan has been implemented by MBAC;
- (iv) the effect on any of the Applicants of the completion of any of the transactions contemplated by this CCAA Plan;
- (v) any compromises or arrangements effected pursuant to this CCAA Plan;
or
- (vi) any other event(s) which occurred on or prior to the Implementation Date which would have entitled any Person to enforce rights and remedies, subject to any express provisions to the contrary in any agreements entered into with any of the Applicants after the Filing Date.

THE MONITOR

17. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Orders and the CCAA Plan, shall be and is hereby authorized, directed and empowered to perform its functions and fulfill its obligations under the CCAA Plan to facilitate the implementation of the CCAA Plan.

18. **THIS COURT ORDERS** that the Monitor has satisfied all of its obligations up to and including the date of this Sanction Order, and that: (i) in carrying out the terms of this Sanction Order and the CCAA Plan including the obligations, duties and responsibilities (if any) described in this Sanction Order, the Monitor shall have all the protections given to it by the CCAA, the Orders, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Sanction Order and/or the CCAA Plan and in performing its duties as Monitor in these CCAA proceedings including the obligations, duties and responsibilities (if any) described in this Sanction Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of MBAC and any information provided by MBAC without independent investigation; (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information, or with respect to any such information disclosed to or provided by the Monitor, including with respect to reliance thereon by any Person; and (v) the distributions delivered by the Monitor pursuant to the CCAA Plan are not delivered by the Monitor in its personal or corporate capacity and are delivered without personal or corporate liability of the Monitor, and, without limiting the foregoing, the Monitor shall have no obligations or liability in connection with any withholdings or deductions that any Person may assert should or should not have been made in connection with such distributions.

19. **THIS COURT ORDERS** that upon the delivery of the Monitor's Implementation Certificate by the Monitor pursuant to paragraph 10 of this Sanction Order, the Monitor shall be discharged and released from its duties other than those obligations, duties and responsibilities: (i) necessary or required to give effect to the terms of the CCAA Plan and this Sanction Order, (ii) in relation to the claims procedure and all matters relating thereto as set out in the Claims Procedure Order, and (iii) in connection with the

completion by the Monitor of all other matters for which it is responsible in connection with the CCAA Plan or pursuant to the Orders of this Court made in these CCAA proceedings (collectively, the "**Outstanding Matters**").

20. **THIS COURT ORDERS** that the Second Report and the Third Report and the activities of the Monitor described therein are hereby approved.
21. **THIS COURT ORDERS** that (i) the fees and disbursements of the Monitor and the Monitor's counsel, as set out in the Affidavit of Alex Morrison, sworn September 27, 2016, and the Affidavit of Leanne Williams, sworn September 26, 2016 are hereby approved.
22. **THIS COURT ORDERS** that the Monitor and its counsel may, but are not required, to pass any further accounts with the Court, which accounts shall be paid by the Applicants in the ordinary course, except in the event that the Monitor or its counsel seeks to enforce the Administration Charge.
23. **THIS COURT ORDERS** that upon completion of the Outstanding Matters, the Monitor shall file a certificate substantially in the form of Schedule "C" hereto (the "**Monitor's Termination Certificate**") and upon filing the Monitor's Termination Certificate, the Monitor shall be discharged, provided however that notwithstanding its discharge herein (a) the Monitor shall remain Monitor for the performance of such incidental duties as may be required, and (b) the Monitor shall continue to have the benefit of the provisions of all Orders made in these CCAA proceedings, including all approvals, protections and stays of proceedings in favour of the Monitor.
24. **THIS COURT ORDERS** that upon the filing of the Monitor's Termination Certificate, the Monitor shall be released and discharged from any and all liability that the Monitor now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of the Monitor while acting in its capacity as Monitor in these proceedings, save and except for liability arising from its gross negligence or wilful misconduct. Without limiting the generality of the foregoing, the Monitor shall be forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, within these proceedings.

25. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor in these proceedings, except with prior leave of this Court and on prior written notice to the Monitor and such further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

BOARD OF DIRECTORS OF MBAC

26. **THIS COURT ORDERS AND DECLARES** that those persons listed on a certificate to be filed with the Court by MBAC on or prior to the Implementation Date shall be deemed to be appointed as the board of directors of MBAC on the Implementation Date, provided that such certificate and the Persons listed thereon shall be subject to the prior written consent of the Plan Sponsor. Concurrently with the appointment of such directors, all directors serving immediately prior to the Implementation Date shall be deemed to resign (unless they are re-appointed in accordance with this paragraph).

CBCA PLAN

27. **THIS COURT ORDERS AND DECLARES** that the CBCA Plan is an arrangement within the meaning of section 192 of the CBCA and the CBCA Plan and the transactions contemplated thereby are fair and reasonable.
28. **THIS COURT ORDERS AND DECLARES** that the CBCA Plan shall be and is hereby approved.
29. **THIS COURT ORDERS** that as of the Implementation Date, the CBCA Plan and all associated steps, transactions, arrangements, and recapitalization effected thereby as set out in the CBCA Plan are approved, binding and effective as therein set out upon MBAC, MBAC Opportunities and Financing Inc., 9913670 Canada Inc. and all other Persons affected by the CBCA Plan.
30. **THIS COURT ORDERS** that the steps to be taken and the transactions, arrangements, and recapitalization to be effected on the Implementation Date are deemed to occur and be effected in the sequential order and at the times contemplated by Section 4.3 of the CBCA Plan.

31. **THIS COURT ORDERS** that the adoption, execution, delivery, implementation and consummation of all matters contemplated under the CBCA Plan involving corporate action of MBAC, MBAC Opportunities and Financing Inc. or 9913670 Canada Inc. has been authorized and approved in all respects and for all purposes without any requirement of further action by the shareholders, directors or officers of MBAC, MBAC Opportunities and Financing Inc. or 9913670 Canada Inc.
32. **THIS COURT ORDERS** that all necessary approvals to take actions are deemed to have been obtained from the directors or the shareholders of MBAC, MBAC Opportunities and Financing Inc. or 9913670 Canada Inc., as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the CBCA Plan shall be deemed to be effective and no such agreement shall have any force or effect.

TERMINATION OF PROCEEDINGS

33. **THIS COURT ORDERS** that upon filing of the Monitor's Termination Certificate, these CCAA proceedings shall be terminated.

EFFECT, RECOGNITION AND ASSISTANCE

34. **THIS COURT ORDERS** that MBAC and the Monitor may apply to this Court for advice and direction with respect to any matter arising from or under the CCAA Plan, the CBCA Plan or this Sanction Order.
35. **THIS COURT ORDERS** that this Sanction Order shall have full force and effect in all provinces and territories of Canada and abroad as against all Persons and parties against whom it may otherwise be enforced.
36. **THIS COURT REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Brazil or in any other foreign jurisdiction, to give effect to this Sanction Order and the CCAA Plan and the CBCA Plan or to assist MBAC, the Monitor and their respective agents in carrying out the terms of this Sanction Order and the CCAA Plan and the CBCA Plan. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to

make such orders and to provide such assistance to MBAC and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Sanction Order and the CCAA Plan and the CBCA Plan, to grant representative status to the Monitor in any foreign proceeding, or to assist MBAC or the Monitor and their respective agents in carrying out the terms of this Sanction Order and the CCAA Plan and the CBCA Plan.

GENERAL

37. **THIS COURT ORDERS** that this Sanction Order shall be posted on the Monitor's Website at www.ey.com/ca/mbac and is only required to be served upon the parties on the Service List and those parties who appeared at the hearing of the motion for this Sanction Order.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 03 2016

PER / PAR:



Schedule "A"
(CCAA Plan)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MBAC FERTILIZER CORP., MBAC
OPPORTUNITIES AND FINANCING INC., MBAC
INTERNATIONAL HOLDINGS COÖPERATIE U.A. AND MBAC
(BARBADOS) INC.

AND IN THE MATTER OF THE CANADA BUSINESS
CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED,
AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF
9913670 CANADA INC. AND INVOLVING MBAC FERTILIZER
CORP. AND MBAC OPPORTUNITIES AND FINANCING INC.

**AMENDED AND RESTATED PLAN OF COMPROMISE AND ARRANGEMENT
PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*
OF MBAC FERTILIZER CORP. AND INVOLVING MBAC OPPORTUNITIES AND FINANCING
INC.**

SEPTEMBER 14, 2016

RECITALS

- (A) MBAC Fertilizer Corp. ("**MBAC**") and MBAC Opportunities and Financing Inc. ("**MBAC Sub**" and, together with MBAC, the "**Plan Applicants**") are debtor companies (as such term is defined in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").
- (B) MBAC Sub is a wholly-owned subsidiary of MBAC.
- (C) On August 4, 2016, the Honourable Justice Newbould of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted the following Orders pursuant to the CCAA:
 - (i) an Initial Order in respect of, among others, the Plan Applicants (as such Order may be amended, restated or varied from time to time, the "**Initial Order**");

- (ii) a Plan Filing and Meeting Order (as such Order may be amended, restated or varied from time to time, the "**Meeting Order**") pursuant to which, among other things, MBAC was authorized to file this plan of compromise and arrangement and to convene a meeting of affected creditors to consider and vote on this plan of compromise and arrangement; and
 - (iii) a Claims Procedure Order (as such Order may be amended, restated or varied from time to time, the "**Claims Procedure Order**"), which, among other things, established the procedures by which claims of creditors of the Applicants and certain non-Applicant entities shall be filed in these proceedings.
- (D) Itafos Mineração S.A., MBAC Fertilizantes S.A., Araxa Mineração e Metalurgia S.A., and MBAC Desenvolvimento S.A. are indirect subsidiaries of the Applicants and each is incorporated under the laws of Brazil (the "**Brazilian Subsidiaries**"). The Brazilian Subsidiaries are not applicants in these proceedings under the CCAA.
- (E) Certain of the Brazilian Subsidiaries are the subject of a restructuring transaction (the "**Brazilian Restructuring Transaction**") to be implemented under an Extrajudicial Restructuring Proceeding (*Recuperação Judicial*) under The Bankruptcy Law (11,101/2005)(the "**Brazilian Proceeding**"). The material terms of the Brazilian Restructuring Transaction are set out in Schedule "A" hereto.
- (F) Zaff LLC (the "**Plan Sponsor**") is the owner of the Brazilian Subsidiary Secured Debt (as defined below) and the Brazilian Subsidiary Unsecured Debt (as defined below).
- (G) The Plan Sponsor and MBAC intend, pursuant to this Plan and pursuant to the Brazilian Restructuring Transaction, to complete a comprehensive restructuring of the Plan Applicants and certain of the Brazilian Subsidiaries (collectively, the "**MBAC Group**") to facilitate the continuation of the business of the MBAC Group as a going concern, address certain liabilities of the Plan Applicants and the Brazilian Subsidiaries, and effect a recapitalization transaction on an expedited basis to provide a stronger financial foundation for the MBAC Group going forward to continue to work towards its operational and financial goals from and after the Implementation Date in the expectation that all Persons (as hereinafter defined) with an economic interest in the MBAC Group will derive a greater benefit from the implementation of this Plan and the Brazilian Restructuring Transaction than would otherwise result.
- (H) This Amended and Restated Plan of Compromise and Arrangement is proposed and presented with the consent of the Plan Sponsor.

NOW THEREFORE MBAC hereby proposes and presents this Plan under the CCAA.

ARTICLE 1 – INTERPRETATION

1.1 Definitions

In this Plan and the Recitals, unless otherwise stated or unless the subject matter or context otherwise requires:

"**Administration Charge**" has the meaning given to that term in the Initial Order;

"**Advisors**" means Norton Rose Fulbright Canada LLP, WeirFoulds LLP, Stocche Forbes Advogados and Felsberg Advogados;

"**Affected Creditor Class**" has the meaning given to that term in Section 3.1;

"Affected Unsecured Claims" means all Claims against MBAC that are not Equity Claims;

"Affected Unsecured Creditor" means the holder of an Affected Unsecured Claim in respect of and to the extent of such Affected Unsecured Claim;

"Allowed" means, with respect to a Claim, any Claim or any portion thereof that has been finally allowed in accordance with the Claims Procedure Order for purposes of receiving distributions under this Plan in accordance with the Claims Procedure Order and the CCAA;

"Amalgamation" has the meaning given to that term in Section 6.5(b);

"Applicable Law" means, with respect to any Person, property, transaction, event or other matter, any Law relating or applicable to such Person, property, transaction, event or other matter, including, where appropriate, any interpretation of the Law (or any part) by any Person, court or tribunal having jurisdiction over it, or charged with its administration or interpretation;

"Applicants" means MBAC Fertilizer Corp., MBAC Opportunities and Financing Inc., MBAC International Holdings Coöperatie U.A. and MBAC (Barbados) Inc.;

"Arrangement" means an arrangement under section 192 of the CBCA on the terms and subject to the conditions set out in the Plan of Arrangement of MBAC Arrangeco Inc., substantially in the form included in a Plan Supplement delivered in connection with this Plan under the CCAA, subject to any amendments or variations thereto made in accordance therewith or made at the direction of the Court;

"Articles of Arrangement" means the articles of arrangement of MBAC Arrangeco Inc. in respect of the Amalgamation, the Continuance and the Common Share Consolidation that are required to be filed with the CBCA Director after the Sanction Order is granted in order for the Arrangement to become effective.

"Bridge Financing Shares" means the 5,428,901 New Common Shares (post-Common Share Consolidation) issued to the Plan Sponsor under the Bridge Financing Settlement, including in exchange for the funding of the Cash Distribution Pool Amount, subject to the adjustment set out in Section 6.7 below;

"Bridge Financing Settlement" means the settlement pursuant to Section 6.5(c) of all obligations of the MBAC Group under the Interim Funding Debt and the Working Capital Debt and for all funding of the Cash Distribution Pool by the Plan Sponsor;

"Brazilian Subsidiaries" has the meaning given to that term in Recital D;

"Brazilian Subsidiary Secured Debt" means the secured debt owing by Itafos Mineração S.A., MBAC Fertilizantes S.A. and MBAC Desenvolvimento S.A. to the Plan Sponsor or its affiliates;

"Brazilian Subsidiary Unsecured Debt" means the unsecured debt owing by Itafos Mineração S.A., MBAC Fertilizantes S.A. and MBAC Desenvolvimento S.A. to the Plan Sponsor or its affiliates;

"Business Day" means any day, other than a Saturday, or a Sunday or a statutory or civic holiday, on which banks are generally open for business in Toronto, Ontario and Sao Paulo, Brazil;

"BV Contribution" means the contribution by the Plan Sponsor of its equity interest in Alpha Brazil Holdings B.V., Brazilian Fertilizers B.V., and DJC Brazil Holdings B.V., and, indirectly, the Brazilian Subsidiary Secured Debt and the Brazilian Subsidiary Unsecured Debt (as restructured and converted to new debt and equity through the Brazilian Restructuring Transaction), as well as the Plan Sponsor's interest in any debt owed by subsidiaries of the Applicants (as restructured and converted to new debt and equity through the Brazilian Restructuring Transaction) to MBAC Amalco in return for the BV

Contribution Shares;

"BV Contribution Shares" means 34,291,400 New Common Shares (post-Common Share Consolidation);

"Cash Distribution Pool" means an amount of cash funded by the Plan Sponsor and held in trust by the Monitor for the benefit of the Plan Sponsor until such cash is distributed on the Implementation Date in accordance with this Plan in the aggregate amount of: (i) 5.5% of all Affected Unsecured Claims for which Affected Unsecured Creditors have elected to receive a cash distribution in accordance with Section 4.1(a) of this Plan; (ii) all distributions to be made to Convenience Class Creditors in accordance with Section 4.1(c) of this Plan; and (iii) the cash component of the Disputed Distribution Claims Reserve (the total of (i), (ii) and (iii) being the **"Cash Distribution Pool Amount"**);

"Cash Election Claims" means the Affected Unsecured Claims of Cash Election Creditors;

"Cash Election Creditor" means an Affected Unsecured Creditor that has elected, in accordance with the Meeting Order, (the **"Cash Election"**) by the Voting Deadline to receive a cash payment in the amount of 5.5% of its Allowed Affected Unsecured Claims from the Cash Distribution Pool and to receive no other entitlements under the Plan;

"CBCA" means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

"CBCA Director" means the Director appointed under Section 260 of the CBCA;

"CCA Proceedings" means the proceedings commenced by the Applicants under the CCAA as contemplated by the Initial Order;

"Certificate of Arrangement" means the certificate giving effect to the Arrangement, to be issued by the CBCA Director pursuant to section 192(7) of the CBCA upon receipt of the Articles of Arrangement in accordance with Section 262 of the CBCA.

"Charges" has the meaning ascribed thereto in the Initial Order;

"Claim" means:

- i. any right or claim, including any Tax Claim, of any Person that may be asserted or made in whole or in part against MBAC, in any capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever of MBAC, and any interest accrued thereon or costs payable in respect thereof, in existence on the Filing Date, or which is based on an event, fact, act or omission which occurred in whole or in part prior to the Filing Date, whether at law or in equity, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, any legal, statutory, equitable or fiduciary duty) or by reason of any equity interest, right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise); and together with any security enforcement costs or legal costs associated with any such claim, and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, warranty, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any claim arising from or caused by the termination, disclaimer, rescission, assignment or repudiation by MBAC of any contract, lease or other agreement, whether written or oral, any claim made or asserted against MBAC through any affiliate, subsidiary, associated or related person, or any right or ability of any Person

to advance a claim for an accounting, reconciliation, contribution, indemnity, restitution or otherwise with respect to any matter, grievance, action (including any class action or proceeding before an administrative tribunal), cause or chose in action, whether existing at present or commenced in the future, and including any other claims that would have been claims provable in bankruptcy had MBAC become bankrupt on the Filing Date, including for greater certainty any Equity Claim and any claim against MBAC for indemnification by a Director or Officer in respect of a Director/Officer Claim but excluding any such indemnification claims covered by the Directors' Charge (each, a "**Pre-filing Claim**", and collectively, the "**Pre-filing Claims**");

- ii. any right or claim of any Person against MBAC in connection with any indebtedness, liability or obligation of any kind whatsoever owed by MBAC to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by MBAC on or after the Filing Date of any contract, lease or other agreement whether written or oral (each, a "**Restructuring Period Claim**", and collectively, the "**Restructuring Period Claims**"); and
- iii. any right or claim of any Person against one or more of the Directors or Officers howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future for which any Director or Officer is alleged to be by statute or otherwise by law liable to pay in his or her capacity as a Director or Officer (each a "**Director/Officer Claim**", and collectively, the "**Director/Officer Claims**"),

in each case other than any Excluded Claim;

"**Common Share Consolidation**" has the meaning given to such term in Section 6.5(b)(iii);

"**Common Shares**" means the common shares in the capital of MBAC or MBAC Amalco, as applicable, that are duly issued and outstanding at any time;

"**Consolidation Number**" means 100 Common Shares.

"**Continuance**" means the continuance of MBAC Amalco under the laws of the Cayman Islands.

"**Convenience Class Claims**" excludes a Disputed Distribution Claim and a Disputed Voting Claim and means: (a) Affected Unsecured Claims of an Affected Unsecured Creditor that total less than or equal to CDN\$10,000 in aggregate; and (b) Affected Unsecured Claims of an Affected Unsecured Creditor that total more than CDN\$10,000 in aggregate and for which such Affected Unsecured Creditor has validly elected to value at CDN\$10,000 for purposes of the Plan by filing a Convenience Class Claim Election by the Voting Deadline.

"**Convenience Class Creditor**" means an Affected Unsecured Creditor having a Convenience Class Claim.

"**Convenience Class Claim Election**" means an election, in accordance with the Meeting Order, pursuant to which an Affected Unsecured Creditor with one or more Affected Unsecured Claims, other than a Disputed Distribution Claim or a Disputed Voting Claim, that total in excess of CDN\$10,000 in aggregate has elected by the Voting Deadline to receive only CDN\$10,000 and is thereby deemed to vote in favour of the Plan in respect of such Affected Unsecured Claims and to receive no other entitlements

under the Plan.

"Court" has the meaning given to that term in Recital C;

"Creditor" means any Person having a Claim and includes without limitation the transferee or assignee of a Claim transferred and recognized as a Creditor in accordance with the Claims Procedure Order or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

"Crown" means Her Majesty in right of Canada or a province of Canada;

"Crown Claims" means any Claim of the Crown, for all amounts that were outstanding at the Filing Date and are of a kind that could be subject to a demand under:

- i. subsection 224(1.2) of the ITA;
- ii. any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the ITA and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts;
- iii. any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the ITA, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:
 - a. has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the ITA; or
 - b. is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

"Directors' Charge" has the meaning given to that term in the Initial Order;

"DIP Lender's Charge" has the meaning given to that term in the Initial Order;

"Director" means anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of MBAC;

"Director/Officer Claim" has the meaning given to that term in the definition of Claim;

"Director/Officer Indemnity Claim" means any existing or future right of any Director or Officer of MBAC against MBAC that arose or arises as a result of any Person filing a Proof of Claim (as defined in the Claims Procedure Order) in respect of a Director/Officer Claim in respect of such Director or Officer of MBAC for which such Director or Officer of MBAC is entitled to be indemnified by MBAC;

"Directors' Charge" has the meaning given to that term in the Initial Order;

"Disputed Distribution Claim" means an Affected Unsecured Claim (including a contingent Affected Unsecured Claim which may crystallize upon the occurrence of an event or events occurring after the Filing Date) or such portion thereof which has not been Allowed for distribution purposes in accordance

with the Claims Procedure Order, which is validly disputed for distribution purposes in accordance with the Claims Procedure Order and which remains subject to adjudication for distribution purposes in accordance with the Claims Procedure Order;

"Disputed Distribution Claims Reserve" means the reserve, if any, to be established by MBAC Amalco on the Implementation Date, which shall be comprised of the New Debentures, Unsecured Creditor Common Shares and cash that would have been delivered in respect of Disputed Distribution Claims if such Disputed Distribution Claims had been Allowed Claims as of such date;

"Disputed Voting Claim" means an Affected Unsecured Claim (including a contingent Affected Unsecured Claim which may crystallize upon the occurrence of an event or events occurring after the Filing Date) or such portion thereof which has not been allowed as a Voting Claim, which is validly disputed as of the Voting Deadline in accordance with the Claims Procedure Order and which remains subject to adjudication as of the Voting Deadline in accordance with the Claims Procedure Order;

"Distribution Claim" means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor against MBAC as finally accepted and determined for distribution purposes in accordance with this Claims Procedure Order and the CCAA;

"Eligible Voting Creditors" means Affected Unsecured Creditors holding Voting Claims or Disputed Voting Claims;

"Employee Priority Claims" means the following claims of MBAC's employees and former employees:

- i. claims equal to the amounts that such employees and former employees would have been qualified to receive under paragraph 136(l)(d) of the *Bankruptcy and Insolvency Act* (Canada) if MBAC had become bankrupt on the Filing Date; and
- ii. claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the date of the Sanction Order, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about MBAC's business during the same period.

"Equity Claim" has the meaning set forth in section 2(1) of the CCAA;

"Excluded Claim" means

- i. any claims secured by any of the Charges;
- ii. any Section 5.1(2) Director/Officer Claims;
- iii. any claims that cannot be compromised pursuant to subsection 19(2) of the CCAA;
- iv. any claims of the Brazilian Subsidiaries, the Non-Applicant Entities or the other Applicants against MBAC;
- v. any Secured Claims;
- vi. any Employee Priority Claims against MBAC;
- vii. any Crown Claims against MBAC; and
- viii. any Post-Filing Claims.

"Excluded Creditor" means a Person who has an Excluded Claim, but only in respect of and to the extent of such Excluded Claim;

"Existing Equity Holders" means, collectively, the Existing Shareholders and any other holders of Equity Claims, in their capacities as such;

"Existing Shareholders" means, as the context requires, Registered Holders or beneficial holders of the Existing Shares, in their capacities as such;

"Existing Share Options" means all rights, options, warrants and other securities convertible or exchangeable into equity securities of MBAC;

"Existing Shares" means all common shares of MBAC that are issued and outstanding at the applicable time prior to the Implementation Time;

"Filing Date" means August 4, 2016;

"Governmental Entity" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power;

"Implementation Date" means the Business Day on which this Plan becomes effective, which shall be the Business Day on which the Monitor has filed with the Court the certificate contemplated in Section 10.6 hereof, or such other date as MBAC, the Monitor and the Plan Sponsor may agree;

"Implementation Time" means 12:01 a.m. on the Implementation Date (or such other time as MBAC, the Monitor and the Plan Sponsor may agree);

"Initial Order" has the meaning given to that term in Recital C;

"Interim Funding Debt" means the obligations of the Applicants under the DIP Term Sheet (as defined in the Initial Order) dated August 4, 2016;

"ITA" means the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.);

"Joint Brazil Claim" has the meaning given to that term in Section 4.1(b)(ii);

"Joint Brazil Claim Election" has the meaning given to that term in Section 4.1(b)(ii);

"Law" means any law, statute, order, decree, consent decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada, the United States, Brazil or any other country, or any domestic or foreign state, county, province, city or other political subdivision or of any Governmental Entity;

"Letter of Transmittal" means a letter of transmittal to be used by Registered Holders of Existing Shares to obtain replacement share certificates reflecting the Common Share Consolidation;

"MBAC Amalco" has the meaning given to that term in Section 6.5(b);

"MBAC Group" has the meaning given to that term in Recital G;

"Meeting" means a meeting of the Affected Unsecured Creditors called for the purpose of considering and voting in respect of this Plan;

"Monitor" means Ernst & Young Inc., in its capacity as Court-appointed Monitor of the Applicants in the CCAA Proceedings;

"Monitor's Website" means <http://www.ey.com/ca/mbac>;

"New Board" means the board of directors of MBAC Amalco following implementation of the Plan, the composition and size of which shall be satisfactory to the Plan Sponsor, subject to applicable Law;

"New Common Shares" means the 52,637,491 Common Shares (post-Common Share Consolidation) to be issued by MBAC Amalco on the Implementation Date in accordance with the steps set out in Section 6.5;

"New Debenture" has the meaning given to that term in Section 4.1(b)(i);

"Non-Applicant Entities" means MBAC Brazil Holdings B.V., MBAC Brazil Holdings II B.V., MBAC Brazil Holdings III B.V., MBAC Brazil Holdings IV B.V. and MBAC International Finance B.V.;

"Non-Applicant Entity Claims" means all claims against any of the Non-Applicant Entities, that are the subject of paragraphs 35 through 37 of the Claims Procedure Order, whether or not such claims were filed in accordance with the Claims Procedure Order;

"Officer" means anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of MBAC;

"Option Plan" means the Stock Option Plan of MBAC effective June 10, 2009, as amended from time to time;

"Option Plan Amendment Terms" means those amendments to the Option Plan set out in Schedule "D" hereto;

"Option Grants" means those grants of options to purchase Common Shares of MBAC Amalco set out in Schedule "D" hereto pursuant to the Option Plan;

"Order" means any order of the Court in the CCAA Proceedings;

"Outside Date" means October 6, 2016, as may be extended in accordance with the Support Agreement;

"Person" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Government Entity or any agency, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status;

"Plan" means this plan of compromise and arrangement and any amendments, modifications or supplements hereto made in accordance with the terms hereof or made at the direction of the Court in the Sanction Order or otherwise with the consent of MBAC and the Plan Sponsor, each acting reasonably;

"Plan Resolution" means the resolution of the Affected Unsecured Creditors relating to this Plan considered at the Meeting;

"Plan Sponsor" means Zaff LLC;

"Post-Filing Claim" means any claims against MBAC that arose from the provision of authorized goods and services provided or otherwise incurred on or after the Filing Date in the ordinary course of business, but excluding any Restructuring Period Claim and any claim in respect of services or goods provided prior to the Filing Date notwithstanding that payment may have become due after the Filing Date, which claims shall be Pre-filing Claims;

"Pre-filing Claim" has the meaning given to that term in the definition of Claim;

"Pro Rata Share" means, in respect of Unsecured Creditor Common Shares, the percentage that an Affected Unsecured Creditor's Allowed Affected Unsecured Claim bears to the aggregate of all Allowed Affected Unsecured Claims and all Disputed Distribution Claims other than Convenience Class Claims and Cash Election Claims;

"Registered Holder" means (i) in respect of the Existing Shares, the holder of such Existing Shares as recorded on the share register maintained by the Transfer Agent, and (ii) in respect of the Existing Share Options, the holder of such Existing Share Options as recorded on the books and records of MBAC;

"Released Claims" has the meaning given to it in Section 9.1;

"Required Majority" means a majority in number of Affected Unsecured Creditors representing at least two thirds in value of the Voting Claims of Affected Unsecured Creditors who are entitled to vote at the Meeting in accordance with the Meeting Order and who are present and voting in person or by proxy on the Plan Resolution at the Meeting;

"Restructuring Period Claim" has the meaning given to that term in the definition of Claim;

"Sanction Order" means the Order of the Court sanctioning and approving this Plan and the Arrangement pursuant to section 6(1) of the CCAA and Section 192 of the CBCA, respectively, which shall include such terms as may be necessary or appropriate to (i) give effect to this Plan, in form and substance satisfactory to MBAC and the Plan Sponsor, each acting reasonably, and (ii) allow MBAC to rely on the exemption from registration set forth in section 3(a)(10) of the US Securities Act;

"Section 5.1(2) Director/Officer Claim" means any Director/Officer Claim that is not permitted to be compromised pursuant to section 5.1(2) of the CCAA, but only to the extent not so permitted;

"Secured Claims" means that portion of a Claim that is (i) secured by security validly charging or encumbering property or assets of MBAC (including statutory and possessory liens that create security interests) but only up to the value of such collateral, and (ii) duly and properly perfected in accordance with the relevant legislation in the appropriate jurisdiction as of the Filing Date;

"Settled Excluded Claims" means the Working Capital Debt and the Interim Funding Debt;

"Support Agreement" means the Support Agreement made April 4, 2016 (as amended or restated from time to time) between MBAC and the Plan Sponsor;

"Tax" or "Taxes" means any and all taxes, duties, fees, premiums, assessments, imposts or levies of any kind whatsoever, including all interest, penalties, fines, additions to tax or other additional amounts in respect thereof, and including those levied on, or measured by, or referred to as, income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, stamp, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, countervail and anti-dumping, all licence, franchise and registration fees and all employment insurance, health insurance and Canada, Quebec and other government pension plan premiums or contributions;

"Tax Claim" means any Claim against MBAC for any Taxes in respect of any taxation year or period;

"Tax Obligation" means any amount of tax owing by a person to a Taxing Authority;

"Taxing Authorities" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada and any political subdivision thereof, any Canadian or foreign government regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxation authority or power and **"Taxing Authority"** means anyone of the Taxing Authorities;

"Transfer Agent" means Computershare Investor Services Inc.;

"TSX" means Toronto Stock Exchange;

"TSXV" means TSX Venture Exchange;

"Undeliverable Distribution" has the meaning given to that term in Section 7.3;

"Unsecured Creditor Common Shares" means 604,254 New Common Shares (post-Common Share Consolidation), which number of common shares will be reduced pro rata by the percentage that all Allowed Affected Unsecured Claims that are Convenience Class Claims or Cash Election Claims bears to all Allowed Affected Unsecured Claims;

"US Dollars" or **"US\$"** means the lawful currency of the United States of America;

"US Securities Act" means the *United States Securities Act of 1933*, as amended from time to time, and the rules and regulations promulgated thereunder, or any successor statute;

"US Securities Commission" means the United States Securities and Exchange Commission;

"US Securities Laws" means, collectively, the *Sarbanes-Oxley Act of 2002* ("Sarbanes-Oxley"), the US Securities Act, as amended, the *U.S. Securities Exchange Act of 1934*, as amended, the rules and regulations of the US Securities Commission, the auditing principles, rules, standards and practices applicable to auditors of "issuers" (as defined in Sarbanes-Oxley) promulgated or approved by the Public Company Accounting Oversight Board and, as applicable, the rules of the New York Stock Exchange;

"Voting Claim" means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor against MBAC as finally accepted and determined as of the Voting Deadline, in accordance with the provisions of the Claims Procedure Order and the CCAA;

"Voting Deadline" means 10 a.m. on the Business Day prior to the Meeting;

"Withholding Obligation" has the meaning given to that term in Section 6.8(b);

"Working Capital Debt" means the loans made by the Plan Sponsor to MBAC Sub in the aggregate principal amount of approximately US\$6,148,994 on or before the Filing Date, which loans are secured by a pledge of MBAC Sub's membership interest in MBAC International Holdings Coöperatie U.A.;

"Zaff Contribution" means the contribution by the Plan Sponsor of all of the issued and outstanding shares in the capital of Zaff Ltd. and all partnership interests in Zaff LP and Zaff 2 LP owned by the Plan Sponsor to MBAC Amalco in return for the Zaff Contribution Shares;

"Zaff Contribution Shares" means 10,946,801 New Common Shares (post-Common Share Consolidation), subject to the adjustment described in Section 6.6.

1.2 Certain Rules of Interpretation

For the purposes of this Plan:

- (a) Unless otherwise expressly provided herein, any reference in this Plan to an instrument, agreement or an Order or an existing document or exhibit filed or to be filed means such instrument, agreement, Order, document or exhibit as it may have been or may be amended, modified, or supplemented in accordance with its terms;
- (b) The division of this Plan into articles and sections are for convenience of reference only and do not affect the construction or interpretation of this Plan, nor are the descriptive headings of articles and sections intended as complete or accurate descriptions of the content thereof;
- (c) The use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of this Plan to such Person (or Persons) or circumstances as the context otherwise permits;
- (d) The words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;
- (e) Unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day;
- (f) Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends;
- (g) Unless otherwise provided, any reference to a statute or other enactment of parliament, a legislature or other Governmental Entity includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation;
- (h) References to a specific Recital, Article or Section shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specific Recital, Article or Section of this Plan, whereas the terms "this Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to this Plan and not to any particular Recital, Article, Section or other portion of this Plan and include any documents supplemental hereto; and
- (i) The word "or" is not exclusive.

1.3 Governing Law

This Plan shall be governed by and construed in accordance with the laws of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation or application of this Plan and all proceedings taken in connection with this Plan and its provisions shall be subject to the jurisdiction of the

Court.

1.4 Currency

Unless otherwise stated, all references in this Plan to sums of money are expressed in, and all payments provided for herein shall be made in, Canadian Dollars.

1.5 Date for Any Action

If the date on which any action is required to be taken hereunder by a Person is not a Business Day, such action shall be required to be taken on the next succeeding day which is a Business Day.

1.6 Time

Time shall be of the essence in this Plan.

1.7 Schedules

The following Schedules are annexed to this Plan and are incorporated by reference into this Plan and form a part hereof:

Schedule A – Brazil Restructuring Transaction Terms

Schedule B – New Debenture Terms

Schedule C – Monitor's Certificate

Schedule D – Option Plan Amendment Terms

ARTICLE 2– PURPOSE AND EFFECT OF THIS PLAN

2.1 Purpose

The purpose of this Plan is to facilitate the continuation of the business of the MBAC Group as a going concern, address certain liabilities of the Applicants, and, in conjunction with the Brazilian Restructuring Transaction, effect a recapitalization transaction on an expedited basis to provide a stronger financial foundation for the MBAC Group to continue to work towards its operational and financial goals from and after the Implementation Date in the expectation that all Persons with an economic interest in the MBAC Group will derive a greater benefit from the implementation of this Plan than would otherwise result.

2.2 Effectiveness

Subject to the satisfaction, completion or waiver (to the extent permitted pursuant to Section 10.4) of the conditions precedent set out herein, this Plan will become effective in the sequence described in Section 6.5 from and after the Implementation Time and shall be binding on and enure to the benefit of MBAC, MBAC Sub, the Affected Unsecured Creditors, all Existing Equity Holders, all holders of Equity Claims, the Plan Sponsor, and all other Persons as provided for herein, or subject to, this Plan and their respective successors and assigns and their respective heirs, executors, administrators and other legal representatives, successors and assigns.

2.3 Persons Not Affected

This Plan does not affect the holders of Excluded Claims to the extent of those Excluded Claims. Nothing in this Plan shall affect the MBAC Group's rights and defences, both legal and equitable, with respect to

any Excluded Claims, including, but not limited to, all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Excluded Claims. Nothing herein shall constitute a waiver of any right of MBAC to dispute the quantum of an Excluded Claim.

ARTICLE 3– CLASSIFICATION, VOTING CLAIMS AND RELATED MATTERS

3.1 Classes

For the purposes of considering and voting on the Plan Resolution, there shall be one class of stakeholders, consisting of Affected Unsecured Creditors (the "**Affected Creditor Class**").

3.2 Meeting

- (a) The Meeting shall be held in accordance with this Plan, the Meeting Order and any further Order in the CCAA Proceedings. Subject to the terms of any further Order in the CCAA Proceedings, the only Persons entitled to notice of, to attend or to speak at the Meeting are the Eligible Voting Creditors (or their respective duly appointed proxyholders), representatives of the Monitor, MBAC, the Plan Sponsor, all such parties' financial and legal advisors, the Chair (as defined in the Meeting Order), the Secretary (as defined in the Meeting Order) and the Scrutineers (as defined in the Meeting Order). Any other person may be admitted to the Meeting only by invitation of MBAC or the Chair.
- (b) For the purposes of voting at the Meeting, each Affected Unsecured Creditor that is not a Convenience Class Creditor and is an Eligible Voting Creditor shall be entitled to one vote equal to the dollar value of their Allowed Affected Unsecured Claim as a member of the Affected Creditor Class.
- (c) Convenience Class Creditors shall be deemed to vote in favour of the Plan.

3.3 Required Majority

In order to be approved, this Plan must receive the affirmative vote of the Required Majority of the Affected Creditor Class.

3.4 Excluded Claims

Excluded Creditors shall not be entitled to vote or (except as otherwise expressly stated in the Meeting Order) attend in respect of their Excluded Claims at any meeting to consider and approve this Plan.

3.5 Existing Equity Holders and Holders of Equity Claims

Existing Equity Holders and holders of Equity Claims shall not be entitled to attend or vote in respect of their Equity Claims at any meeting to consider and approve this Plan.

3.6 Crown Claims

All Crown Claims in respect of all amounts that were outstanding at the Filing Date shall be paid in full to the Crown within six months of the Sanction Order, as required by subsection 6(3) of the CCAA.

3.7 Payments to Employees

Immediately after the date of the Sanction Order, MBAC will pay in full all Employee Priority Claims, if

any, to its employees and former employees.

ARTICLE 4 – TREATMENT OF CLAIMS

4.1 Treatment of Affected Unsecured Creditors

- (a) Following the Implementation Time and in accordance with the steps and sequence as set forth in this Plan, each Affected Unsecured Creditor that is a Cash Election Creditor shall receive a cash payment in the amount of 5.5% of its Allowed Affected Unsecured Claim from the Cash Distribution Pool by cheque sent by prepaid ordinary mail (each such payment being a “**Cash Election Distribution**”) and shall not be entitled to receive any further distribution under the Plan.
- (b) Following the Implementation Time and in accordance with the steps and sequence as set forth in this Plan, each Affected Unsecured Creditor that is not a Cash Election Creditor or a Convenience Class Creditor shall receive:
 - (i) its Pro Rata Share of the Unsecured Creditor Common Shares and a new subordinated convertible debenture issued by MBAC Amalco in a principal amount equal to 10% of such Affected Unsecured Creditor’s Allowed Affected Unsecured Claim and having substantially the terms set out in Schedule “B” hereto (the “**New Debenture**”) and shall not be entitled to receive any further distribution under the Plan; or
 - (ii) if elected by an Affected Unsecured Creditor whose Affected Unsecured Claim is a claim for which one of the Brazilian Subsidiaries is also liable (a “**Joint Brazil Claim**”), on or before the Voting Deadline, such Affected Unsecured Creditor may elect, in accordance with the Meeting Order (the “**Joint Brazil Claim Election**”), to receive such Affected Unsecured Creditor’s entitlement, if any, under the Brazilian Restructuring Transaction in the Brazilian Proceeding, and such electing Affected Unsecured Creditor shall not be entitled to receive any further distribution under the Plan.
- (c) Following the Implementation Time and in accordance with the steps and sequence as set forth in this Plan, each Affected Unsecured Creditor that is a Convenience Class Creditor shall receive a distribution from the Cash Distribution Pool in the amount of its Convenience Class Claim by cheque sent by pre-paid ordinary mail and shall not be entitled to receive any further distribution under the Plan.

4.2 Treatment of Existing Equity Holders

- (a) Each Existing Shareholder shall retain its Existing Shares subject to the Common Share Consolidation and in accordance with the steps and sequences set forth herein.
- (b) Pursuant to this Plan and in accordance with the steps and sequences set forth herein, all Existing Share Options shall be cancelled and shall be deemed to be cancelled without the need for any repayment of capital thereof or any other liability, payment or compensation therefor and for greater certainty, no holders of Existing Share Options shall be entitled to receive any interest, dividends, premium or other payment in connection therewith.

4.3 Equity Claims

All Equity Claims shall be fully, finally and irrevocably and forever compromised, released, discharged, cancelled and barred on the Implementation Date. Holders of Equity Claims shall not receive any

consideration or distributions under this Plan and shall not be entitled to vote on this Plan at the Meeting. Notwithstanding the foregoing, Existing Shareholders shall be entitled to continue to hold their Existing Shares in accordance with the terms of this Plan, subject to the Common Share Consolidation.

ARTICLE 5 – MEETING

5.1 Meeting

The Meeting to consider and vote on this Plan shall be conducted in accordance with the terms of the Claims Procedure Order and the Meeting Order.

5.2 Acceptance of Plan

If this Plan is approved by the Required Majority entitled to vote at the Meeting, then this Plan shall be deemed to have been agreed to, accepted and approved by the Affected Unsecured Creditors and shall be binding upon all Affected Unsecured Creditors, if the Sanction Order is granted and the conditions described in Section 10.3 hereof have been satisfied or waived, as applicable.

ARTICLE 6 - IMPLEMENTATION

6.1 Administration and Directors' Charges

On the Implementation Date, all outstanding, invoiced obligations, liabilities, fees and disbursements secured by the Administration Charge and the Directors' Charge shall be fully paid by MBAC. Upon receipt by the Monitor of confirmation from each of the beneficiaries of the Administration Charge and the Directors' Charge that payments of the amounts secured by the Administration Charge and the Directors' Charge have been made, the Monitor shall file a certificate with the Court confirming same and thereafter, the Administration Charge and the Directors' Charge shall be and be deemed to be discharged from the assets of the Applicants, without the need for any other formality.

6.2 Corporate Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under this Plan involving corporate action of MBAC or MBAC Sub will occur and be effective as of the Implementation Date (or such other date as MBAC and the Plan Sponsor may agree), and will be authorized and approved under this Plan and by the Court, where appropriate, as part of the Sanction Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of MBAC or MBAC Sub. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of MBAC or MBAC Sub, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by this Plan shall be effective and no such agreement shall have any force or effect.

6.3 Fractional Interests

No certificates representing fractional Common Shares shall be allocated under this Plan, and fractional share interests shall not entitle the owner thereof to vote or to any rights of a shareholder of MBAC. Any legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to fractional Common Shares pursuant to this Plan shall be rounded down to the nearest whole number without compensation therefor.

6.4 Pre-Implementation Date Transactions

The following transactions shall be effected prior to the implementation date of the Plan:

- (a) not less than ten Business Days before the Implementation Date, the Plan Sponsor shall irrevocably provide to the Monitor, for the Monitor to hold on behalf of the Plan Sponsor for distribution in accordance with this Plan, the Cash Distribution Pool Amount.

6.5 Implementation Date Transactions

Commencing at the Implementation Time, the following events or transactions will occur, or be deemed to have occurred and be taken and effected, in the following order in five minute increments and at the times set out in this Section 6.5 (or in such other manner or order or at such other time or times as MBAC and the Plan Sponsor may agree, acting reasonably), without any further act or formality required on the part of any Person, except as may be expressly provided herein:

- (a) The following shall occur concurrently:
 - (i) any and all Existing Share Options shall be cancelled and shall be deemed to be cancelled without the need for any repayment of capital thereof or any other compensation therefor and shall cease to be of any further force or effect;
 - (ii) all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without any consideration or distributions therefor (for greater certainty, the Existing Shares shall be retained by the Existing Shareholders, subject to the Common Share Consolidation);
 - (iii) MBAC shall incorporate a new subsidiary corporation under the laws of the Cayman Islands and the membership interest in MBAC International Holdings Coöperatie U.A. that is held by MBAC shall be transferred to that newly incorporated subsidiary of MBAC in exchange for fair market value consideration;
- (b) The Articles of Arrangement shall be filed pursuant to the CBCA and the Arrangement shall be implemented pursuant to which:
 - (i) MBAC, MBAC Arrangeco Inc. and MBAC Sub shall be amalgamated with the same effect as under Section 184 of the *Canada Business Corporations Act* (the "**Amalgamation**") and the amalgamated corporation shall be called "MBAC Fertilizer Corp." ("**MBAC Amalco**");
 - (ii) the articles of MBAC Amalco shall be amended to effect a consolidation (the "**Common Share Consolidation**") of the issued and outstanding common shares of MBAC Amalco on the basis of one post-consolidation Common Share of MBAC Amalco for each 100 Common Shares of MBAC Amalco outstanding immediately prior to the Common Share Consolidation. Any fractional interests in the consolidated Common Shares will, without any further act or formality, be cancelled without payment of any consideration therefor. Following the completion of such consolidation, the stated capital of the Common Shares of MBAC Amalco shall be equal to the stated capital of the Common Shares of MBAC Amalco immediately prior to consolidation;
 - (iii) MBAC Amalco shall be authorized with the same effect as under Section 188 of the *Canada Business Corporations Act* to continue under the laws of the Cayman Islands (the "**Continuance**");

- (c) Immediately prior to acceptance of the Continuance of MBAC Amalco under the laws of the Cayman Islands and the subsequent implementation of the Brazilian Restructuring Transaction:
- (i) In exchange for, and in full and final settlement of, each Allowed Affected Unsecured Claim other than the Convenience Class Claims, the Cash Distribution Claims and the Joint Brazil Claims for which an election under Section 4.1(b)(ii) has been made, MBAC Amalco shall issue to each holder of an Allowed Affected Unsecured Claim, other than a Convenience Class Claim or a Cash Distribution Claim or a Joint Brazil Claim, its Pro Rata Share of Unsecured Creditor Common Shares and its New Debenture;
 - (ii) In exchange for, and in full and final settlement of, each Convenience Class Claim, the Monitor shall pay, on behalf of MBAC Amalco, from the Cash Distribution Pool, to each Convenience Class Creditor, the amount of such Convenience Class Creditor's Convenience Class Claim;
 - (iii) In exchange for, and in full and final settlement of, each Cash Election Unsecured Creditor's Allowed Affected Unsecured Claim, the Monitor shall pay, on behalf of MBAC Amalco from the Cash Distribution Pool, to each Cash Election Unsecured Creditor, the amount of such Cash Election Unsecured Creditor's Cash Election Distribution;
 - (iv) In accordance with the Bridge Financing Settlement, the Bridge Financing Shares, as may be adjusted pursuant to Section 6.7, shall be issued to the Plan Sponsor in full and final settlement of all claims of the Plan Sponsor against any entity in the MBAC Group under the Working Capital Debt and the Interim Funding Debt and in connection with the funding of the Cash Distribution Pool Amount, and the DIP Lender's Charge shall be deemed discharged on the Implementation Date without any further act or formality;
 - (v) The directors of MBAC immediately prior to the Implementation Time shall be deemed to have resigned and the New Board shall be deemed to have been appointed as the board of directors of MBAC Amalco.
 - (vi) The Option Plan Amendment Terms shall become effective and the Option Grants shall be implemented and shall be deemed to have been approved by all requisite shareholder or other corporate authorizations;
- (d) Immediately following the acceptance of the continuance of MBAC Amalco under the laws of the Cayman Islands and the completion of the Continuance and the subsequent implementation of the Brazilian Restructuring Transaction:
- (i) The BV Contribution shall be deemed to have been completed and the BV Contribution Shares shall be issued to the Plan Sponsor;
 - (ii) The Zaff Contribution shall be deemed to have been completed and the Zaff Contribution Shares, as may be adjusted pursuant to Section 6.6, shall be issued to the Plan Sponsor;
 - (iii) The releases and injunctions referred to in Section 9 shall become effective.
 - (iv) MBAC Amalco shall pay: (i) all of the reasonable fees and expenses secured by the Administration Charge, including a reserve amount as determined by the Monitor for the purposes of completing the administration of the CCAA

Proceedings and obtaining the Monitor's discharge; and (ii) all valid claims secured by the Directors' Charge.

- (v) The Monitor shall deliver to MBAC Amalco any cash remaining in Cash Distribution Pool that is an Undeliverable Distribution (as defined in Section 7.3 below) to be held by MBAC Amalco in escrow and dealt with in accordance with Section 7.3 below.
- (vi) The Monitor shall deliver to MBAC Amalco any cash remaining in the Cash Distribution Pool that would be payable on account of a Disputed Distribution Claim for which a Cash Election has been made to be held by MBAC Amalco in a segregated account constituting the Disputed Distribution Claims Reserve to be dealt with in accordance with Section 8.2 below.

6.6 Zaff Contribution Adjustment

- (a) The number of Zaff Contribution Shares to be issued to the Plan Sponsor has been calculated based upon Zaff LP and Zaff 2 LP holding the following common shares in each of GB Minerals Ltd. and Stonegate Agricom Ltd. as of the Implementation Date and based upon the Plan Sponsor owning 100% of the limited partnership units in each of Zaff LP and Zaff 2 LP:
 - (i) GB Minerals Ltd: 396,551,930 common shares of GB Minerals Ltd. (the "**Prescribed GB Shares**"). 9,913,798 of the Zaff Contribution Shares (the "**GB Contribution Shares**") are to be received by the Plan Sponsor on account of its indirect contribution to MBAC Amalco of these common shares in GB Minerals Ltd.; and
 - (ii) Stonegate Agricom Ltd: 154,950,462 common shares of Stonegate Agricom Ltd. (the "**Prescribed Stonegate Shares**"). 1,033,003 of the Zaff Contribution Shares (the "**Stonegate Contribution Shares**") are to be received by the Plan Sponsor on account of its indirect contribution to MBAC Amalco of these common shares in Stonegate Agricom Ltd.

If, at the Implementation Date, Zaff LP and Zaff 2 LP, in aggregate, hold common shares of Stonegate Agricom Ltd. representing more or less than the Prescribed Stonegate Shares, then the number of Stonegate Contribution Shares to be issued to the Plan Sponsor on the Implementation Date shall be adjusted upward or downward for any increase or decrease, as applicable, in Zaff LP's and Zaff 2 LP's aggregate ownership of Stonegate Agricom Ltd. common shares at a ratio of 150 common shares of Stonegate Agricom Ltd. for each common share of MBAC Amalco (the "**Stonegate Ratio**"). To the extent that any such increase or decrease in common shares of Stonegate Agricom Ltd. held by Zaff LP or Zaff 2 LP is caused by any share consolidation, share split, share dividend or any other modification to the equity capital of Stonegate Agricom Ltd. that results in a modification to the shareholdings of shareholders of Stonegate Agricom Ltd. generally, the foregoing adjustment shall not be made and, instead of the foregoing adjustment, the Stonegate Ratio and the Prescribed Stonegate Shares shall be adjusted as necessary to eliminate the impact of such modification in the equity capital of Stonegate Agricom Ltd. upon the number of Zaff Contribution Shares to be issued.

If, at the Implementation Date, Zaff LP and Zaff 2 LP, in aggregate, hold common shares of GB Minerals Ltd. representing more or less than the Prescribed GB Shares, then the number of GB Contribution Shares to be issued to the Plan Sponsor on the Implementation Date shall be adjusted upward or downward for any increase or decrease, as applicable, in Zaff LP's and Zaff 2 LP's aggregate ownership of GB Minerals

Ltd. common shares at a ratio of 2.5 common shares of MBAC Amalco for each 100 common shares of GB Minerals Ltd. (the "**GB Ratio**"). To the extent that any such increase or decrease in common shares of GB Minerals Ltd. held by Zaff LP or Zaff 2 LP is caused by any share consolidation, share split, share dividend or any other modification to the equity capital of GB Minerals Ltd. that results in a modification to the shareholdings of shareholders of GB Minerals Ltd. generally, the foregoing adjustment shall not be made and, instead of the foregoing adjustment, the GB Ratio and the Prescribed GB Shares shall be adjusted as necessary to eliminate the impact of such modification in the equity capital of GB Minerals Ltd. upon the number of Zaff Contribution Shares to be issued.

If, at the Implementation Date, the Plan Sponsor owns less than 100% of the limited partnership units of Zaff LP or Zaff 2 LP, then the number of GB Contribution Shares and Stonegate Contribution Shares to be issued to the Plan Sponsor shall be reduced pro rata to reflect the minority interest of third parties in Zaff LP or Zaff 2 LP and, indirectly, such minority interest in the shares of GB Minerals Ltd. and Stonegate Agricom Ltd. held by Zaff LP and Zaff 2 LP.

6.7 Bridge Financing Settlement Adjustment

The number of Bridge Financing Shares to be issued hereunder in connection with the Bridge Financing Settlement has been calculated on the assumption that the Cash Distribution Pool Amount, Working Capital Debt and the Interim Funding Debt will total \$10,290,000 on the Implementation Date. The number of Bridge Financing Shares to be issued under the Plan will be subject to a pro rata increase or decrease if the Cash Distribution Pool Amount, Working Capital Debt and Interim Financing Debt are greater than or less than \$10,290,000, respectively on the Implementation Date.

6.8 Tax Matters

- (a) Notwithstanding any provisions of the Plan, each Person that receives any distribution, disbursement or other payment pursuant to the Plan shall have sole and exclusive responsibility for the satisfaction and payment of any Tax Obligations imposed on such Person by any Taxing Authority on account of such distribution, disbursement or payment.
- (b) Any payor shall be entitled to deduct and withhold and remit from any distribution, payment or consideration otherwise payable to any Person pursuant to the Plan such amounts as are required (any "**Withholding Obligation**") to be deducted and withheld with respect to such payment under the ITA, or any provision of federal, provincial, territorial, state, local or foreign tax law, in each case, as amended or succeeded. For greater certainty, no distribution, payment or other consideration should be made to or on behalf of a Person until such person has delivered to the Monitor and MBAC or MBAC Amalco such documentation prescribed by Applicable Law or otherwise reasonably required by MBAC or MBAC Amalco as will enable MBAC or MBAC Amalco to determine whether or not, and to what extent, such distribution, payment or consideration to such Person is subject to any Withholding Obligation imposed by any Taxing Authority.
- (c) All distributions made by or on behalf of MBAC and MBAC Amalco pursuant to the Plan shall be first in satisfaction of the portion of Affected Unsecured Claims that are not subject to any Withholding Obligation.
- (d) To the extent that amounts are withheld or deducted and paid over to the applicable Taxing Authority, such withheld or deducted amounts shall be treated for all purposes of the Plan as having been paid to such Person as the remainder of the payment in respect

of which such withholding and deductions were made. No gross-up or other adjustment will be made to any distributions to Affected Unsecured Creditors under the Plan on account of any amounts deducted or withheld from any distribution as a result of any Withholding Obligation.

- (e) For the avoidance of doubt, it is expressly acknowledged and agreed that the Monitor will not make distributions, payments or disbursements and that all such distributions payments and disbursements shall be made on behalf of MBAC or MBAC Amalco and no provision hereof shall be construed to have any other effect.

ARTICLE 7 – ISSUANCE AND DISTRIBUTION OF NEW COMMON SHARES

7.1 Issuance of New Common Shares

All New Common Shares issued and outstanding as part of the implementation of this Plan shall be deemed to be issued and outstanding as fully-paid and non-assessable. The amount added to the stated capital of the Common Shares as a result of the issuance of New Common Shares in accordance with this Plan shall be equal to the fair market value of the consideration received by MBAC Amalco for the issuance of such New Common Shares.

7.2 Delivery of New Common Shares, New Debentures and Cash Distributions

- (a) MBAC Amalco shall use its commercially reasonable best efforts to cause the delivery of the New Common Shares and the New Debentures to be distributed under this Plan no later than the second Business Day following the Implementation Date (or such other date as MBAC Amalco and the Plan Sponsor may agree).
- (b) The delivery of Unsecured Creditor Common Shares and New Debentures to Affected Unsecured Creditors in consideration for their Affected Unsecured Claims will be made by delivery of a share certificate and a New Debenture to each of the Affected Unsecured Creditors based on registration and delivery instructions received by the Monitor in writing from each Affected Unsecured Creditor no less than 10 Business Days prior to the Implementation Date.
- (c) The delivery of the BV Contribution Shares and the Zaff Contribution Shares will be made (at the election of MBAC Amalco with the consent of the Monitor and the Plan Sponsor) by delivery of a share certificate to the Plan Sponsor based on registration and delivery instructions received by the Monitor in writing no less than 10 Business Days prior to the Implementation Date.
- (d) Unless a securities law legend is not required by US Securities Laws, share certificates and New Debentures delivered pursuant to this Section 7.2 shall have legends affixed thereon.

7.3 Undeliverable Distributions

If any distribution of New Common Shares or any portion of the Cash Distribution Pool Amount is undeliverable (that is for greater certainty that cannot be properly registered or delivered to the intended recipient because of inadequate or incorrect registration or delivery information or otherwise) (an “**Undeliverable Distribution**”), MBAC Amalco shall hold such Undeliverable Distribution in escrow, and administered in accordance with this Section 7.3. No further distributions in respect of an Undeliverable Distribution shall be made unless and until MBAC Amalco is notified by the applicable Person of its current address and/or registration information, as applicable, at which time MBAC Amalco shall make such distributions to such Person. All claims for Undeliverable Distributions must be made on or before the date that is the 365th day following the Implementation Date, after which the right to receive

distributions under this Plan in respect of such an Undeliverable Distribution shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without any compensation therefor, notwithstanding any federal, provincial, or state laws to the contrary, and any New Common Shares that are the subject of such Undeliverable Distribution shall be cancelled and any portion of the Cash Distribution Pool Amount shall be returned to the Plan Sponsor.

ARTICLE 8 – PROCEDURE FOR DISTRIBUTIONS REGARDING DISPUTED DISTRIBUTION CLAIMS

8.1 No Distribution Pending Allowance

An Affected Unsecured Creditor holding a Disputed Distribution Claim will not be entitled to receive a distribution under the Plan in respect of such Disputed Distribution Claim or any portion thereof unless and until, and then only to the extent that, such Disputed Distribution Claim becomes an Allowed Affected Unsecured Claim.

8.2 Distributions After Disputed Distribution Claims Resolved

- (a) Distributions of Unsecured Creditor Common Shares, the New Debentures or any portion of the Cash Distribution Pool Amount in relation to a Disputed Distribution Claim of an Affected Unsecured Creditor will be held by MBAC Amalco in a segregated account constituting the Disputed Distribution Claims Reserve to be dealt with in accordance with this Section, for the benefit of the Affected Unsecured Creditors with Allowed Affected Unsecured Claims until the final determination of the Disputed Distribution Claim in accordance with the Claims Procedure Order and this Plan.
- (b) To the extent that any Disputed Distribution Claim becomes an Allowed Affected Unsecured Claim in accordance with this Plan, MBAC Amalco shall distribute to the holder of such Allowed Affected Unsecured Claim, that number of Unsecured Creditor Common Shares and its New Debenture or that portion of the Cash Distribution Pool Amount from the Disputed Distribution Claims Reserve equal to such Affected Unsecured Creditor's Pro Rata Share of Unsecured Creditor Common Shares and its entitlement to the New Debentures under the Plan or such Affected Unsecured Creditor's entitlement from the Cash Distribution Pool, as applicable.
- (c) On the date that all Disputed Distribution Claims have been finally resolved in accordance with the Claims Procedure Order and any required distributions contemplated in section (b) have been made, if (i) the aggregate number of Unsecured Creditor Common Shares remaining in the Disputed Distribution Claims Reserve is less than or equal to 500 (after the consolidation described in Section 6.5(e)), MBAC Amalco shall cancel those Unsecured Creditor Common Shares; or (ii) the aggregate number of Unsecured Creditor Common Shares remaining in the Disputed Distribution Claims Reserve is equal to or greater than 500 (after the consolidation described in Section 6.5(e)), MBAC Amalco shall distribute such Unsecured Creditor Common Shares to the Affected Unsecured Creditors with Allowed Affected Unsecured Claims other than Convenience Class Claims, Cash Distribution Claims or Joint Brazil Claims for which the Joint Brazil Claim Election has been made such that after giving effect to such distributions each such Affected Unsecured Creditor has received its applicable Pro Rata Share of such Unsecured Creditor Common Shares.
- (d) On the date that all Disputed Distribution Claims have been finally resolved in accordance with the Claims Procedure Order and any required distributions contemplated in Section (b) have been made, if any New Debentures remain in the Disputed Distribution Claims Reserve then MBAC Amalco shall cancel those New

Debentures.

- (e) On the date that all Disputed Distribution Claims have been finally resolved in accordance with the Claims Procedure Order, and any required distributions contemplated in section (b) have been made, if any cash remains in the Disputed Distribution Claims Reserve, such cash shall be returned to the Plan Sponsor.

ARTICLE 9– RELEASES

9.1 Release

- (a) On the Implementation Date, the following shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred:
 - (i) all Affected Unsecured Claims;
 - (ii) all Settled Excluded Claims;
 - (iii) all Equity Claims other than, for greater certainty, the holding by Existing Shareholders of their Existing Shares as consolidated pursuant to the Common Share Consolidation;
 - (iv) all Director/Officer Claims;
 - (v) all Non-Applicant Entity Claims;
 - (vi) any and all demands, claims, actions, causes of action, counterclaims, suits, debts, covenants, damages, judgments, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert, against the Applicants, the Plan Sponsor, the Monitor, and each of their respective financial advisors, legal counsel, agents, directors, officers or partners, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Implementation Date that are in any way relating to, arising out of or in connection with (i) the restructuring, disclaimer, rescission, breach or termination of any contract, lease, agreement or other arrangement, whether written or oral; (ii) the business and affairs of the Applicants or their subsidiaries; (iii) the Existing Shares; (iv) the Existing Share Options; (v) Equity Claims; (vi) the Support Agreement; (vii) this Plan; or (viii) the CCAA Proceedings; provided that nothing herein shall waive, release, discharge, cancel or bar any right to enforce the obligations under this Plan or any Excluded Claim.

(collectively, the “Released Claims”).
- (b) All Persons (regardless of whether or not such Persons are Affected Unsecured Creditors) are permanently and forever barred, estopped, stayed and enjoined, on and after the Implementation Time, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) in respect of a Released Claim; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or

means, directly or indirectly, any judgment, award, decree or order in respect of a Released Claim; or (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, or for breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the parties who is the subject of a Released Claim.

9.2 Timing of Releases and Injunctions

All releases and injunctions set forth in this Article 9 shall become effective on the Implementation Date at the time or times and in the manner set forth in Section 6.5 hereof.

ARTICLE 10 – COURT SANCTION, CONDITIONS PRECEDENT AND IMPLEMENTATION

10.1 Application for Sanction Order

If this Plan is approved by the Required Majority, MBAC shall apply for the Sanction Order on the date set for the hearing for the Sanction Order or such later date as the Court may set.

10.2 Sanction Order

The Sanction Order shall, among other things, declare that:

- (a) this Plan (including the arrangements and releases set out herein) is fair and reasonable and has been sanctioned and approved pursuant to section 6 of the CCAA and will be binding and effective as herein set out on the Applicants, all Affected Unsecured Creditors, all holders of Equity Claims and all other Persons as provided for in this Plan or in the Sanction Order;
- (b) the Arrangement, including the Continuance, the Amalgamation and the Common Share Consolidation are approved;
- (c) subject to the performance by MBAC and MBAC Amalco of their obligations under this Plan, and except to the extent expressly contemplated by this Plan or the Sanction Order, all obligations or agreements to which MBAC is a party immediately prior to the Implementation Time, will be and shall remain in full force and effect as at the Implementation Date in respect of MBAC Amalco, unamended except as they may have been amended by agreement of the parties subsequent to the Filing Date, and no Person who is a party to any such obligations or agreements shall, following the Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, option, dilution or other remedy) or make any demand under or in respect of any such obligation or agreement, by reason of:
 - (i) any defaults or events of default arising as a result of the insolvency of MBAC prior to the Implementation Date;
 - (ii) any change of control of MBAC or MBAC Amalco arising from implementation of

- this Plan;
- (iii) the fact that MBAC or MBAC Amalco has sought or obtained relief under the CCAA or that this Plan has been implemented by MBAC;
 - (iv) the effect on MBAC or MBAC Amalco of the completion of any of the transactions contemplated by this Plan;
 - (v) any compromises or arrangements effected pursuant to this Plan; or
 - (vi) any other event(s) which occurred on or prior to the Implementation Date which would have entitled any Person to enforce rights and remedies, subject to any express provisions to the contrary in any agreements entered into with MBAC after the Filing Date.
- (d) the releases effected by this Plan shall be approved, and declared to be binding and effective as of the Implementation Date upon all Affected Unsecured Creditors, holders of Equity Claims, the Monitor and all other Persons affected by this Plan and shall enure to the benefit of all such Persons; and
- (e) from and after the Implementation Date, all Persons with an Affected Unsecured Claim shall be deemed to (i) have consented and agreed to all of the provisions of this Plan as an entirety; and (ii) each Affected Unsecured Creditor shall be deemed to have granted, and executed and delivered to the Applicants all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan in its entirety.

10.3 Conditions to Plan Implementation

The implementation of this Plan shall be conditional upon the fulfillment, satisfaction or waiver (to the extent permitted by Section 10.4 hereof) of the following conditions:

- (a) The Court shall have granted the Sanction Order, the operation and effect of which shall not have been stayed, reversed or amended, and in the event of an appeal or application for leave to appeal, final determination shall have been made by the applicable appellate court;
- (b) No Applicable Law shall have been passed and become effective, the effect of which makes the consummation of this Plan illegal or otherwise prohibited;
- (c) All necessary judicial consents and any other necessary or desirable third party consents, if any, to deliver and implement all matters related to this Plan shall have been obtained;
- (d) All documents necessary to give effect to all material provisions of this Plan (including the Sanction Order, this Plan, the Common Share Consolidation, the Continuance and the Amalgamation and all documents related thereto) shall have been executed and/or delivered by all relevant Persons in form and substance satisfactory to MBAC and the Plan Sponsor;
- (e) All material filings under applicable Laws shall have been made and any material regulatory consents or approvals that are required in connection with this Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated;
- (f) All conditions to implementation of this Plan set out in the Support Agreement shall have

been satisfied or waived in accordance with their terms and the Support Agreement shall not have been terminated; and

- (g) The Brazilian Restructuring Transaction shall have been approved by the applicable court in the Brazilian Proceeding on terms consistent with the Support Agreement and this Plan and all steps required to be taken to permit the Brazilian Restructuring Transaction to be implemented, as contemplated in Section 6.5 hereof, shall have occurred.

10.4 Waiver of Conditions

MBAC and the Plan Sponsor may at any time and from time to time waive the fulfillment or satisfaction, in whole or in part, of the conditions set out herein, to the extent and on such terms as such parties may agree to; provided, however, that the conditions set out in Section 10.3(a) and (g) cannot be waived.

10.5 Implementation Provisions

If the conditions contained in Section 10.3 are not satisfied or waived (to the extent permitted under Section 10.4) by the Outside Date, unless MBAC and the Plan Sponsor agree in writing to extend such period, this Plan and the Sanction Order shall cease to have any further force or effect and will not be binding on any Person.

10.6 Monitor's Certificate of Plan Implementation

Upon written notice from MBAC (or counsel on their behalf) and the Plan Sponsor to the Monitor that the conditions to Plan implementation set out in Section 10.3, have been satisfied or waived, the Monitor shall, as soon as possible following receipt of such written notice, deliver to MBAC, and file with the Court, a certificate which states that all conditions precedent set out in Section 10.3 have been satisfied or waived and that the Implementation Date has occurred, in substantially the form as the certificate attached as Schedule "C" to this Plan.

ARTICLE 11 – GENERAL

11.1 Waiver of Defaults

Subject to the performance by MBAC and MBAC Amalco of their obligations under this Plan, and except to the extent expressly contemplated by this Plan or the Sanction Order, no Person who is a party to any obligations or agreements with MBAC or MBAC Amalco shall, following the Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, option, dilution or other remedy) or make any demand under or in respect of any such obligation or agreement, by reason of:

- (a) any defaults or events of default arising as a result of the insolvency of MBAC or MBAC Sub prior to the Implementation Date;
- (b) any change of control of MBAC, MBAC Sub or MBAC Amalco arising from implementation of this Plan;
- (c) the fact that MBAC or MBAC Sub has sought or obtained relief under the CCAA or that this Plan or the Brazilian Restructuring Transaction has been implemented by the MBAC Group;
- (d) the effect on MBAC, MBAC Sub or MBAC Amalco of the completion of any of the transactions contemplated by this Plan or the Brazilian Restructuring Transaction;

- (e) any compromises or arrangements effected pursuant to this Plan or the Brazilian Restructuring Transaction; or
- (f) any other event(s) which occurred on or prior to the Implementation Date which would have entitled any Person to enforce rights and remedies, subject to any express provisions to the contrary in any agreements entered into with MBAC, MBAC Sub or MBAC Amalco after the Filing Date.

For greater certainty, nothing in this paragraph 11.1 shall waive, compromise or discharge any obligations of MBAC or MBAC Amalco in respect of any Excluded Claim.

11.2 Deeming Provisions

In this Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

11.3 Non-Consummation

MBAC reserves the right to revoke or withdraw this Plan at any time prior to the Implementation Date, with the consent of the Monitor and the Plan Sponsor.

If the Implementation Date does not occur on or before the Outside Date (as the same may be extended in accordance with the terms hereof and of the Support Agreement), or if this Plan is otherwise withdrawn in accordance with its terms: (a) this Plan shall be null and void in all respects, and (b) nothing contained in this Plan, and no acts taken in preparation for consummation of this Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against the MBAC Group, their respective successors or any other Person; (ii) prejudice in any manner the rights of the MBAC Group, their respective successors or any other Person in any further proceedings involving the MBAC Group or their respective successors; or (iii) constitute an admission of any sort by the MBAC Group, their respective successors or any other Person.

11.4 Modification of Plan

- (a) MBAC may, at any time and from time to time, amend, restate, modify and/or supplement this Plan with the consent of the Monitor and the Plan Sponsor, provided that any such amendment, restatement, modification or supplement must be contained in a written document that is filed with the Court and:
 - (i) if made prior to or at the Meeting: (A) the Monitor, MBAC or the Chair (as defined in the Meeting Order) shall communicate the details of any such amendment, restatement, modification and/or supplement to Affected Unsecured Creditors and other Persons present at the Meeting prior to any vote being taken at the Meeting; (B) MBAC shall provide notice to the service list of any such amendment, restatement, modification and/or supplement and shall file a copy thereof with the Court forthwith and in any event prior to the Court hearing in respect of the Sanction Order; and (C) the Monitor shall post an electronic copy of such amendment, restatement, modification and/or supplement on the Monitor's Website forthwith and in any event prior to the Court hearing in respect of the Sanction Order; and
 - (ii) if made following the Meeting: (A) MBAC shall provide notice to the service list of any such amendment, restatement, modification and/or supplement and shall file a copy thereof with the Court; (B) the Monitor shall post an electronic copy of such amendment, restatement, modification and/or supplement on the Monitor's Website; and (C) such amendment, restatement, modification and/or supplement shall require the approval of the Court following notice to the Affected Unsecured

Creditors.

- (b) Notwithstanding Section 11.4(a) hereof, any amendment, restatement, modification or supplement may be made by MBAC: (i) if prior to the date of the Sanction Order, with the consent of the Monitor and the Plan Sponsor; and (ii) if after the date of the Sanction Order, with the consent of the Monitor and the Plan Sponsor and upon approval by the Court, provided in each case that it concerns a matter that, in the opinion of MBAC, acting reasonably, is of an administrative nature required to better give effect to the implementation of this Plan and the Sanction Order or to cure any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Unsecured Creditors.
- (c) Any amended, restated, modified or supplementary plan or plans of compromise filed with the Court and, if required by this section, approved by the Court, shall, for all purposes, be and be deemed to be a part of and incorporated in this Plan

11.5 Severability of Plan Provisions

If, prior to the Implementation Time, any term or provision of this Plan is held by the Court to be invalid, void or unenforceable, at the request of MBAC, made with the consent of the Plan Sponsor (acting reasonably), the Court shall have the power to either (a) sever such term or provision from the balance of this Plan and provide MBAC and the Plan Sponsor with the option to proceed with the implementation of the balance of this Plan as of and with effect from the Implementation Time, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted, provided that the Plan Sponsor has approved such alteration or interpretation, acting reasonably. Notwithstanding any such holding, alteration or interpretation, and provided that this Plan is implemented, the remainder of the terms and provisions of this Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

11.6 Preservation of Rights of Action

Except as otherwise provided in this Plan or in the Sanction Order, or in any contract, instrument, release, indenture or other agreement entered into in connection with this Plan, following the Implementation Date, MBAC Amalco will retain and may enforce, sue on, settle, or compromise (or decline to do any of the foregoing) all claims, rights or causes of action, suits and proceedings, whether in law or in equity, whether known or unknown, that MBAC may hold against any Person or entity without further approval of the Court.

11.7 Responsibilities of Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceedings and this Plan with respect to MBAC and will not be responsible or liable for any obligations of MBAC.

11.8 Notices

Any notice or other communication to be delivered hereunder must be in writing and refer to this Plan and may, as hereinafter provided, be made or given by personal delivery, ordinary mail, email or by facsimile addressed to the respective parties as follows:

If to MBAC or MBAC Sub, at:

MBAC Fertilizer Corp.
1 Dundas Street West
Suite 2500
Toronto, Ontario
M5G 1Z3

Attention: Tony Cina
Email: tony.cina@Yamana.com

with a copy to:

Norton Rose Fulbright Canada LLP
200 Bay Street, Suite 3800
Toronto, Ontario
M5J 2Z4

Attention: Cathy Singer / Evan Cobb
Email: cathy.singer@nortonrosefulbright.com /
evan.cobb@nortonrosefulbright.com

(a) If to the Plan Sponsor at:

Zaff LLC
c/o De Jong Capital LLC
109 N. Post Oak Lane
Suite 435
Houston, Texas 77024

Attention: Brent De Jong
Email: Brent@dejongcapital.com

with a copy to:

WeirFoulds LLP
66 Wellington Street West, Suite 4100
Toronto, Ontario
M5K 1B7

Attention: Ian Mitchell / Danny
Nunes
Email: imitchell@weirfoulds.com /
dnunes@weirfoulds.com

(b) If to the Monitor, at:

Ernst & Young Inc., Court-appointed Monitor of MBAC Fertilizer Corp. and MBAC
Opportunities & Financing Inc.
Ernst & Young Tower
222 Bay St., 32nd Floor
PO Box 251
Toronto, Ontario
M5K 1J7

Attention: Alex Morrison
Email: alex.f.morrison@ca.ey.com

With a required copy (which shall not be deemed notice) to:

Thornton Grout Finnigan LLP
100 Wellington St. W., Suite 3200
Toronto, Ontario M5K 1K7

Attention: Kyla Mahar
Email: kmahar@tgf.ca

or to such other address as any party may from time to time notify the others in accordance with this Section 11.8. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or emailing, provided that such day in either event is a Business Day and the communication is so delivered, faxed or emailed before 5:00 p.m. on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

11.9 Paramountcy

From and after the Implementation Time on the Implementation Date, any conflict between:

- (a) this Plan; and
- (b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between any Person and MBAC Amalco as at the Implementation Date,

will be deemed to be governed by the terms, conditions and provisions of this Plan and the Sanction Order, which shall take precedence and priority.

11.10 Further Assurances

Notwithstanding that the transactions and events set out herein will occur and be deemed to occur in the order set out in this Plan without any further act or formality, each of the Persons named or referred to in, or subject to, this Plan will make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by any of them to carry out the full intent and meaning of this Plan and to give effect to the transactions contemplated herein.

Schedule "A"

Brazilian Restructuring Transaction Terms

This schedule is a summary of certain of the terms and conditions of the Brazilian Restructuring Transaction. All matters described herein shall be governed by the terms of the documents that will be used to implement the Brazilian Restructuring Transaction (the "**Brazilian Transaction Documents**"). A full description of the terms of the Brazil Restructuring Transaction is contained Brazilian Transaction Documents.

<u>Matter</u>	<u>Description</u>
Creditors Subject to the Brazilian Restructuring Transaction	The Brazilian Restructuring Transaction affects only "unsecured claims", defined as claims that: (i) are prepetition claims; and (ii) are not secured by a consensual lien or, if secured by a consensual lien, for which a deficiency in the value of the collateral securing the claim exists. The Brazilian Restructuring Transaction does not affect tax claims in Brazil, labor-related claims in Brazil or claims of the environmental agency of the State of Tocantins, Brazil.
Plan Consideration	The Brazilian Restructuring Transaction grants creditors two alternatives to elect from: the Cash Payment (as defined below) and the Securities Payment (as defined below).
Cash Payment	The Cash Payment provides creditors with an upfront cash payment of up to R\$15,000.00 within 90 days of the Brazilian Restructuring Transaction's judicial confirmation, up to the value of such creditor's claim.
Securities Payment	<p>The Securities Payment will result in a creditor's unsecured claims being exchanged for warrants and debentures issued by the Brazilian Subsidiary against which their claim exists.</p> <p>Under the Securities Payment, 10% of the value of the claim will be exchanged for Debentures issued by the Brazilian Subsidiary against which the creditor's claim exists on the terms described below, and the remaining 90% of the value of the claim will be exchanged for Warrants on the terms described below.</p> <p>Creditors may choose not to receive Debentures, but instead exchange 100% of their claim value for Warrants.</p>

<p>Debentures</p>	<p>The Debentures will have a face value equal to 10% of the unsecured claim for which they are issued and principal will be repaid in 10 (ten) annual installments at a 10% annual interest rate. Interest will also be paid annually.</p> <p>Each Debenture will be unsecured and convertible into preferred shares of the Brazilian Subsidiary that has issued such Debenture at a rate of one preferred share for each R\$1.00 of Debenture principal outstanding (the "Preferred Shares").</p>
<p>Warrants</p>	<p>The Warrants will grant a creditor the right to purchase Preferred Shares having the terms outlined above issued by the Brazilian Subsidiary against which such creditor holds its unsecured claim.</p> <p>Each Warrant will entitle the creditor to acquire at the exercise price a number of Preferred Shares of the Brazilian Subsidiary that has issued such Warrant determined by the following formula:</p> $\frac{90\% \text{ of such creditor's unsecured claim}}{\text{R\$1.00}}$ <p>The exercise price of the Warrant will be R\$ 0.01 (one cent) per Preferred Share.</p> <p>The Warrants will expire in 180 (one hundred and eighty) days.</p>
<p>Preferred Shares</p>	<p>Preferred Shares issued by the respective Brazilian Subsidiary are convertible, at the option of the holder and for a period of 180 days following the exercise of the Warrants, into a number of MBAC Amalco shares determined by the following formula:</p> $\text{MBAC shares} = \text{Preferred Shares} * 1.6044$ <p>Preferred Shares are redeemable by the Brazilian Subsidiary that issued such Preferred Shares. The redemption price will be the lower of accounting book value and appraised market value of the Preferred Shares (and, if the book value is negative, the appraised market value would apply).</p>

Schedule "B"

New Debenture Terms

Issuer:	MBAC Fertilizer Corp.
Term	10 years from the Implementation Date
Currency	Issued in Canadian Dollars
Interest:	10% per annum, paid annually in cash on the first anniversary of the Implementation Date and on each anniversary of the Implementation Date thereafter until all principal has been repaid in full or until the Conversion Date (the "Annual Payment Date").
Default Fees and Interest	A fee equal to 2% of the then outstanding principal balance and additional default interest at 1% per annum.
Principal Repayment	Principal shall be repaid in ten equal annual instalments on each Annual Payment Date, unless converted in accordance with the Conversion Feature described below.
Security	The obligations under the New Debentures shall be unsecured.
Ranking	The obligations under the New Debentures shall be subordinate to all other unsecured claims against the Issuer.
Conversion Feature:	<p>On the Conversion Date, the principal amount of New Debentures held by a converting holder of New Debentures will be converted into an amount of common shares of the Issuer resulting from the division of the principal outstanding as at the Conversion Date on such New Debentures by \$25.00.</p> <p>No fractional shares of the Issuer will be issued as a result of the conversion and any residual balance of New Debentures attributable to such fractional shares, as well as any accrued and unpaid interest on those New Debentures, shall be paid in cash by the Issuer on the Conversion Date.</p> <p>"Conversion Date" means a date that is ten Business Days after the holder of New Debentures delivers a prescribed form of conversion notice to the Issuer (the "Conversion Notice").</p>
Optional Prepayment	The Issuer may prepay any or all amounts owing on the New Debentures from time to time without premium or penalty provided that no Conversion Notice in respect of such New Debentures has been delivered to the Issuer in respect of such New Debentures.
Representations and Warranties:	Customary for a transaction of this type.
Covenants:	Customary for a transaction of this type.
Resale Restrictions:	The New Debentures will not be transferrable without the prior written consent of the Issuer.

Schedule "C"

Monitor's Certificate

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MBAC FERTILIZER CORP., MBAC
OPPORTUNITIES AND FINANCING INC. AND MBAC
INTERNATIONAL HOLDINGS COÖPERATIE U.A., AND MBAC
(BARBADOS) INC.

Applicants

MONITOR'S CERTIFICATE

(Re. Plan Implementation)

RECITALS

- A. Pursuant to an order of the Court dated August 4, 2016 (the "**Initial Order**"), MBAC Fertilizer Corp., among others, filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").
- B. Pursuant to the Initial Order, Ernst & Young Inc. was appointed the Monitor of the Applicants (the "**Monitor**") with the powers, duties and obligations set out in the Initial Order.
- C. MBAC Fertilizer Corp. ("**MBAC**") has filed a Plan of Compromise and Arrangement under the CCAA, dated August 4, 2016 (as amended and restated on September 14, 2016, the "**Plan**"), which Plan has been approved by the required majorities of Affected Unsecured Creditors and sanctioned by the Court; and

D. Unless otherwise indicated herein, initially capitalized terms used herein have the meaning set out in the Plan.

THE MONITOR HEREBY CERTIFIES that it has received written notice from MBAC Fertilizer Corp. and from the Plan Sponsor that the conditions precedent set out in Section 10.3 of the Plan have been satisfied or waived in accordance with the Plan and that the Implementation Date has occurred.

This Certificate was delivered by the Monitor at _____ [TIME] on _____, 2014.

ERNST & YOUNG INC., in its capacity as Monitor of MBAC Fertilizer Corp. and MBAC Opportunities and Financing Inc., MBAC International Holdings Coöperatie U.A. and MBAC (Barbados) Inc., and not in its personal or corporate capacity

By: _____

Name:

Title:

Schedule "D"

Option Plan Amendment Terms

The Option Plan shall be amended in accordance with applicable securities exchange rules to permit the Option Grants to Specified Management Personnel.

New plans will also be created which provide for the issuance of Restricted Share Units and Deferred Share Units, respectively (together, the "**New Plans**"). The Restricted Share Units and Deferred Share Units shall be on terms as determined by the board of directors of MBAC and disclosed by MBAC in a Plan Supplement to be delivered prior to the Voting Deadline to the Affected Unsecured Creditors who have filed Claims in accordance with the Claims Procedure Order. This Plan Supplement will also be posted on the Monitor's Website prior to the Voting Deadline.

The Option Plan will reserve for issuance that number of Common Shares equal to a maximum of 10% of the issued Common Shares at any point in time.

The New Plan pursuant to which the Restricted Share Units may be granted will be limited to 10% of issued Common Shares calculated on the day following the Implementation Date.

The Option Grants shall provide for the issuance of options under the Option Plan to Specified Management Personnel for the purchase of Common Shares. The options issued under the Option Grant, if exercised, would result in the issuance of Common Shares not to exceed 5% of the issued and outstanding Common Shares calculated as at the date such options are issued. The exercise price under the Option Grants shall be equal to the closing trading price of the Common Shares on the TSXV on the date that is ten Business Days following the date that the Common Shares commence trading on the TSXV following the CCAA Proceedings. The options that are the subject of the Option Grants will be granted with effect on the eleventh Business Day following the date that the Common Shares commence trading on the TSXV and will be exercisable for a period of not more than 10 years after issuance.

For the purposes of this Schedule "D", "**Specified Management Personnel**" means those officers, directors and senior management of MBAC Amalco and its subsidiaries as will be determined by the board of directors of MBAC and disclosed in the Plan Supplement described above.

Schedule "B"
(CBCA Plan)

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MBAC FERTILIZER CORP., MBAC
OPPORTUNITIES AND FINANCING INC., MBAC
INTERNATIONAL HOLDINGS COÖPERATIE U.A. AND MBAC
(BARBADOS) INC.

AND IN THE MATTER OF THE CANADA BUSINESS
CORPORATIONS ACT, R.S.C. 1985, c. C-44,
AS AMENDED, AND IN THE MATTER OF A PROPOSED
ARRANGEMENT OF 9913670 CANADA INC. AND INVOLVING
MBAC FERTILIZER CORP. AND MBAC OPPORTUNITIES
AND FINANCING INC.

**PLAN OF ARRANGEMENT PURSUANT TO THE CANADA BUSINESS CORPORATIONS
ACT OF 9913670 CANADA INC. AND INVOLVING MBAC FERTILIZER CORP. AND MBAC
OPPORTUNITIES AND FINANCING INC.**

September 14, 2016

PLAN OF ARRANGEMENT

RECITALS

- (A) 9913670 Canada Inc. (the "**Applicant**") is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (the "**CBCA**").
- (B) MBAC Fertilizer Corp. ("**MBAC Fertilizer**") and MBAC Opportunities and Financing Inc. ("**MBAC Opportunities**") are corporations incorporated under the CBCA and are affiliates of the Applicant, and together with the Applicant are referred to herein as the "**MBAC Group**".
- (C) MBAC Fertilizer and MBAC Opportunities and certain of their affiliates commenced proceedings (the "**Proceedings**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") in the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on August 4, 2016.

- (D) MBAC Fertilizer obtained authorization from the Court to file with the Court a plan of compromise and arrangement of MBAC Fertilizer under the CCAA (as amended, supplemented or restated from time to time, the “**CCAA Plan**”) on August 4, 2016 and to call a meeting of a single class of affected creditors to consider and vote upon the CCAA Plan.
- (E) This Plan is a plan of arrangement under section 192 of the CBCA and is to be implemented in conjunction with the CCAA Plan.
- (F) The purpose of this Plan is to facilitate certain corporate reorganization steps by the Applicant, MBAC Fertilizer and MBAC Opportunities that are necessary for implementation of the CCAA Plan and that are not practicable under any other provisions of the CBCA in the circumstances.

NOW THEREFORE the Applicant hereby proposes and presents this Plan under the CBCA.

ARTICLE 1 – INTERPRETATION

1.1 Definitions

In this Plan and the Recitals, unless otherwise stated or unless the subject matter or context otherwise requires:

“**Applicable Law**” means, with respect to any Person, property, transaction, event or other matter, any Law relating or applicable to such Person, property, transaction, event or other matter, including, where appropriate, any interpretation of the Law (or any part) by any Person, court or tribunal having jurisdiction over it, or charged with its administration or interpretation;

“**Applicant**” has the meaning given to that term in Recital A;

“**Arrangement**” means an arrangement under section 192 of the CBCA on the terms and subject to the conditions set out in this Plan, subject to any amendments or variations thereto made in accordance with Section 6.4 of this Plan or made at the direction of the Court in the Final Order;

“**Articles of Arrangement**” means the articles of arrangement of the Applicant in respect of the Arrangement, that are required to be filed with the CBCA Director after the Final Order is made in order for the Arrangement to become effective on the Implementation Date;

“**Business Day**” means any day, other than a Saturday, or a Sunday or a statutory or civic holiday, on which banks are generally open for business in Toronto, Ontario;

“**CBCA**” has the meaning given to that term in Recital A;

“**CBCA Director**” means the Director appointed under section 260 of the CBCA;

“**CCAA**” has the meaning given to that term in Recital C;

“**CCAA Plan**” has the meaning given to that term in Recital D;

“**Certificate of Arrangement**” means the certificate giving effect to the Arrangement, to be issued by the CBCA Director pursuant to section 192(7) of the CBCA upon receipt of the Articles of Arrangement in accordance with section 262 of the CBCA;

“**Court**” has the meaning given to that term in Recital C;

"Existing Equity Holders" means, collectively, the Existing Shareholders and, as context requires, the Registered Holders or beneficial holders of Existing Share Options, in their capacities as such;

"Existing Share Options" means all rights, options, warrants and other securities convertible or exchangeable into equity securities of MBAC Fertilizer;

"Existing Shares" means all common shares of MBAC Fertilizer that are issued and outstanding at the applicable time prior to the Implementation Time;

"Final Order" means the Order of the Court approving the Arrangement under section 192 of the CBCA, which shall include such terms as may be necessary or appropriate to (i) give effect to the Arrangement and this Plan;

"Governmental Entity" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power;

"MBAC Group" has the meaning set forth in Recital B;

"Law" means any law, statute, order, decree, consent decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada or the United States, or any other country, or any domestic or foreign state, county, province, city or other political subdivision or of any Governmental Entity;

"Implementation Date" means the date shown on the Certificate of Arrangement issued by the CBCA Director;

"Implementation Time" means 12:01 a.m. on the Implementation Date;

"Order" means any order of the Court in the CBCA Proceedings;

"Outside Date" means October 6, 2016, as may be extended in accordance with the Support Agreement;

"Person" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Government Entity or any agency, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status;

"Plan" means this plan of arrangement and any amendments, modifications or supplements hereto made in accordance with the terms hereof or made at the direction of the Court in the Final Order;

"Proceedings" has the meaning set forth in Recital C; and

"Support Agreement" means the Support Agreement made April 4, 2016 (as amended or restated from time to time) between MBAC Fertilizer and Zaff LLC (f/k/a Alpha Infrastructure LLC).

1.2 Certain Rules of Interpretation

For the purposes of this Plan:

- (a) Unless otherwise expressly provided herein, any reference in this Plan to an instrument, agreement or an Order or an existing document or exhibit filed or to be filed means such instrument, agreement, Order, document or exhibit as it may have been or may be amended, modified, or supplemented in accordance with its terms;
- (b) The division of this Plan into articles and sections are for convenience of reference only and do not affect the construction or interpretation of this Plan, nor are the descriptive headings of articles and sections intended as complete or accurate descriptions of the content thereof;
- (c) The use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of this Plan to such Person (or Persons) or circumstances as the context otherwise permits;
- (d) The words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;
- (e) Unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day;
- (f) Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends;
- (g) Unless otherwise provided, any reference to a statute or other enactment of parliament, a legislature or other Government Entity includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation;
- (h) References to a specific Recital, Article or Section shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specific Recital, Article or Section of this Plan, whereas the terms "this Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to this Plan and not to any particular Recital, Article, Section or other portion of this Plan and include any documents supplemental hereto; and
- (i) The word "or" is not exclusive.

1.3 Governing Law

This Plan shall be governed by and construed in accordance with the laws of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation or application of this Plan and all proceedings taken in connection with this Plan and its provisions shall be subject to the jurisdiction of the Court.

1.4 Date for Any Action

If the date on which any action is required to be taken hereunder by a Person is not a Business Day, such action shall be required to be taken on the next succeeding day which is a Business Day.

1.5 Time

Time shall be of the essence in this Plan.

1.6 Schedules

The following Schedules are annexed to this Plan and are incorporated by reference into this Plan and form a part hereof:

Schedule 1 – Articles of Arrangement

ARTICLE 2 – PURPOSE AND EFFECT OF THIS PLAN

2.1 Purpose

This Plan is presented in connection with the CCAA Plan. The purpose of this Plan is to facilitate certain corporate reorganization steps by the Applicant, MBAC Fertilizer and MBAC Opportunities that are necessary for implementation of the CCAA Plan and that are not practicable under any other provisions of the CBCA in the circumstances.

2.2 Effectiveness

Subject to the satisfaction, completion or waiver (to the extent permitted pursuant to Section 5.3) of the conditions precedent set out herein, this Plan will become effective in the sequence described in Section 4.3 from and after the Implementation Time and shall be binding on and enure to the benefit of the MBAC Group, all Existing Equity Holders, and all other Persons named or referred to in, or subject to, this Plan and their respective successors and assigns and their respective heirs, executors, administrators and other legal representatives, successors and assigns.

2.3 CCAA Plan

For greater certainty, this Plan is to be interpreted in combination with the CCAA Plan and nothing in the Plan is intended to conflict with, override, supersede, invalidate or nullify any provisions of the CCAA Plan and the CCAA Plan shall remain fully enforceable following the implementation of the Plan.

ARTICLE 3 – RESTRUCTURING AND RELATED MATTERS

3.1 Corporate Restructuring

In accordance with the steps and sequence set forth in Section 4.3:

- a) the Applicant and MBAC Opportunities shall amalgamate with MBAC Fertilizer with the same effect as under Section 184 of the CBCA to form an amalgamated corporation ("**MBAC Amalco**") (the "**Amalgamation**");
- b) the articles of MBAC Amalco shall be amended to effect a consolidation (the "**Common Share Consolidation**") of the issued and outstanding common shares of MBAC Amalco on the basis of one post-consolidation common share of MBAC Amalco for each 100 common shares of MBAC Amalco outstanding immediately prior to the Common Share Consolidation. Any fractional interests in the consolidated common shares will, without any further act or formality, be

cancelled without payment of any consideration therefor. Following the completion of such consolidation, the stated capital of the common shares of MBAC Amalco shall be equal to the stated capital of the common shares of MBAC Amalco immediately prior to consolidation; and

- c) MBAC Amalco shall be continued under the laws of the Cayman Islands (the "**Continuance**").

ARTICLE 4 – IMPLEMENTATION

4.1 Corporate Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under this Plan involving corporate action of any members of the MBAC Group will occur and be effective as of the Implementation Date, and will be authorized and approved under this Plan and by the Court, where appropriate, as part of the Final Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of the MBAC Group. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of the MBAC Group, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by this Plan shall be deemed to be effective and no such agreement shall have any force or effect.

4.2 Fractional Interests

All fractional common shares of MBAC Amalco shall be cancelled and such cancellation shall not entitle the owner thereof to vote or to any rights of a shareholder of MBAC Amalco. Any legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to fractional common share of MBAC Amalco pursuant to this Plan shall be rounded down to the nearest whole number without compensation therefor.

4.3 Implementation Date Transactions

Capitalized terms used in this Section 4.3 and not otherwise defined have the meanings given to them in the CCAA Plan.

Commencing at the Implementation Time, the following events or transactions will occur, or be deemed to have occurred and be taken and effected, in the following order and at the times set out in this Section 4.3 (or in such other manner or order or at such other time or times as the Applicant and Zaff LLC may agree, acting reasonably), without any further act or formality required on the part of any Person, except as may be expressly provided herein:

- (a) Immediately following the steps set out in Section 6.5(a) of the CCAA Plan, the Articles of Arrangement shall be filed pursuant to the CBCA and the Amalgamation shall be deemed to occur and MBAC Amalco shall be created and shall be called "MBAC Fertilizer Corp.";
- (b) Immediately following the Amalgamation, the Common Share Consolidation shall be completed;
- (c) MBAC Amalco shall be authorized with the same effect as under Section 188 of the CBCA to proceed with the Continuance;
- (d) Prior to the acceptance of the Continuance of MBAC Amalco under the laws of the Cayman Islands,
 - (i) In exchange for, and in full and final settlement of, each Allowed Affected

Unsecured Claim other than the Convenience Class Claims, the Cash Distribution Claims and the Joint Brazil Claims for which an election under Section 4.1(b)(ii) has been made, MBAC Amalco shall issue to each holder of an Allowed Affected Unsecured Claim, other than a Convenience Class Claim or a Cash Distribution Claim or a Joint Brazil Claim, its Pro Rata Share of Unsecured Creditor Common Shares and its New Debenture;

- (ii) In exchange for, and in full and final settlement of, each Convenience Class Claim, the Monitor shall pay, on behalf of MBAC Amalco, from the Cash Distribution Pool, to each Convenience Class Creditor, the amount of such Convenience Class Creditor's Convenience Class Claim;
 - (iii) In exchange for, and in full and final settlement of, each Cash Election Unsecured Creditor's Allowed Affected Unsecured Claim, the Monitor shall pay, on behalf of MBAC Amalco from the Cash Distribution Pool, to each Cash Election Unsecured Creditor, the amount of such Cash Election Unsecured Creditor's Cash Election Distribution;
 - (iv) In accordance with the Bridge Financing Settlement, the Bridge Financing Shares, as may be adjusted pursuant to Section 6.7 of the CCAA Plan, shall be issued to the Plan Sponsor in full and final settlement of all claims of the Plan Sponsor against any entity in the MBAC Group under the Working Capital Debt and the Interim Funding Debt and in connection with the funding of the Cash Distribution Pool Amount, and the DIP Lender's Charge shall be deemed discharged on the Implementation Date without any further act or formality;
- (e) Immediately following the steps set out in Section 4.3(d) above the Continuance shall have been completed.

ARTICLE 5– COURT SANCTION, CONDITIONS PRECEDENT AND IMPLEMENTATION

5.1 Application for Final Order

The Applicant shall apply for the Final Order on September 29, 2016 or such later date as the Court may set.

5.2 Conditions to Plan Implementation

The implementation of this Plan shall be conditional upon the fulfillment, satisfaction or waiver (to the extent permitted by Section 8.3) of the following conditions:

- (a) The Court shall have granted the Final Order, the operation and effect of which shall not have been stayed, reversed or amended, and in the event of an appeal or application for leave to appeal, final determination shall have been made by the applicable appellate court;
- (b) No Applicable Law shall have been passed and become effective, the effect of which makes the consummation of this Plan or the CCAA Plan illegal or otherwise prohibited;
- (c) All necessary judicial consents and any other necessary or desirable third party consents, if any, to deliver and implement all matters related to this Plan and the CCAA Plan shall have been obtained;
- (d) All documents necessary to give effect to all material provisions of this Plan and the CCAA Plan shall have been executed and/or delivered by all relevant Persons in form

and substance satisfactory to MBAC and Zaff LLC;

- (e) All material filings under applicable Laws shall have been made and any material regulatory consents or approvals that are required in connection with this Plan and the CCAA Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated; and
- (f) All conditions to implementation of the CCAA Plan as set out in the CCAA Plan shall have been satisfied or waived in accordance with their terms.

5.3 Waiver of Conditions

The Applicant and Zaff LLC may at any time and from time to time waive the fulfillment or satisfaction, in whole or in part, of the conditions set out herein, to the extent and on such terms as such parties may agree to; provided, however, that the conditions set out in Section 5.2(a) above and the conditions set out in Sections 10.3(a) and (g) of the CCAA Plan cannot be waived.

5.4 Implementation Provisions

If the conditions contained in Section 5.2 are not satisfied or waived (to the extent permitted under Section 5.3) by the Outside Date, unless the Applicant and Zaff LLC agree in writing to extend such period, this Plan and the Final Order shall cease to have any further force or effect and will not be binding on any Person.

ARTICLE 6– GENERAL

6.1 Binding Effect

At the Implementation Time:

- (a) this Plan will become effective;
- (b) the treatment of Existing Equity Holders under this Plan shall be final and binding for all purposes and enure to the benefit of the Applicant, the other members of the MBAC Group, all Existing Equity Holders, and all other Persons and parties named or referred to in, or subject to, this Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;
- (c) all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan in its entirety shall be deemed to have been executed and delivered to the Applicant and any other member of the MBAC Group.

6.2 Deeming Provisions

In this Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

6.3 Non-Consummation

If the Implementation Time does not occur by the Outside Date (as the same may be extended in accordance with the terms hereof), or if the Plan is otherwise withdrawn in accordance with its terms: (a) this Plan shall be null and void in all respects, and (b) nothing contained in this Plan, and no acts taken in preparation for consummation of this Plan, shall prejudice in any manner the rights of the MBAC Group, their successors or any other Person in any further proceedings involving the MBAC Group or their successors; or constitute an admission of any sort by the MBAC Group, their successors or any other Person.

6.4 Modification of Plan

- (a) The Applicant reserves the right, at any time and from time to time, to amend, restate, modify and/or supplement this Plan, provided that any such amendment, restatement, modification or supplement must be contained in a written document which is filed with the Court and shall be subject to review and, if appropriate, further direction by the Court at the hearing for the final approval of the Plan.
- (b) Notwithstanding Section 6.4(a), if the Applicant determines, acting reasonably and in good faith, that the amendment, restatement, modification or supplement (A) concerns a matter which is of an administrative nature required to better give effect to the implementation of this Plan and the Final Order or to cure any errors, omissions or ambiguities, the Applicant may make such amendment without the consent of any other Person.
- (c) Any amended, restated, modified or supplementary plan or plans of arrangement and reorganization made in accordance with this Section 6.4, shall, for all purposes, be and be deemed to be a part of and incorporated in this Plan.

6.5 Severability of Plan Provisions

If, prior to the Implementation Time, any term or provision of this Plan is held by the Court to be invalid, void or unenforceable, at the request of the Applicant, the Court shall have the power to either (a) sever such term or provision from the balance of this Plan and provide the Applicant with the option to proceed with the implementation of the balance of this Plan as of and with effect from the Implementation Time, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that this Plan is implemented, the remainder of the terms and provisions of this Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

6.6 Further Assurances

Notwithstanding that the transactions and events set out herein will occur and be deemed to occur in the order set out in this Plan without any further act or formality, each of the Persons named or referred to in, or subject to, this Plan will make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by any of them to carry out the full intent and meaning of this Plan and to give effect to the transactions contemplated herein.

Schedule "C"

(Form of Monitor's Termination Certificate)

Court File No. CV-16-11475-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
MBAC FERTILIZER CORP., MBAC OPPORTUNITIES AND FINANCING INC., MBAC
INTERNATIONAL HOLDINGS COÖPERATIE U.A. AND MBAC (BARBADOS) INC.**

**AND IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c.
C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 9913670
CANADA INC. AND INVOLVING MBAC FERTILIZER CORP. AND MBAC OPPORTUNITIES
AND FINANCING INC.**

Applicants

(Monitor's Certificate)

A. **WHEREAS** on October ●, 2016, the Honourable Justice Newbould made an order (the "Sanction Order") authorizing the discharge of Ernst & Young Inc., in its capacity as monitor (the "Monitor") in the *Companies' Creditors Arrangement Act* proceedings of MBAC Fertilizer Corp. (the "Company"), among others , and terminating these proceedings effective upon the filing with the Court of a certificate in which the Monitor certifies that all Outstanding Matters (as defined in the Sanction Order) have been completed.

NOW THEREFORE THE MONITOR CERTIFIES the following:

1. The Monitor hereby certifies that the Outstanding Matters are now completed.

DATED at the City of Toronto, in the Province of Ontario, this ● day of ●, 2016.

ERNST & YOUNG INC., in its capacity as Court-appointed Monitor of MBAC Fertilizer Corp., MBAC Opportunities and Financing Inc., MBAC International Holdings Coöperatie U.A. and MBAC (Barbados) Inc., and not in its personal capacity

By:

Name:

Title:

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

Court File No.: CV-16-11475-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
MBAC FERTILIZER CORP. ET AL.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

SANCTION ORDER

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Lawyers for the Applicants

TAB 8

2006 CarswellOnt 6230
Ontario Superior Court of Justice

Muscletech Research & Development Inc., Re

2006 CarswellOnt 6230, [2006] O.J. No. 4087, 152 A.C.W.S. (3d) 16, 25 C.B.R. (5th) 231

Muscletech Research and Development Inc. et al

Ground J.

Heard: September 29, 2006

Judgment: October 13, 2006

Docket: 06-CL-6241

Counsel: Fred Myers, David Bish for Applicants, Muscletech Research and Development Inc. et al
Natasha MacParland, Jay Swartz for Monitor, RSM Richter Inc.

Justin Fogarty, Fraser Hughes, Chris Robertson for Ishman, McLaughlin, Jaramillo Claimants

Jeff Carhart for Ad Hoc Tort Claimants Committee

Sara J. Erskine for Ward et al

Alan Mark, Suzanne Wood for Iovate Companies, Paul Gardiner

A. Kauffman for GNC Oldco Inc.

Tony Kurian for HVL Incorporated

Steven Golick for Zurich Insurance Company

Subject: Insolvency; Corporate and Commercial

MOTIONS by objecting claimants in proceedings under Companies' Creditors Arrangement Act for various interim orders.

Ground J.:

1 This is a somewhat unique proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. (1985) Ch. c.36 as amended ("CCAA"). The Applicants have also commenced ancillary proceedings under Chapter 15 of the U.S. Bankruptcy Code and are now before the United States District Court for the Southern District of New York ("U.S. Court"). All of the assets of the Applicants have been disposed of and no proceeds of such disposition remain in the estate. The Applicants no longer carry on business and have no employees. The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants against the Applicants and others (the "Third Parties") in the United States. In addition to the Applicants, the Third Parties, which include affiliated and non-affiliated parties, were named as defendants or otherwise involved in some 33 Product Liability Actions. The liability of the Third Parties in the Product Liability Actions is linked to the liability of the Applicants, as the Product Liability Actions relate to products formerly sold by the Applicants.

2 Certain of the Third Parties have agreed to provide funding for settlement of the Product Liability Actions and an ad hoc committee of tort claimants (the "Committee") has been formed to represent the Plaintiffs in such Products Liability Actions (the "Claimants"). Through its participation in a court-ordered mediation (the "Mediation Process") that included the Applicants and the Third Parties, the Committee played a fundamental role in the settlement of 30 of the 33 Product Liability Actions being the Product Liability Claims of all of those Product Liability Claimants represented in the Mediation Process by the Committee.

3 The Moving Parties in the motions now before this court, being the Claimants in the three Product Liability Actions which have not been settled (the "Objecting Claimants"), elected not to be represented by the Committee in the Mediation Process and mediated their cases individually. Such mediations were not successful and the Product Liability Actions of the Moving Parties remain unresolved.

4 Pursuant to a Call for a Claims Order issued by this court on March 3, 2006, and approved by the U.S. court on March 22, 2006, each of the Objecting Claimants filed Proofs of Claim providing details of their claims against the Applicants and Third Parties. The Call for Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, the Applicants engaged in a process of extensive discussions and negotiations. With the input of various key players, including the Committee, the Applicants established a claims resolution process (the "Claims Resolution Process"). The Committee negotiated numerous protections in the Claims Resolution Process for the benefit of its members and consented to the Claims Resolution Order issued by this court on August 1, 2006, and approved by the U.S. court on August 11, 2006.

5 The Claims Resolution Order appoints the Honourable Edward Saunders as Claims Officer. The Claims Resolution Order also sets out the Claims Resolution Process including the delivery of a Notice of Objection to Claimants for any claims not accepted by the Monitor, the provision for a Notice of Dispute to be delivered by the Claimants who do not accept the objection of the Monitor, the holding of a hearing by the Claims Officer to resolve Disputed Claims and an appeal therefrom to this court. The definition of "Product Liability Claims" in the Claims Resolution Order provides in part:

"Product Liability Claim" means any right or claim, including any action, proceeding or class action in respect of any such right or claim, other than a Claim, Related Claim or an Excluded Claim, of any Person which alleges, arises out of or is in any way related to wrongful death or personal injury (whether physical, economic, emotional or otherwise), whether or not asserted and however acquired, against any of the Subject Parties arising from, based on or in connection with the development, advertising and marketing, and sale of health supplements, weight-loss and sports nutrition or other products by the Applicants of any of them.

.....

Nature of the Motions

6 The motions now before this court emanate from Notices of Motion originally returnable August 22, 2006 seeking:

1. An Order providing for joint hearings before Canadian and U.S. Courts and the establishment of a cross-border insolvency protocol in this CCAA proceeding, to determine the application or conflict of Canadian and U.S. law in respect of the relief requested herein.

2. An Order amending the June 8, 2006 Claims Resolution Claim to remove any portions that purport to determine the liabilities of third party non-debtors who have not properly applied for CCAA relief.

.....

3. An Order requiring the Monitor and the Applicants herein,

(a) to provide an investigator, funded by the Claimants (the "Investigator"), with access to all books and records relied upon by the Monitor in preparing its Sixth Report, including all documents listed at Appendix "2" to that report;

(b) to provide the Investigator with copies of or access to documents relevant to the investigation of the impugned transactions as the Investigator may request, and

(c) providing that the Investigator shall report back to this Honourable Court as to its findings, and a Notice of Motion returnable September 29, 2006 seeking.

4. An Order finding that the Notices of Objection sent by the Monitor/Applicants do not properly object to the Claimants' claims against non-debtor third parties;
5. An Order that the Claimants' Product Liability Claims against non-debtor third parties are deemed to be accepted by the Applicants pursuant to paragraph 14 of the Claims Resolution Order;
6. In the alternative, an Order that the Monitor, on behalf of the Applicants, provide further and better Notices of Objection properly objecting to claims against non-debtor third parties so that the Claimants may know the case they are to meet and may respond appropriately.

Analysis

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

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

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

9 It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:

While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

10 I do not regard the motions before this court with respect to claims against Third Parties as being made pursuant to paragraph 37 of the Claims Resolution Order which provides that a party may move before this court "to seek advice and directions or such other relief in respect of this Order and the Claims Resolution Process." The relief sought by the Objecting Creditors with respect to claims against Third Parties is an attack upon the substance of the Claims Resolution Order and of the whole structure of this CCAA proceeding which is to resolve claims against the Applicants and against Third Parties as part of a global settlement of the litigation in the United States arising out of the distribution and sale of the offending products by the Applicants. What the Objecting Claimants are, in essence, attempting to do is to vary or set aside the Claims Resolution Order. The courts have been loathe to vary or set aside an order unless it is established that there was:

- (a) fraud in obtaining the order in question;

(b) a fundamental change in circumstances since the granting of the order making the order no longer appropriate;

(c) an overriding lack of fairness; or

(d) the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing and the time when a review is sought that was not known at the time of the original hearing and that could have led to a different result.

None of such circumstances can be established in the case at bar.

11 In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.

12 The Objecting Claimants also seek an order of this court that their claims against Third Parties are deemed to be accepted pursuant to paragraph 14 of the Claims Resolution Order. Section 14 of the Claims Resolution Order provides in part as follows:

This Court Orders that, subject to further order of this Court, in respect of any Claim or Product Liability Claim set out in a Proof of Claim for which a Notice of Objection has not been sent by the Monitor in accordance with paragraph 12(b) above on or before 5:00 p.m. (Eastern Standard Time) on August 11, 2006, such Claim or Product Liability Claim is and shall be deemed to be accepted by the Applicants.

13 The submission of the Objecting Claimants appears to be based on the fact that, at least in one case, the Notice of Objection appears to be an objection solely on behalf of the Applicants in that Exhibit 1 to the Notice states "the Applicants hereby object to each and all of the Ishman Plaintiffs' allegations and claims." The Objecting Claimants also point out that none of the Notices of Objection provide particulars of the objections to the Objecting Claimants' direct claims against third parties. I have some difficulty with this submission. The structure of the Claims Resolution Order is that a claimant files a single Proof of Claim setting out its Claims or Product Liability Claims and that if the Applicants dispute the validity or quantum of any Claim or Product Liability Claim, they shall instruct the Monitor to send a single Notice of Objection to the Claimant. Paragraph 12 of the Claims Resolution Order states that the Applicants, with the assistance of the Monitor, may "dispute the validity and/or quantum or in whole or in part of a Claims or a Product Liability Claim as set out in a Proof of Claim." The Notices of Objection filed with the court do, in my view, make reference to certain Product Liability Claims against Third Parties and, in some cases, in detail. More importantly, the Notices of Objection clearly state that the Applicants, with the assistance of the Monitor, have reviewed the Proof of Claim and have valued the amount claimed at zero dollars for voting purposes and zero dollars for distribution purposes. I fail to understand how anyone could read the Notices of Objection as not applying to Product Liability Claims against Third Parties as set out in the Proof of Claim. The Objecting Claimants must have read the Notices of Objection that way initially as their Dispute Notices all appear to refer to all claims contained in their Proofs of Claim. Accordingly, I find no basis on which to conclude that the Product Liability Claims against the Third Parties are deemed to have been accepted.

14 The Objecting Claimants seek, in the alternative, an order that the Monitor provide further and better Notices of Objection with respect to the claims against the Third Parties so that the Objecting Claimants may know the case they have to meet and may respond appropriately. I have some difficulty with this position. In the context of the Claims Resolution Process, I view the Objecting Claimants as analogous to plaintiffs and it is the Applicants who need to know the case they have to meet. The Proofs of Claim set out in detail the nature of the claims of the Objecting Claimants against the Applicants and Third Parties and, to the extent that the Notices of Objection do not fully set out in detail

the basis of the objection with respect to each particular claim, it appears to me that this is a procedural matter, which should be dealt with by the Claims Officer and then, if the Objecting Claimants remain dissatisfied, be appealed to this court. Section 25 of the Claims Resolution Order provides:

This Court Orders that, subject to paragraph 29 hereof, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him by the parties, as well as any other procedural or evidentiary matters that may arise in respect of the hearing of a Disputed Claim, including, without limitation, the production of documentation by any of the parties involved in the hearing of a Disputed Claim.

15 In fact, with respect to the medical causation issue which is the first issue to be determined by the Claims Officer, the Claims Officer has already held a scheduling hearing and has directed that by no later than August 16, 2006, all parties will file and serve all experts reports and will-say statements for all non-expert witnesses as well as comprehensive memoranda of fact of law in respect of the medical causation issues. To the extent that the Objecting Claimants appear to have some concerns as to natural justice, due process and fairness, in spite of the earlier decision of Judge Rakoff with respect to the Claims Resolution Order and the consequent amendments made to such Order, in my view, any such concerns are adequately addressed by the rulings made by the Claims Officer with respect to the hearing of the medical causation issue. I would expect that the Claims Officer would make similar rulings with respect to the other issues to be determined by him.

16 In addition, as I understand it, all three actions commenced by the Objecting Claimants in the United States were ready for trial at the time that the CCAA proceedings commenced and I would have thought, as a result, that the Objecting Claimants are well aware of the defences being raised by the Applicants and the Third Parties to their claims and as to the positions they are taking with respect to all of the claims.

17 Accordingly, it appears to me to be premature and unproductive to order further and better Notices of Objection at this time.

18 The motion seeking an order requiring the Monitor and the Applicants to provide an Investigator selected by the Objecting Claimants relates to transactions referred to by the Monitor in preparing its Sixth Report which dealt with certain transactions entered into by the Applicants with related parties prior to the institution of these CCAA proceedings. The Objecting Creditors also seek to have the Investigator provided with copies of, or access to, all documents relevant to an investigation of the impugned transactions as the Investigator may request. It appears from the evidence before this court that the Applicants prepared for the Monitor a two-volume report (the "Corporate Transactions Report") setting out in extensive detail the negotiation, documentation and implementation of the impugned transactions. Subsequently by order of this court dated February 6, 2006, the Monitor was directed to review the Corporate Transactions Report and prepare its own report to provide sufficient information to allow creditors to make an informed decision on any plan advanced by the Applicants. This review was incorporated in the Monitor's Sixth Report filed with this court and the U.S. court on March 31, 2006. In preparing its Sixth Report, the Monitor had the full cooperation of, and full access to the documents of, the Iovate Companies and Mr. Gardiner, the principal of the Iovate Companies. No stakeholder has made any formal allegation that the review conducted by the Monitor was flawed or incomplete in any way. The Monitor has also, pursuant to further requests, provided documentation and additional information to stakeholders on several occasions, subject in certain instances to the execution of confidentiality agreements particularly with respect to commercially sensitive information of the Applicants and the Iovate Companies which are Third Parties in this proceeding. There is no evidence before this court that the Monitor has, at any time, refused to provide information or to provide access to documents other than in response to a further request from the Objecting Claimants made shortly before the return date of these motions, which request is still under consideration by the Monitor. The Sixth Report is, in the opinion of the Respondents, including the Committee, a comprehensive, thorough, detailed and impartial report on the impugned transactions and I fail to see any utility in appointing another person to duplicate the work of the Monitor in reviewing the impugned transactions where there has been no allegation of any deficiency, incompleteness or error in the Sixth Report of the Monitor.

19 I also fail to see how a further report of an Investigator duplicating the Monitor's work would be of any assistance to the Objecting Claimants in making a decision as to whether to support any Plan that may be presented to this court. The alternative to acceptance of a Plan is, of course, the bankruptcy of the Applicants and I would have thought that, equipped with the Corporate Transactions Report and the Sixth Report of the Monitor, the Objecting Claimants would have more than enough information to consider whether they wish to attempt to defeat any Plan and take their chances on the availability of relief in bankruptcy.

20 In any event, it is my understanding that, at the request of the Committee, any oppression claims or claims as to reviewable transactions have been excluded from the Claims Resolution Process.

21 The final relief sought in the motions before this court is for an Order providing for joint hearings before this court and the U.S. court and the establishment of a cross-border protocol in this proceeding to determine the application of Canadian and U.S. law or evidentiary rulings in respect of the determination of the liability of Third Parties. During the currency of the hearing of these motions, I believe it was conceded by the Objecting Claimants that the question of the applicability of U.S. law or evidentiary rulings would be addressed by the Claims Officer. The Objecting Claimants did not, on the hearing of these motions, press the need for the establishment of a protocol at this time. An informal protocol has been established with the consent of all parties whereby Justice Farley and Judge Rakoff have communicated with each other with respect to all aspects of this proceeding and I intend to follow the same practice. Any party may, of course, at any time bring a motion before this court and the U.S. court for an order for a joint hearing on any matter to be considered by both courts.

22 The motions are dismissed. Any party wishing to make submissions as to the costs of this proceeding may do so by brief written submissions to me prior to October 31, 2006.

Motions dismissed.

TAB 9

2010 ONSC 1708
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2010 CarswellOnt 1754, 2010 ONSC 1708, 192 A.C.W.S. (3d) 368, 63 C.B.R. (5th) 44, 81 C.C.P.B. 56

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Morawetz J.

Heard: March 3-5, 2010
Judgment: March 26, 2010
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam, Suzanne Wood for Applicants
Lyndon Barnes, Adam Hirsh for Nortel Directors
Benjamin Zarnett, Gale Rubenstein, C. Armstrong, Melaney Wagner for Monitor, Ernst & Young Inc.
Arthur O. Jacques for Nortel Canada Current Employees
Deborah McPhail for Superintendent of Financial Services (non-PBGF)
Mark Zigler, Susan Philpott for Former and Long-Term Disability Employees
Ken Rosenberg, M. Starnino for Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund
S. Richard Orzy, Richard B. Swan for Informal Nortel Noteholder Group
Alex MacFarlane, Mark Dunsmuir for Unsecured Creditors' Committee of Nortel Networks Inc.
Leanne Williams for Flextronics Inc.
Barry Wadsworth for CAW-Canada
Pamela Huff for Northern Trust Company, Canada
Joel P. Rochon, Sakie Tambakos for Opposing Former and Long-Term Disability Employees
Robin B. Schwill for Nortel Networks UK Limited (In Administration)
Sorin Gabriel Radulescu for himself
Guy Martin for himself, Marie Josee Perrault
Peter Burns for himself
Stan and Barbara Arnelien for themselves

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

MOTION by insolvent corporation for court approval of settlement agreement under Companies' Creditors Arrangement Act.

Morawetz J.:

Introduction

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

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

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

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

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

4 Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

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

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

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

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

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

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

- (e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;
- (f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;
- (g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;
- (h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;
- (i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis;¹
- (j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and
- (k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

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

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

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

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

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

The Facts

A. Status of Nortel's Restructuring

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

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

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

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

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

B. The Settlement Agreement

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

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

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

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

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

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

Positions of the Parties on the Settlement Agreement

The Applicants

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

- (a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;
- (b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;
- (c) prevents disruption in the transition of benefits for current employees;
- (d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;

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

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

24 Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

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

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

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

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

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

30 Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, (S.C.C.) and *Grace Canada Inc., Re* (Ont. S.C.J. [Commercial List]) [*Grace 2008*] at para. 40.

31 The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Air Canada, Re* (Ont. S.C.J. [Commercial List]) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

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

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

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

Former and LTD Employees

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

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

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

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

39 In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

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

CAW

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

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

Board of Directors

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

Opposing LTD Employees

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

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

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

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

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

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

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

UCC

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

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

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

Noteholders

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

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

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

Superintendent

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

Northern Trust

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

Law and Analysis

A. Representation and Notice Were Proper

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

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

B. Effect of the Settlement Approval Order

61 In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval

Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

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

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at para 16. I am satisfied that this objective has been achieved.

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

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

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

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at paras. 28-29, citing *Metcalfe, supra*, at paras. 44 and 61.

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

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at para. 30, citing *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (Ont. Gen. Div. [Commercial List]) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

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

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or

arrangement: see, for example, *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List]).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Calpine Canada Energy Ltd., Re* (Alta. C.A. [In Chambers]) [*Calpine*] at para. 23, affirming (Alta. Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra*, and *Grace Canada Inc., Re* (Ont. S.C.J. [Commercial List]) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List]).

D. Should the Settlement Agreement Be Approved?

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

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

i) Spirit and Purpose

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

ii) Balancing of Parties' Interests

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

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

Third Party Releases

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

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

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

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

81 The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

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

Clause H.2

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

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

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

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

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

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

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

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

91 One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the

outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

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

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

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

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

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

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

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

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

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

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

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

Disposition

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

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

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

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

104 Accordingly, the motion is dismissed.

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

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

Motion dismissed.

Footnotes

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

TAB 10

1989 CarswellBC 334
British Columbia Court of Appeal

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada

1989 CarswellBC 334, [1989] 3 W.W.R. 363, [1989] B.C.W.L.D. 720, [1989] C.L.D. 403,
[1989] B.C.J. No. 63, 13 A.C.W.S. (3d) 303, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195

**NORTHLAND PROPERTIES LIMITED et al. v. EXCELSIOR LIFE
INSURANCE COMPANY OF CANADA, NATIONAL LIFE ASSURANCE
COMPANY OF CANADA and GUARDIAN INSURANCE CO. OF CANADA**

McEachern C.J.B.C., Esson and Wallace JJ.A.

Judgment: January 5, 1989

Docket: Vancouver Nos. CA010238; CA010198; CA010271

Counsel: *F.H. Herbert* and *N. Kambas*, for appellant Excelsior Life Insurance Company of Canada and appellant National Life Assurance Company of Canada.

A.P. Czepil, for appellant Guardian.

H.C.R. Clark and *R.D. Ellis*, for respondent companies.

G.W. Ghikas and *C.S. Bird*, for respondent Bank of Montreal.

Subject: Corporate and Commercial; Insolvency

Appeal from order of Trainor J. approving reorganization plan filed under Companies' Creditors Arrangement Act.

McEachern C.J.B.C. (Excerpt from the transcript):

1 We are giving an oral judgment this morning because of the commercial urgency of these appeals and because counsel's helpful arguments have narrowed the issues substantially. We are indebted to counsel for their useful submissions.

2 The petitioners (respondents on these appeals) are a number of companies (which I shall call "the companies") who have outstanding issues of secured bonds and are all engaged in real estate investment and development in Western North America and who collectively own and operate a number of office buildings and the Sandman Inn chain of hotels and motels. The appellants, Excelsior Life and National Life and Guardian Trust, are creditors of the petitioners who hold mortgages over specific properties owned by certain of the companies. They, along with eleven other lenders, are called "priority mortgagees".

3 The companies ran into financial problems starting in 1981 and by spring of 1988, the companies owed approximately \$200 million against assets of \$100 million. The major creditor, the Bank of Montreal (which I shall sometimes call "the bank"), was owed approximately \$117 million by the companies and the bank authorized the commencement of a receivership action. The bank holds security in all of the assets of the companies by way of trust deeds and bonds ranking second in priority to the security held by the priority mortgagees. Before decision in the receivership proceedings, the companies petitioned under the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36] (which I shall sometimes refer to as "C.C.A.A.") for an order directing meetings of the secured and unsecured creditors to consider a proposed compromise or arrangement plan.

4 Mr. Justice Trainor, on 7th April 1988, granted the petition authorizing the companies to file a reorganization plan with the court, and that in the meantime, the companies would continue to carry on business and remain in possession

of their undertaking, property and assets. Further, all proceedings against the companies were stayed. The original reorganization plan was filed on 25th August 1988. It provided that each priority mortgagee holding security over the property of the individual petitioners would constitute a separate class.

5 The petitioners obtained an order to hold a creditors' meeting on 31st October 1988 and 1st November 1988. The order provided that in addition to meetings of individual classes of creditors, there should be a later general meeting of all creditors to consider the plan. In addition, the petitioners obtained an order to file and serve the amended plan seven days before the creditors' meeting along with their information circular. Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rates and directions for the calling of meetings.

6 The amended plan was based on the following classes of creditors (descriptions of which are contained in the reasons for judgment of Trainor J. at pp. 6-7) namely:

7 — shareholder creditors

8 — A bondholders

9 — PUT debt claimants and C bondholders

10 — priority mortgagees

11 — government creditors

12 — property tax creditors

13 — general creditors

14 The amended plan also proposed consolidation of all the petitioner companies. The amended plan provided that all priority mortgagees would be grouped into one class for voting purposes. There were fifteen priority mortgagees in total, eleven of which were fully secured while the remaining four (including the appellants) faced deficiencies. The amended plan also authorized the companies to negotiate with creditors in order, if possible, to reach as much agreement as possible so that the plan would have a better chance of gaining the requisite majorities.

15 The companies and the Bank of Montreal reached a settlement agreement on 20th October 1988, dealing with (a) the amounts owing to the bank by the companies; (b) claims by the companies and others against the bank in relation to a lender liability lawsuit; and (c) the terms of a compromise between the bank and the companies. The Bank of Montreal, according to the information circular, would only realize \$32,859,005 upon liquidation. The settlement agreement between the Bank of Montreal and the companies, which is incorporated as part of the plan, provides that as of 17th January 1989, the bank is to receive the sum of \$41,650,000 in either cash or in cash plus properties. A copy of this agreement was provided to creditors, along with such other documents including a notice of the meetings, the reorganization plan, and an extensive information circular.

16 The class meetings and the general meetings of creditors were held in Vancouver on 31st October and 1st November 1988. All classes of creditors voted unanimously in favour of the plan except the priority mortgagee class. This class approved the plan by the requisite majority pursuant to the provisions of the C.C.A.A., that is, a simple majority of creditors in the class holding at least 75 per cent of the debt voting in favour of the plan. 73.3 per cent of the priority mortgagees holding 78.35 per cent of the debt voted in favour of the plan.

17 Relax Development Corporation Ltd., a priority mortgagee facing a deficiency, voted in favour of the plan. If Relax had not voted in favour of the plan, the companies would not have obtained the requisite majority from the priority mortgagee class. Prior to the settlement with the bank, Relax struck an agreement with the companies on the value of its security amounting to about \$900,000 over an appraisal value which was in dispute. Relax agreed in the settlement to vote in favour of the plan. More about that later.

18 The appellants on these appeals voted against the plan, and raised objections that the plan improperly put all priority mortgagees into one class, and also that the plan preferred some creditors over others. They allege that the net effect of the plan on the fully secured priority mortgagees is different than that on the mortgagees facing deficiencies, in that the plan reduces the amount of debt owed to the mortgagees facing deficiencies to the market value of the subject property of their respective security, and required assignment of the deficiency for \$1. They lose the right to obtain an order absolute of foreclosure pursuant to their security. On the other hand, the fully secured priority mortgagees recover the entire amount of their indebtedness.

19 The appellants Excelsior and National are secured creditors of the petitioner, Northland Properties Ltd., one of the companies. They hold a first mortgage jointly over an office tower in Calgary adjacent to the Calgary Sandman Inn. Both buildings share common facilities. The principle amount of the debt owing to Excelsior and National as of 26th October 1988, is \$15,874,533 plus interest of \$311,901. The market value of the office tower as of 13th May 1988 was stated to be \$11,675,000. They, therefore, face a potential deficiency of \$4,512,434.

20 Guardian Trust is a secured creditor of the petitioner, Unity Investment Company Limited, and holds a first mortgage over a small office building in Nelson, British Columbia. The amount owing to Guardian is \$409,198.46 and the estimated deficiency is approximately \$150,000 exclusive of transaction costs.

21 Mr. Justice Trainor, on 12th December 1988, found that the companies had complied with the provisions of the C.C.A.A., and, therefore, the court could exercise its discretion and sanction the reorganization plan. Excelsior and National and Guardian appeal against that decision.

22 Mr. Justice Trainor had the carriage of this matter almost from the beginning and he heard several preliminary applications. In a careful and thorough judgment, he set out the facts distinctly, reviewed the authorities and approved the plan. I do not propose to review the authorities again because they are extensively quoted in nearly every judgment on this subject. It will be sufficient to say that they include *Re Companies' Creditors Arrangement Act; A.G. of Can. v. A.G. Que.*, [1934] S.C.R. 659, [1934] 4 D.L.R. 75; *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 53 A.R. 39 (Q.B.); *Re Associated Investors of Can. Ltd.*, [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 67 C.B.R. (N.S.) 237, 38 B.L.R. 148, (sub nom. *Re First Investors Corp. Ltd.*) 46 D.L.R. (4th) 669 (Q.B.); *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.*, [1891] 1 Ch. 231 (C.A.); *Re Dairy Corp. of Can. Ltd.*, [1934] O.R. 436, [1934] 3 D.L.R. 347; *Re Wellington Bldg. Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626; *Br. Amer. Nickel Corp. v. O'Brien Ltd.*, [1927] A.C. 369 (P.C.); *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B.D. 573 (C.A.), and others.

23 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:

24 (1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

25 (2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

26 (3) The plan must be fair and reasonable.

27 Similarly, 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.

28 There were really four issues argued on this appeal but, as is so often the case, there is some overlapping. I shall attempt to deal with them individually.

29 First it was alleged, principally by Mr. Czepil, that the Act does not authorize a plan whereby the creditors of other companies can vote on the question of whether the creditors of another company may compromise his claim. He called this the cross-company issue.

30 This argument arises out of the particular facts that Mr. Czepil's client found itself in where it had a first mortgage, that is, Guardian had a first mortgage on a building owned by Unity which was the only asset of Unity, and he says the C.C.A.A. does not permit creditors of other companies to vote on the disposition of Guardian's security. I think there would be considerable merit in this submission except for the fact that the plan contemplates the consolidation of all the petitioner companies and the applications are made in this case not just under the C.C.A.A., but also under ss. 276-78 of the British Columbia Company Act, R.S.B.C. 1979, c. 59. In this respect, it is necessary to mention s. 20 of the C.C.A.A. which provides:

31 20. The provisions of this Act may be applied conjointly with the provisions of any Act of Canada or of any province, authorizing or making provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

32 During the argument of these appeals, we were treated to a review of the history of this matter in the court below. In reasons for judgment dated 5th July 1988 [now reported *Re Northland Properties Ltd.* (1988), 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266], Mr. Justice Trainor recited that he had been asked by some of the parties to approve a consolidation plan, but he declined to do so as the plan was not then before him in final form. It is implicit that Trainor J. thought he had authority to approve a consolidation plan and he referred to American authorities particularly, *Re Northland Properties Ltd.* [B.C.] Trainor J. 219 *Re Baker & Getty Fin. Services Inc.*, 78 B.R. 139 (U.S. Bankruptcy Ct., N.D. Ohio, 1987), and in *Re Snider Bros.*, 18 B.R. 320 (U.S. Bankruptcy Ct., D. Mass., 1982), and he said that he accepted the analysis of *Snider*, which proposes the test between economic prejudice of continued debtor separateness versus the economic prejudice of consolidation, and holds that consolidation is preferable if its economic prejudice is less than separateness prejudice.

33 I think Mr. Justice Trainor was right for the reasons described in the American authorities and because to hold otherwise would be to deny much meaning to s. 20 of the C.C.A.A. and would mean that when a group of companies operated conjointly, as these companies did (all were liable on the Bank of Montreal bonds), it would be necessary to propose separate plans for each company and those plans might become fragmented seriously.

34 I am satisfied there is jurisdiction to entertain a consolidation proposal.

35 Secondly, it was agreed that the composition of the class of priority creditors was unfair by reason of including all priority mortgagees without regard to the fact that some of them faced a deficiency and some did not. The appellants were each in the latter difficulty and they argue that they should have been placed in a different class because the other 11 priority mortgagees were going to get paid in full whether the plan was approved or not. This argument would have more merit if the plan were only for the benefit of the undersecured priority mortgagee. But the plan was also for the benefit of the company and the other creditors who, by their votes, indicted that they thought the plan was in their best interest. The learned chambers judge considered this question carefully. At p. 25 of his reasons he said this:

36 An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:

37 1. The nature of the debt is the same, that is, money advanced as a loan.

38 2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.

39 3. The nature of the security is that it is a first mortgage.

40 4. The remedies are the same — foreclosure proceedings, receivership.

41 5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped-for appreciation in value.

42 6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.

43 The points of dissimilarity are that they are separate priorities and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.

44 Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

45 I agree with that, but I wish to add that in any complicated plan under this Act, there will often be some secured creditors who appear to be oversecured, some who do not know if they are fully secured or not, and some who appear not to be fully secured. This is a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both.

46 I adopt, with respect, the reasoning of Forsyth J. of the Court of Queen's Bench of Alberta, in a recent unreported decision in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, No. 8801-14453, 17th November 1988 [now reported 63 Alta. L.R. (2d) 361, 92 A.R. 81], particularly at pp. 13 and 14 [pp. 369-70]. I am unable to accede to this ground of appeal.

47 Thirdly, I pause to mention that it was not suggested that the arrangement with the Bank of Montreal constituted a preference. It was argued, however, that the entire plan was tainted by the agreement made by the companies with Relax. Apparently, there was an appraisal showing a value of its security at \$3.7 million while other evidence suggests a value of between \$4.5 million to \$4.6 million. The amount owing to Relax on its mortgage was \$6 million.

48 Early in the history of this matter before the plan was finalized, and before the companies struck their crucial arrangement with the Bank of Montreal, the companies and Relax agreed to a future cash payment of \$500,000 and a valuation of \$4 million for the Relax property which could, in total, amount to a preference of up to \$900,000 to Relax and that company, in consideration of that compromise, agreed to vote for the plan.

49 It should be mentioned that the plan, from its inception, ensured to the priority mortgagees the full market value of their security to be determined either by agreement, appraisal, or, if necessary, arbitration. Thus, the appellants do not stand to lose anything by the agreement made with Relax. It is the bank which carried the burden of that expense.

50 There is no doubt that side deals are a dangerous game and any arrangement made with just one creditor endangers the appearance of the bona fides of a plan of this kind and any debtor who undertakes such a burden does so at considerable risk. In this case, however, it is apparent that this agreement was not made for the purpose of ensuring a favourable vote because at the time the deal was struck the companies had not reached an accommodation arrangement with the bank. I think the companies were negotiating, as businessmen do, on values for the purpose of putting a plan together.

51 Further the arrangement with Relax was fully disclosed in the plan. This does not ensure its full absolution if it was improper, but at least it removes any coloration of an underhanded or secret deal. In fact, there were also negotiations between the companies and the appellants but nothing came of those discussions.

52 After referring to the fact that the plan anticipated and permitted negotiations about values and other matters, the learned chambers judge said this at pp. 28 and 29 of his reasons:

53 The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.

54 If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and reread a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

55 In the circumstances of this case, I would not disagree with the learned chambers judge in that connection.

56 Lastly, it remains to be considered whether the plan is fair and reasonable. I wish to refer to three matters.

57 First, the authorities warn us against second-guessing businessmen (see *Re Alabama*, supra, at p. 244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, voted for the plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

58 Secondly, I wish to mention Mr. Czepil's argument that the plan was unfair, perhaps not conceptually, but operationally by authorizing negotiations. He says this put the parties in a difficult position when it came to vote because they risked retribution if they failed to reach agreement and then voted against the plan. He complains that some benefits offered in negotiations are no longer available to his clients.

59 With respect, negotiations between businessmen are much to be desired and I would not wish to say anything that would impede that salutary process. If negotiations lead to unfairness, then other considerations, of course, arise. But that, in my view, is not this case.

60 Thirdly, the plan assures all the priority mortgagees the full market value of their security without liquidation expenses. That is more than they could expect to receive if there had been no plan.

61 What they gave up is the right to take the property by order absolute or to seek a judicial sale and pursue the borrower for the deficiency. Guardian was actually offered its security but declined to accept it. The difficulty about this whole matter is the uncollectability of the deficiency having regard to the overwhelming debt owed to the bank which would practically eliminate any real chance of recovery of the deficiency.

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

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

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

65 I agree with that.

66 I also agree with the learned chambers judge that the plan should have been approved and I would dismiss these appeals accordingly.

Esson J.A.:

67 I agree.

Wallace J.A.:

68 I agree.

McEachern J.A.:

69 The appeals are dismissed with costs.

Appeal dismissed.

End of Document

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TAB 11

1993 CarswellOnt 182
Ontario Court of Justice (General Division)

Olympia & York Developments Ltd. v. Royal Trust Co.

1993 CarswellOnt 182, [1993] O.J. No. 545, 12 O.R. (3d) 500, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149

**Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re
plan of arrangement of OLYMPIA & YORK DEVELOPMENTS LIMITED
and all other companies set out in Schedule "A" attached hereto**

R.A. Blair J.

Heard: February 1 and 5, 1993

Oral reasons: February 5, 1993

Written reasons: February 24, 1993

Judgment: February 24, 1993

Docket: Doc. B125/92

Counsel: [List of counsel attached as Schedule "A" hereto.]

Subject: Corporate and Commercial; Insolvency

Application for sanctioning of plan under *Companies' Creditors Arrangement Act*.

R.A. Blair J.:

1 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. 27 of the 35 classes have voted in favour of the Final Plan; 8 have voted against it. The Applicants now bring the Final Plan before the Court for sanctioning, pursuant to section 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 purpose, as stated in Article 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% by OYDL and as to 10% 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 5 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 Article 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 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289 (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the *Companies' Creditors Arrangement Act*, with this overview, at pp. 308-309:

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 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario *Companies Act*. The N.S.C.A. recently followed *Re Northland Properties Ltd.* in *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S.C.A.). Farley J. did as well in *Re Campeau Corp.*, [1992] O.J. No. 237 (Ont. Ct. of Justice, Gen. Div.) [now reported at 10 C.B.R. (3d) 104].

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, supra*.

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 mailing 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), 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. 116, 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 addressed 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. at 231 (C.A.), a case involving a scheme and arrangement under the *Joint Stock Companies Arrangements Act, 1870* [(U.K.), 33 & 34 Vict., 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.* (1988), 73 C.B.R. (N.S.) 175, at p. 184 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195, at p. 205 (B.C.C.A.); *Re Langley's Ltd.*, [1938] O.R. 123 (C.A.), at p. 129; *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245; *École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987) Inc.* (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.).

39 In *Re Keddy Motors Inns Ltd.*, *supra*, 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. 257-258). Freeman J.A. stated at p. 258:

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 *École Internationale*, *supra* 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 and 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 8 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 5 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 that 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 5 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% of the creditors represented and voting at the meeting and 93.37% 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), 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 OBCA. 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 8 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% test of section 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 section 6 of the CCAA makes the mathematics of the approval process clear — the Plan must be approved by at least 50% of the creditors of a particular class representing at least 75% 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 Keddly Motor Inns Ltd.*, *supra*, at p. 20. 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. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297:

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 section 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 section 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. 600):

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 Immo Inc. v. Société Anonyme Just Invest* (1988), 70 C.B.R. (N.S.) 91 (C.S. Que.). There, the arrangement had been accepted by all creditors except one secured creditor, Société Anonyme 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 separated 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 affect 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 are 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 (C.S. Que.), at p. 18; L.W. Houlden & C.H. 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, semi-colon, and capital letter has been vigilantly examined by the creditors and a battalion of advisors. 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 paragraph 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 an 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 provided 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 re-structuring. 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 re-organization and corporate re-structuring 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 section 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, section 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.

Application allowed.

APPENDIX "A" — Counsel for Sanctioning Hearing Order

David A. Brown, Q.C.,	-- For the Olympia & York
Yoine Goldstein, Q.C.,	Applicants
Stephen Sharpe and	
Mark E. Meland	
Ronald N. Robertson, Q.C.	-- For Hong Kong & Shanghai
	Banking Corporation
David E. Baird, Q.C., and	-- For Bank of Nova Scotia
Ms Patricia Jackson	
Michael Barrack and	-- For the First Canadian
S. Richard Orzy	Place Bondholders,
	the Fifth Avenue Place
	Bondholders and the
	L'Esplanade Lauriere
	Bondholders

Olympia & York Developments Ltd. v. Royal Trust Co., 1993 CarswellOnt 182

1993 CarswellOnt 182, [1993] O.J. No. 545, 12 O.R. (3d) 500, 17 C.B.R. (3d) 1...

William G. Horton	-- For Royal Bank of Canada
Peter Howard and Ms J. Superina	-- For Citibank Canada
Frank J. C. Newbould, Q.C.	-- For the Unsecured/Under- Secured Creditors Committee
John W. Brown, Q.C., and J.J. Lucki	-- For Canadian Imperial Bank of Commerce
Harry Fogul and Harold S. Springer	-- For the Exchange Tower Bondholders
Allan Sternberg and Lawrence Geringer	-- For the O & Y Eurocreditco Debenture Holders
Arthur O. Jacques and Paul M. Kennedy	-- For Bank of Nova Scotia, Agent for Scotia Plaza Lenders
Lyndon Barnes and J.E. Fordyce	-- For Credit Lyonnais, Credit Lyonnais Canada
J. Carfagnini	-- For National Bank of Canada
J.L. McDougall, Q.C.	-- For Bank of Montreal
Carol V.E. Hitchman	-- For Bank of Montreal (Phase I First Canadian Place)
James A. Grout	-- For Credit Suisse
Robert I. Thornton	-- For I.B.J. Market Security Lenders
Ms C. Carron	-- For European Investment Bank
W.J. Burden	-- For some debtholders of O & Y Commercial Paper II Inc.
G.D. Capern	-- For Robert Campeau
Robert S. Harrison and A.T. Little	-- For Royal Trust Co. as Trustee

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TAB 12

1998 CarswellOnt 1145
Ontario Court of Justice, General Division [Commercial List]

Sammi Atlas Inc., Re

1998 CarswellOnt 1145, [1998] O.J. No. 1089, 3 C.B.R. (4th) 171, 59 O.T.C. 153, 78 A.C.W.S. (3d) 10

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

In The Matter of the Courts of Justice Act, R.S.O. 1990, c.C.43

In The Matter of a Plan of Compromise or Arrangement of Sammi Atlas Inc.

Farley J.

Heard: February 27, 1998

Judgment: February 27, 1998

Docket: 97-BK-000219, B230/97

Counsel: *Norman J. Emblem*, for the applicant, Sammi Atlas Inc.

James Grout, for Argo Partners, Inc.

Thomas Matz, for the Bank of Nova Scotia.

Jay Carfagnini and *Ben Zarnett*, for Investors' Committee.

Geoffrey Morawetz, for the Trade Creditors' committee.

Clifton Prophet, for Duk Lee.

Subject: Insolvency; Corporate and Commercial

MOTION for approval and sanctioning of plan of compromise and arrangement under *Companies' Creditors Arrangement Act*; MOTION by creditor for amendment of plan.

Farley J.:

1 This endorsement deals with two of the motions before me today:

1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and

2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

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

1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act* ("CCAA"); and

3) the Plan must be fair and reasonable.

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

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

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

5 Those voting on the Plan (and I note there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p.510 of *Olympia & York 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. The vote in the present case is even higher than in *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) where I observed at p.141:

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

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

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

materially upon the fairness and reasonableness of a plan. I note in passing that it would be inappropriate to attempt to obtain a preview of the court's views as to sanctioning by brining on such a motion. See my views in *Central Guaranty Trustco Ltd., Re* at p.143:

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

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

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

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

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

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

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

Addendum:

10 I reviewed with the insolvency practitioners (legal counsel and accountants) the aspect that industrial and commercial concerns in a CCAA setting should be distinguished from "bricks and mortgage" corporations. In their reorganization it is important to maintain the goodwill attributable to employee experience and customer (and supplier) loyalty; this may very quickly erode with uncertainty. Therefore it would, to my mind be desirable to get down to

brass tacks as quickly as possible and perhaps a reasonable target (subject to adjustment up or down according to the circumstances including complexity) would be for a six month period from application to Plan sanction.

Motion for approval granted; motion for amendment dismissed.

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TAB 13

2012 ONSC 7050
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 15913, 2012 ONSC 7050, 224 A.C.W.S. (3d) 21

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

Morawetz J.

Heard: December 7, 2012
Judgment: December 12, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Sino-Forest Corporation
Derrick Tay, Jennifer Stam, Cliff Prophet, for Monitor, FTI Consulting Canada Inc.
Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholders
Kenneth Rosenberg, Kirk Baert, Max Starnino, A. Dimitri Lascaris, for Class Action Plaintiffs
Won J. Kim, James C. Orr, Michael C. Spencer, Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical
Investments LP, Comité Syndicale Nationale de Retraite Bâtirente Inc.
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young Inc.
Peter Green, Ken Dekkar, for BDO Limited
Edward A. Sellers, Larry Lowenstein, for Board of Directors of Sino-Forest Corporation
John Pirie, David Gadsden, for Poyry (Beijing)
James Doris, for Plaintiff in New York Class Action
David Bish, for Underwriters
Simon Bieber, Erin Pleet, for David Horsley
James Grout, for Ontario Securities Commission
Emily Cole, Joseph Marin, for Allen Chan
Susan E. Freedman, Brandon Barnes, for Kai Kit Poon
Paul Emerson, for ACE/Chubb
Sam Sasso, for Travelers

Subject: Insolvency; Civil Practice and Procedure

MOTION by debtor corporation for order sanctioning plan of compromise and reorganization.

Morawetz J.:

1 On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

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

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

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

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

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

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

8 The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

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

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

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

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

Facts

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

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

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

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

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

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

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

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

19 SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012 [2012 CarswellOnt 14701 (Ont. C.A.)], and unless further extended, will expire on February 1, 2013.

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

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

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

23 After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

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

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

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

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

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

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

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

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

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

33 In reasons released on July 27, 2012 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly

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

34 On August 31, 2012 [2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List])], an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

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

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

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

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

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

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

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

41 Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

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

with respect to indemnified Noteholder Class Action Claims are also limited to the \$150 million Indemnified Noteholder Class Action Limit.

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

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

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

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

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

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

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

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

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

	<i>Vote For</i>	<i>Vote Against</i>	<i>Total Votes</i>
Class Action Indemnity Claims	4	1	5

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

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

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

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

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

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

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

Law and Argument

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

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

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

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

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

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

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

55 SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims

Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

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

57 Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Canadian Airlines Corp., Re*, and *Nortel Networks Corp., Re*, [2009] O.J. No. 2166 (Ont. S.C.J. [Commercial List]). Further, courts should resist classification approaches that potentially jeopardize viable plans.

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

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

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

61 In *Nelson Financial Group Ltd., Re*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

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

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

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

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

65 The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

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

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

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

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

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

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

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

Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

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

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

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

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

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

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

Disposition

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

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

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

Motion granted.

TAB 14

2013 ONSC 2519
Ontario Superior Court of Justice [Commercial List]

SkyLink Aviation Inc., Re

2013 CarswellOnt 7670, 2013 ONSC 2519, [2013] O.J. No. 2664, 229 A.C.W.S. (3d) 24, 3 C.B.R. (6th) 83

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

In the Matter of a Plan of Compromise and Arrangement of Skylink Aviation Inc. Applicant

Morawetz J.

Heard: April 23, 2013

Oral reasons: April 23, 2013

Docket: CV-13-1003300CL

Counsel: Robert J. Chadwick, Logan Willis for SkyLink Aviation Inc.
Harvey Chaiton for Arbib, Babrar and Sunbeam Helicopters
Emily Stock for Certain Former and Current Directors, for Insured Claims
S.R. Orzy, Sean Zweig for Noteholders
Shayne Kukulowicz for Certain Directors and Officers
M.P. Gottlieb, A. Winton for Monitor, Duff & Phelps

Subject: Insolvency

APPLICATION by debtor for approval of plan under *Companies' Creditors Arrangement Act* and to extend stay.

Morawetz J.:

1 SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), seeks an Order (the "Sanction Order"), among other things:

(a) sanctioning SkyLink Aviation's Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");

(b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and

(c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 [2013 CarswellOnt 2785 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 No party opposed the requested relief.

3 Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company's goal of a going-concern recapitalization transaction (the "Recapitalization") that minimizes any impact on operations and maximizes value for the Company's stakeholders.

4 Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company's stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number

representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

5 The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

The Facts

6 SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, "SkyLink"), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the "SkyLink Business").

7 SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk conflict zones.

8 SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the "Monitor").

9 The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. The Recapitalization involves: (i) the refinancing of the Company's first lien debt; (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders' claim that is treated as unsecured under the Plan.

10 On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers. SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

11 Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately \$123.4 million.

12 The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

(a) \$28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the "Secured Noteholders Allowed Secured Claim"); and

(b) \$94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the "Secured Noteholders Allowed Unsecured Claim").

13 The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the "Valuation") prepared by Duff & Phelps Canada Limited.

14 The Claims Procedure resulted in \$133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of \$94.9 million and other unsecured Claims of \$38.8 million, being filed against the Company.

15 In addition, ten claims were filed against the Directors and Officers totalling approximately \$21 million. Approximately \$13 million of these claims were also filed against the Company.

16 Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the "Original Plan").

Purpose and Effect of the Plan

17 In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company's stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

18 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

19 Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

20 Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

21 The Plan provides for the release of a number of parties (the "Released Parties"), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

22 The Plan does not release: (i) the right to enforce SkyLink Aviation's obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

Meetings of Creditors

23 At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

24 Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for

approval of the Plan under the CCAA would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

25 Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the "New Shareholders' Agreement"), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

Requirements for Approval

26 The general requirements for court approval of a CCAA plan are well established:

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

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

Canadian Airlines Corp., Re, 2000 ABQB 442 (Alta. Q.B.), at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed (2000), 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.).

27 Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

28 With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

29 Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

- (a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;
- (b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;
- (c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;
- (d) the Affected Creditors voted to approve the Plan at the Meetings;
- (e) the Plan is economically feasible;

(f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the goingconcern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

30 In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]); affirmed 2008 ONCA 587 (Ont. C.A.) leave to appeal refused (2008), 257 O.A.C. 400 (note) (S.C.C.).

31 Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

32 Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

33 I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

(a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;

(b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;

(c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;

(d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;

(e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

34 I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

Sealing the Confidential Appendix

35 The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

36 The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

Extension of Stay Period

37 The Applicant also requests an extension of the Stay Period until May 31, 2013.

38 I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

Application granted.

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

Court File No.: CV-15-11192-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR VICTORIAN ORDER OF
NURSES FOR CANADA ET AL.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at **Toronto**

**BOOK OF AUTHORITIES
(Re Motion Returnable November 23, 2016)**

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