TAB 15

29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42

1994 CarswellNB 14

Siscoe & Savoie v. Royal Bank

SISCOE & SAVOIE v. ROYAL BANK OF CANADA, LAW SOCIETY OF NEW BRUNSWICK and J. DAVID HUMPHREY (in his capacity as Taxation Officer by virtue of Law Society Act of New Brunswick)

New Brunswick Court of Appeal

Hoyt C.J.N.B., Ayles and Turnbull JJ.A.

Heard: March 15, 1994

Judgment: December 14, 1994

Docket: Doc. 330/93/CA

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Counsel: Peter J.C. White, for appellant.

Harry H. Williamson, Q.C., for respondent Royal Bank of Canada.

David M. Norman, Q.C., for respondent Law Society of New Brunswick.

J. David Humphrey, Q.C. not represented by counsel.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Barristers and Solicitors --- Organization and regulation of profession -- Law Societies -- General.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act.

Practice --- Costs -- Taxation or assessment of costs -- Right to -- Where bill of costs already paid.

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Remuneration of solicitor -- Order made under Act requiring all disbursements to flow through centralized trust account -- Law firm's accounts flowing through -- Law Society Act providing that "person from whom payment is claimed" may request taxation -- Bank as secured creditor qualifying as such a person -- Judgment upheld on appeal -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Law Society Act, S.N.B. 1973, c. 80 (1st Sess.).

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Functions of monitor -- Monitor being agent of court and being responsible and accountable to court -- Monitor owing fiduciary duty to all parties and having obligation to ensure that one creditor not given advan tage over another -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

A group of companies, collectively known as MM, was granted an order under the Companies' Creditors Arrangement Act ("CCAA") staying any proceedings against them and allowing them to remain in possession of their assets in order to

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carry on business. A law firm acted for MM in obtaining the CCAA order and in dealing with its day-to-day legal business. The bank was MM's only secured creditor. The order provided that the companies were to be treated as one entity entitled to file one plan of arrangement. It also provided that all receipts and disbursements relating to MM's operations were to flow through a centralized trust account until the creditors approved the plan. A monitor was appointed to review the receipts and disbursements flowing through the trust account and to report to the court monthly. The order also provided that, except for authorized disbursements, no ordinary creditors of MM were to be paid until the plan was approved and sanctioned by the court. No secured creditors were to be paid.

The plan was not approved and a trustee in bankruptcy was appointed. Prior to the trustee's appointment, the law firm received a total of $78,865.48. Because of a dispute over the legal fees and disbursements, the bank and the trustee applied for a notice of taxation of the law firm's accounts. A taxation officer was appointed. The law firm applied for an order that the Law Society of New Brunswick and the taxation officer had no jurisdiction to tax the firm's accounts upon the request of the bank. The taxation hearing was stayed pending the outcome of the application.

The application was dismissed upon a finding that the bank qualified under the words "any person from whom payment is claimed" in s. 34(3)(b) of the Law Society Act (N.B.). The bank was a person who had a direct pecuniary interest in having the account verified since, as the only secured creditor, it would be the sole beneficiary if the legal accounts were taxed down.

The law firm appealed, arguing that the trial judge erred in finding that the words "any person from whom payment is claimed" extended to include any person "who has a direct pecuniary interest in having the account verified."

Held:

The appeal was dismissed.

Under the CCAA order, the money that the bank would otherwise have been entitled to under its security became the working capital to fund the continued operation of MM during the existence of the order. As a result, it was in effect the bank "from whom payment is claimed" by the law firm. The deposits in the trust account were not the absolute property of MM. The eligible legal accounts were not protected by solicitor-client privilege; they were subject to review and approval by the monitor and the court. Therefore, the trial judge was correct in deciding that the bank had the status to obtain the notice of taxation. Any legal accounts not authorized by the CCAA order and any rendered prior to the order should be disallowed. Any amounts paid to the law firm for such ineligible services or for amounts for which there was no account should be taxed off. As the law firm was an ordinary unsecured creditor of MM, it was not entitled to a preference over the other creditors, nor to priority over the bank, except to the extent permitted by the order.

A monitor is an agent of the court and, as such, responsible and accountable to the court. The monitor owes a fiduciary duty to all parties and has an obligation to ensure that one creditor is not given an advantage over any other creditor. One of the purposes of the review of all of the receipts and disbursements was to ensure that they were reasonable in amount, incurred fairly and authorized by the order. There was no evidence that such a review was undertaken.

Statutes considered:

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

Law Society Act, S.N.B. 1973, c. 80 --

s. 34(2)

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s. 34(3)(b)

Regulations considered:

Law Society Act, S.N.B. 1973, c. 80 --

Taxation Regulation -- Law Society Act,

O.C. 93-114

s. 4(3)

Appeal from judgment reported at (1993), 22 C.B.R. (3d) 76, 138 N.B.R. (2d) 395, 354 A.P.R. 395 (Q.B.) dismissing application for order that Law Society of New Brunswick and taxation officer had no jurisdiction to tax law firm's account at request of bank.

The judgment of the court was delivered by *Turnbull J.A.*:

1 This appeal [from (1993), 22 C.B.R. (3d) 76 (N.B. Q.B.)] concerns the right of a secured creditor to obtain the taxation of legal accounts rendered to three corporations in connection with proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCA Act").

2 Siscoe & Savoie, a law firm, are appealing a decision of McIntyre J., of the Court of Queen's Bench, dismissing its application for an order that the Law Society of New Brunswick and its taxation officer, J. David Humphrey, Q.C., have no jurisdiction to authorize and carry out the taxation of the law firm's accounts. A Notice of Taxation, dated May 18, 1993, was issued by the Law Society on the application of the respondent, the Royal Bank of Canada, a secured creditor. A trustee in bankruptcy also signed the application but did not take part in these proceedings.

3 On December 19, 1991, an Order was granted under the CCA Act (the "CCAA Order") staying any proceedings against MITI-MART Ltd., MITI-MART Inc. and 036123 N.B. Ltd. (the "Miti-Mart Corporations") and allowing them to remain in possession of their assets in order to carry on business and attempt to obtain a plan of arrangement all in accordance with the provisions of the CCAA Order. The law firm acted for the Miti-Mart Corporations in obtaining the CCAA Order and was also the Miti-Mart Corporations' regular lawyers. The Royal Bank was the Miti-Mart Corporations' regular banker and their only secured creditor, as the assignee of a General Assignment of Debts from each of them.

4 Included in the CCAA Order were several provisions relevant to this appeal. All three corporations were to be treated as one entity and to be entitled to file one plan of arrangement. All proceedings by any secured creditor were stayed, except with leave of the Court, and no bank could exercise any right of set-off against funds on deposit. All receipts and disbursements of the Miti-Mart Corporations were to be deposited to and withdrawn from an account maintained at the Bank of Nova Scotia in Bathurst, New Brunswick, (the "CCAA Trust Account"), until the Plan was approved by the creditors of the Miti-Mart Corporations.

5 The Miti-Mart Corporations were empowered by the CCAA Order to carry on their businesses, in the ordinary course, and, in particular:

> 14(d) to employ and retain such ... solicitors ... to advise and represent [the Miti-Mart Corporations] in matters arising out of the operation of the business in the ordinary course, and the expenditures incurred by [the Miti-Mart Corporations] in so doing shall be paid from the proceeds of operations of [the Miti-Mart Corporations],

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> and 14(e) to employ and retain such ... solicitors ... as [the Miti-Mart Corporations] may consider necessary for the purpose of preparing the Plan, and all matters ancillary thereto, including without limitation, the classification of creditors, the holding of meetings and applications to this Court, and the expenditures incurred by [the Miti-Mart Corporations] in so doing shall be paid from the proceeds of operations of [the Miti-Mart Corporations];

6 A chartered accountant, Lawrence Chapman, was appointed monitor to review the receipts and disbursements of the Miti-Mart Corporations flowing through the CCAA Trust Account and to report to the Court on a monthly basis.

7 The CCAA Order further provided that, except for authorized disbursements, no ordinary creditors of the Miti-Mart Corporations were to be paid until the Plan was approved by the creditors and sanctioned by the Court and, except for normal bank charges and in terest payments, the same restriction applied to prohibit payments to any secured creditors, such as the Royal Bank.

8 The attempt to obtain an approved Plan failed and Dave W. Stevenson, C.A., was appointed trustee in bankruptcy of the Miti-Mart Corporations on February 4, 1992, six and one-half weeks after the CCAA Order.

9 At the request of the Royal Bank, the Trustee undertook a review of the Miti-Mart Corporations' accounting records and invoices from the date of the CCAA Order to the date of the bankruptcy.

10 The Trustee confirmed that the Royal Bank was the only secured creditor of the Miti-Mart Corporations. He reported that the accounting records were neither complete nor were there invoices supporting all the payments of legal fees and disbursements.

11 The Trustee discovered six invoices totalling $17,611.59 from a Fredericton law firm which apparently acted as Counsel to Siscoe & Savoie. The records reflected payment of $6,278.86 drawn on the CCAA Trust Account for three of those invoices and no record of payment from that account for the other three.

12 In connection with Siscoe & Savoie, the Trustee reported payments of $78,865.48. These payments were accounted for as follows:

1. An account dated December 19, 1991 for services from December 13 to December 19, 1991 paid from the Miti-Mart Corporations' Royal Bank accounts;	$ 8,113.70
2. An account dated January 10, 1992 for services from January 2, to January 10, 1992 paid from the CCAA Trust account;	12,241.35
3. An account dated December 19, 1991 for services from January 13 to January 16, 1992 paid from the CCAA Trust account (the date of this account is an obvious error);	14,035.02
4. An account dated January 24, 1992 for services from January 16 to	10,967.43

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January 24, 1992 paid from the CCAA Trust account; and	
5. Payments to Siscoe & Savoie of 24,007.98 and $9,500 from the CCAA Trust account and for which no invoices could be found.	33,507.98
TOTAL	$78,865.48

13 Included in items 2, 3 and 4 were fax charges totalling $17,374.50 and, in item 3, a disbursement to Work Word #810 for $6,227.60.

14 Except for the initial CCAA Order, we were not provided with copies of any further orders under the CCA Act. There is evidence that from December 19, 1991 to January 18, 1992, $260,476.38 was deposited in the CCAA Trust account. Ultimately, the Royal Bank, as the only secured creditor, received $35,757, being the balance of that account "upon dissolution of the Court Order of December 19, 1991." How this dissolution was done does not appear in the record, nor is there any evidence that the Monitor reviewed the receipts and disbursements, or reported to the Court nor that the Court approved any accounts. Counsel for the law firm advised that he understood the Monitor was discharged. In addition, he was not aware of any court order approving the accounts of the Miti-Mart Corporations.

15 The Royal Bank tried unsuccessfully to obtain a satisfactory explanation from Siscoe & Savoie of the payments described in item 5. The Royal Bank also concluded that the legal fees and disbursements were excessive. As a result, the Royal Bank and the Trustee in Bankruptcy applied for a Notice of Taxation of the Siscoe & Savoie legal accounts, items 1 through 4, and the "missing accounts", item 5. The Trustee also assigned any amounts taxed off the accounts to the Royal Bank, "the only secured creditor of the companies, for its own use absolutely".

16 J. David Humphrey, Q.C. was appointed taxation officer by the Law Society and he set July 22nd, 1993 as the date for the taxation hearing. That hearing was stayed in order for Siscoe & Savoie to make an application contesting Mr. Humphrey's jurisdiction.

17 As noted, the trial Judge dismissed the application. He held that the taxation provisions of the *Law Society Act*, S.N.B. 1973, c. 80 (1st Sess.), as amended, extended to "any person who has a direct pecuniary interest in having the account verified" [at p. 79]. He found that the Royal Bank did have a "direct pecuniary interest" since, as the only secured creditor, it would be the sole beneficiary if the legal accounts were taxed down.

18 The relevant sections of the *Law Society Act*, in this matter are as follows:

> 34 ...
>
> (2) Any bill for fees, costs, charges or disbursements may be taxed before a taxing officer appointed by the Lieutenant-Governor in Council in accordance with the regulations.
>
> (3) Notice of taxation of any bill for fees, costs, charges or disbursements may be given:
>
> .....
>
> (*b*) by any person from whom payment is claimed to the barrister or solicitor claiming payment,

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19 The law firm alleges the trial judge erred by ruling that the words, "any person from whom payment is claimed", in s. 34(3)(*b*) of the Act, extend to include any person "who has a direct pecuniary interest in having the account verified". They also claim he erred in determining that (1) the Royal Bank has a direct pecuniary interest in the account of the law firm's client (the Miti-Mart Corporations), (2) a monitor appointed under the *Companies' Creditors Arrangement Act* did not have the ability to properly review a solicitor's account for correctness and (3) an administrative tribunal has standing to review accounts ordered paid by virtue of a court order.

20 The respondent, J. David Humphrey, Q.C., did not participate in the appeal.

21 The respondent, Law Society, supported the appeal but only with respect to arguing that the Royal Bank was not a person "from whom payment is claimed", thus did not have the status to obtain a "notice of taxation". The Law Society disagreed with the conclusion of the trial judge that taxation rights extend "to any person who has a direct pecuniary interest in having the account verified".

22 In addition, the Law Society submitted that if there were proceedings before the Court in relation to the law firm's legal accounts no Notice of Taxation should issue; citing subs. 4(3) of Reg. 93-114, the Taxation Regulation -- *Law Society Act*, as authority. That subsection reads as follows:

> (3) A notice of taxation for a bill for fees, costs, charges or disbursements shall not be given if proceedings before the Court have been commenced in relation to the bill.

23 Paragraph 13 of the CCAA Order designated the Monitor, Mr. Chapman, as the person to review the receipts and disbursements, which would include the legal accounts, of the Miti-Mart Corporations and to report to the Court on a monthly basis. There was no evidence that the Monitor reviewed the legal bills, let alone expressed an opinion on their correctness or reported to the Court. As such, whether a monitor has "the ability to properly review a solicitor's account for correctness" is not an issue in this appeal.

24 With the dissolution of the CCAA Order there is no proceeding before, or decision of, the Court in relation to the law firm's accounts; therefore, a notice of taxation may issue to a qualified person. The CCAA Order did not order that the accounts be paid; it only authorized payment of the eligible accounts subject to the Monitor's review. The Court also had an inherent jurisdiction to approve or disapprove of any account during the continuation of the CCAA Order.

25 Thus the only remaining issue to be decided is whether the Royal Bank qualifies as a person who can obtain a notice of taxation to have the legal accounts taxed. In this case, is the Royal Bank a person "from whom payment is claimed" by the law firm?

26 The CCA Act allows corporations, such as the Miti-Mart Corporations that are in serious financial difficulty, to carry on their business under Court supervision while preserving a status quo, so that the principals of the corporations and their creditors can attempt to work out a plan of arrangement or compromise. (See the article by David H. Goldman, David E. Baird, Q.C. and Michael A. Weinczok, "Arrangements Under the *Companies' Creditors Arrangement Act*" (1991) 1 C.B.R. (3d) 135 for an extensive discussion of the CCA Act and the effect of proceedings under it.)

27 The stay of proceedings granted in the CCAA Order prevented the creditors and other claimants from realizing on their security or enforcing their claims without the leave of the Court.

28 The Monitor is an agent of the Court. As a result, the Monitor is responsible and accountable to the Court. He also owed a fiduciary duty to all the parties and an obligation to ensure that one creditor is not given an advantage over any

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other creditor. In accordance with the CCAA Order, the Monitor was ordered to review all the receipts and disbursements of the Miti-Mart Corporations. One of the purposes of that review was to ensure that all disbursements from the CCAA Trust Account were reasonable in amount, incurred fairly and authorized by para. 14 of the CCAA Order. There is no evidence that this was done.

29 By letter dated November 14, 1991, the Royal Bank had agreed to maintain credit facilities in favour of the Miti-Mart Corporations until December 31, 1991, on condition that "all funds related to sales of goods from Miti-Mart locations" be deposited in the Royal Bank. In addition, the debts assigned by the General Assignments of Debts to the Royal Bank were ordered deposited to the CCAA Trust Account. In each assignment the assigning Miti-Mart Corporation acknowledged that "all moneys received [by it] from the collection of the debts or any of them shall be received in trust for the Bank".

30 The CCAA Order neither impairs a secured creditor's title to its security nor the immediate crystallization of its right to seize and sell. What the CCAA Order did do was to postpone the Royal Bank's exercise of its right to realize on its security, which in this case would be the collection of the Miti-Mart Corporations' debts. The CCAA Order directed that these amounts be deposited in the CCAA Trust Account with the result that these deposits were the source of the funds to pay the authorized disbursements. In effect, the monies which the Royal Bank would otherwise have been entitled to under their security became the working capital to fund the continued operation of the Miti-Mart Corporations during the existence of the CCAA Order. To the extent that the Miti-Mart Corporations' creditors, including the law firm, were allowed payment pursuant to para. 14 of the CCAA Order, they obtained a preference over the only secured creditor, the Royal Bank. As such, the value of the Royal Bank's security was at risk.

31 In these circumstances it is, in effect, the Royal Bank "from whom payment is claimed" by the law firm. The deposits in the CCAA Trust Account were not the absolute property of the Miti-Mart Corporations. Nor were the eligible legal accounts protected by a solicitor-client privilege. They were subject to review and approval by the Monitor, as well as by the Court, with respect to both the services rendered and the amount of the account. It is for these reasons that I agree with the trial judge that the Royal Bank had the status to obtain the Notice of Taxation.

32 On the taxation, the Taxation Officer should only include those bills for fees, costs, charges or disbursements that relate to the just and reasonable legal services rendered in connection with the application for the CCAA Order, unless they were paid from the Miti-Mart Corporations' Royal Bank account, as well as those legal services authorized by paras. 14(d) and (e) of the CCAA Order. Any legal accounts not so authorized, and any rendered prior to the CCAA Order, should be disallowed, and any amounts that were paid to the law firm from the CCAA Trust Account for such ineligible legal services or for amounts for which there is no account should be taxed off. The law firm, as an ordinary unsecured creditor of the Miti-Mart Corporations, is neither entitled to a preference over the other creditors nor a priority over the Royal Bank, except to the extent permitted by para. 16 of the CCAA Order.

33 Accordingly, I would dismiss the appeal of the law firm, Siscoe & Savoie, and the respondent, the Law Society of New Brunswick. I would allow costs of the appeal to the respondent, the Royal Bank of Canada, against the appellant law firm in the amount of $1,500 plus disbursements. The matter is ordered returned to the Taxation Officer to set a date for the taxation.

Appeal dismissed.

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TAB 16

2004 BCSC 20, 49 C.B.R. (4th) 110, 27 B.C.L.R. (4th) 332, 47 C.P.C. (5th) 313

2004 CarswellBC 87

Jackpine Forest Products Ltd., Re
In the Matter of The Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36
In the Matter of The Company Act, R.S.B.C. 1996, c. 62
In the Matter of Jackpine Forest Products Ltd. and Jackpine Engineered Wood Products Inc. (Petitioners)
British Columbia Supreme Court
Burnyeat J.
Heard: November 28, 2003
Judgment: January 21, 2004
Docket: Vancouver L033141

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Counsel: J.I. McLean, C.D. Brousson for Jackpine Forest Products Ltd., Jackpine Engineered Wood Products Inc.

C.M. Ritchie for GE Canada Equipment Financing G.P.

H.M.B. Ferris for Monitor, PricewaterhouseCoopers Inc.

C.M. Emslie for Bank of Montreal

G.J. Gehlen for Lignum Limited

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Civil practice and procedure --- Costs -- Scale and quantum of costs -- Quantum of costs -- Special costs

Secured creditor's application to substitute monitor appointed under Companies' Creditors Arrangement Act was dismissed -- Debtor company applied for various costs orders -- Application was granted in part -- Costs in proceedings under Act are governed by inherent jurisdiction of court and Rules of Court, 1990 -- Order for special costs was not appropriate -- Conduct of applicant was not reprehensible or deserving of censure -- Application was not brought for improper purpose.

Civil practice and procedure --- Costs -- Particular orders as to costs -- Costs on solicitor and own client basis

Secured creditor's application to substitute monitor appointed under Companies' Creditors Arrangement Act was dismissed -- Debtor company applied for various costs orders -- Application was granted in part -- Costs in proceedings under Act are governed by inherent jurisdiction of court and Rules of Court, 1990 -- Rules did not contemplate order for solicitor-and-own-client costs on interlocutory application -- Fixing of "lump sum costs" is limited to party-and-party costs -- Legislature did not intend to remove right of interested party to require assessment of solicitor's bill.

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

Secured creditor's application to substitute court appointed monitor was dismissed -- Debtor company applied for various costs orders -- Application was granted in part -- Costs in proceedings under Companies' Creditors Arrangement Act are governed by inherent jurisdiction of court and Rules of Court, 1990 -- Secured creditors who opposed application were entitled to fixed party-and-party costs -- Only one set of costs was awarded given duplication of interests -- Adding of creditors' solicitors' bills to amounts owing by debtor company was matter governed by security agreements between them -- Court ordered that applicant pay company's bill after assessment -- Purpose of Act would not be furthered if company's debt were increased by defending unmeritorious interlocutory applications -- Monitor's costs were not recoverable under priority created by order of appointment -- Monitor should not have taken part in application involving dispute between creditors -- Monitor as impartial officer could not pursue own interest in defending appointment.

Cases considered by Burnyeat J.:

> Canadian Imperial Bank of Commerce v. Cedar Hills Properties Ltd. (1997), 1997 CarswellBC 1557, (sub nom. Canadian Imperial Bank of Commerce v. Sovereign Life Insurance Co.) 150 W.A.C. 21, (sub nom. Canadian Imperial Bank of Commerce v. Sovereign Life Insurance Co.) 92 B.C.A.C. 21, 11 R.P.R. (3d) 292, 32 B.L.R. (2d) 277, 47 C.B.R. (3d) 153, 9 C.P.C. (4th) 180, 35 B.C.L.R. (3d) 1, [1997] 8 W.W.R. 26 (B.C. C.A.) -- considered
>
> Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) -- followed
>
> Eron Mortgage Corp., Re (1998), 1998 CarswellBC 102, 2 C.B.R. (4th) 184, 53 B.C.L.R. (3d) 24 (B.C. S.C.) -- followed
>
> Garcia v. Crestbrook Forest Industries Ltd. (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242, 14 C.C.E.L. (2d) 84, 41 C.P.C. (3d) 298, (sub nom. Garcia v. Crestbrook Forest Industries Ltd. (No. 2)) 45 B.C.A.C. 222, (sub nom. Garcia v. Crestbrook Forest Industries Ltd. (No. 2)) 72 W.A.C. 222, 1994 CarswellBC 1184 (B.C. C.A.) -- referred to
>
> Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) -- considered
>
> Reference re Companies' Creditors Arrangement Act (Canada) (1934), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, 1934 CarswellNat 1 (S.C.C.) -- considered
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> Siscoe & Savoie v. Royal Bank (1994), 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42, 1994 CarswellNB 14 (N.B. C.A.) -- considered
>
> Sulphur Corp. of Canada Ltd., Re (2002), 2002 ABQB 682, 2002 CarswellAlta 896, 35 C.B.R. (4th) 304, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152 (Alta. Q.B.) -- considered
>
> United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) -- considered

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Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) -- referred to

Statutes considered:

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

Generally -- referred to

Legal Profession Act, S.B.C. 1998, c. 9

Generally -- referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally -- referred to

R. 57 -- referred to

R. 57(1) -- referred to

R. 57(13.1) [en. B.C. Reg. 83/2002] -- considered

R. 57(13.1)(a) [en. B.C. Reg. 83/2002] -- referred to

R. 57(13.1)(b) [en. B.C. Reg. 83/2002] -- considered

R. 57(34) -- considered

R. 57(35) -- considered

App. B, s. 2(2)(b) -- referred to

App. B, s. 2(2)(c) -- referred to

Tariffs considered:

Rules of Court, 1990, B.C. Reg. 221/90

App. B -- referred to

ADJUDICATION on costs.

***Burnyeat J.*:**

1 On November 28, 2003, GE Canada Equipment Financing G.P. ("GE") a secured creditor of Jackpine Forest Products Ltd. and Jackpine Engineered Wood Products Inc. ("Jackpine") applied to substitute a different firm in place of PricewaterhouseCoopers Inc. ("P.W.C.") who had been appointed as the Monitor in these *Companies'*

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Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("*C.C.A.A.*") proceedings on November 28, 2003.

2 Appearing to oppose that motion were counsel on behalf of Jackpine, the Monitor, and two secured creditors, Bank of Montreal ("BOM") and Lignum Limited ("Lignum")

3 The application to substitute the Monitor was dismissed without the necessity of hearing from the counsel who were opposing the application of GE. The questions which arise are whether costs should be available to the various parties who appeared to oppose the Motion of GE, what type of costs should be available, and whether any costs can be added to the balances owing under the security which charges the property of Jackpine.

SUBMISSION OF THE PARTIES

4 Jackpine submits that GE should pay the costs of Jackpine, Lignum, BOM, and the Monitor for the respective counsel's preparation and attendance on the application of GE. Jackpine seeks these costs in the fixed amount of $18,400.00 payable forthwith and without setoff against debt owing by Jackpine to GE. Jackpine submits that this amount represents partial indemnity of the legal fees and disbursements incurred by Jackpine, Lignum, BOM and the Monitor which will otherwise be added to the indebtedness of Jackpine under the security held by Lignum and BOM or to the indebtedness of Jackpine arising out of the Order appointing the Monitor whereby the expenses of the Monitor were given a priority ranking ahead of the security held by Lignum, BOM and GE. Jackpine also submits that GE should not be allowed to add any of its costs to the indebtedness of Jackpine under the security held by GE.

5 Jackpine submits that the total of $18,400.00 is based upon estimates received from counsel and is made up as follows: Jackpine ($6,200), BOM ($6,200), Lignum ($3,000), and the Monitor ($3,000).

6 GE submits that there is no justification for an order for Special Costs or solicitor and own client costs, that the Court should only award Party and Party (Scale 2) costs because the application was of less than ordinary difficulty and that only Jackpine should be allowed its costs as no relief was being sought against Lignum and BOM, as the exiting Monitor is a Court appointed officer and should not have taken a position on the motion, and as only one set of costs should be awarded when several parties have the same interest in the outcome of an application. In particular, GE submits that the interests of BOM and Lignum were identical with the interests of Jackpine so there was no necessity for counsel on behalf of BOM and Lignum to make submissions in addition to those being made by counsel for Jackpine and, in any event, Lignum did not file any materials and planned to rely "essentially on submissions made by counsel for the Petitioners [Jackpine]".

APPLICABLE RULES AND STATUTORY PROVISIONS

7 Costs to be awarded in proceedings under the *C.C.A.A.* are governed under the inherent jurisdiction of the Court and the British Columbia *Rules of Court* as there are no applicable provisions within the *C.C.A.A.* dealing with this question of costs.

8 Rule 57(1) of the *Rules of Court* provides that, where costs are payable under the *Rules* or by order, costs will be assessed as Party and Party Costs under Appendix B unless the Court orders that they be assessed as Special Costs. Rule 57(13.1) of the *Rules of Court* provides:

> The court may award lump sum costs of an interlocutory application and may
>
> (a) fix those costs, either inclusive or exclusive of disbursements, or

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(b) order that the costs amount be in accordance with Schedule 3 of Appendix B and fix the scale of those costs in accordance with section 2(2) of that Appendix.

9 Appendix B of the *Rules of Court* deals with "Party and Party Costs" and not with Special Costs or a bill under the *Legal Profession Act*.

10 Rule 57(34) provides: "A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis. Rule 57(35) provides: "A lump sum bill shall contain a description of the nature of the services and of the matter involved as would, in the opinion of the Registrar, afford any solicitor sufficient information to advise a client on the reasonableness of the charge made."

ARE SPECIAL COSTS AVAILABLE?

11 Special Costs are generally awarded only where it can be said that there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties: *Young v. Young* (1993), 84 B.C.L.R. (2d) 1 (S.C.C.) and *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (B.C. C.A.).

12 In the case at bar, I can not conclude that the conduct of GE is reprehensible or deserving of censure or that the motion was undertaken for an improper motive or purpose. The bringing of the application of GE does not merit reproof or rebuke. Accordingly, I am satisfied that it is not appropriate that costs be awarded against GE on a Special Cost basis.

CAN WHAT WOULD AMOUNT TO A BILL UNDER THE LEGAL PROFESSION ACT OR SPECIAL COSTS BE AWARDED UNDER RULE 57(13.1) OF THE RULES OF COURT?

13 Rule 57(13.1) appears to contemplate the Court may either fix summarily the costs of an interlocutory application or order an assessment of those costs pursuant to Appendix B. I can not conclude that the Legislature intended that an award for special costs or for an amount equivalent to a bill under the *Legal Profession Act* could be set under Rule 57(13.1) despite the fact that Rule 57(34) provides that either may be rendered on a "lump sum basis" and despite the use of that phrase within Rule 57(13.1).

14 First, if the reference to "lump sum costs" in Rule 57(13.1) was meant to refer not only to Party and Party Costs but also to Special Costs or a bill under the *Legal Profession Act*, then the procedures to deal with the assessment of Special Costs or a bill under the *Legal Profession Act* should have been included under Rule 57(13.1)(b). However, Rule 57(13.1)(b) only deals with the procedure available for an assessment of Party and Party Costs. In the absence of such provisions under Rule 57(13.1)(b), I can conclude that the ability to fix "lump sum costs" under Rule 57(13.1)(a) is limited to fixing costs on a Party and Party basis despite the use of the same phrase used in Rule 57(34).

15 Second, I am satisfied that it could not have been the intent of the Legislature to remove the ability of an interested party to require the assessment of a bill under the *Legal Profession Act*. Jackpine submits that I should award costs in favour of BOM and Lignum against GE so that BOM and Lignum will not add the amount of any bills they receive to the balances owing under their security. If the Court has the ability under Rule 57(13.1)(a) to fix the amount of a bill under the *Legal Profession Act*, then it appears that no interested party would have the ability to question that amount on an assessment as is provided under the *Legal Profession Act*. I am satisfied that that could not be the intent of the Legislature.

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16 Third, despite the use of the phrase "lump sum costs" under Rule 57(13.1.), I am satisfied that an award on a lump sum basis is not the same as the "lump sum costs" described under Rule 57(34). In this regard, Rule 57(35) requires a description which would afford any solicitor sufficient information to advise a client of the reasonableness of the charge made but that description would not be available if the Court could set an amount equivalent to a bill under the *Legal Profession Act*.

17 As I am satisfied that the alternatives laid out under Rule 57(13.1) are limited to the alternatives available if the Court proposes to award Party and Party Costs on a lump sum basis, the question which then arises is whether the relief sought by Jackpine is available pursuant to the equitable jurisdiction of the Court.

A BILL UNDER THE LEGAL PROFESSION ACT

18 If the security granted by Jackpine to GE, BOM, or Lignum allowed for a bill under the *Legal Profession Act* to be added to the balance owing under the security of those secured creditors, then it may well be that the costs incurred by counsel on behalf of GE, BOM, and Lignum could be added to the balance owing under the security granted by Jackpine. However, there is no evidence before me which would allow me to reach that conclusion. Specifically, the security instruments of GE, BOM, and Lignum are not in evidence.

19 Accordingly, it would not be possible to ascertain whether the fear of Jackpine is warranted in the absence of a review of the specific security of GE, BOM and Lignum and in the absence of the advice that GE, BOM and/or Lignum have purported to add to the balances owing under their security the amount of the bill of their counsel relating to the November 28, 2003 application.

20 As well, I think it unlikely that the costs of appearing to oppose an application to substitute another company for the appointed monitor would come within the indemnity provisions usually contained within security. In *Canadian Imperial Bank of Commerce v. Cedar Hills Properties Ltd.* (1997), 35 B.C.L.R. (3d) 1 (B.C. C.A.), Newbury, J.A. on behalf of the Court dealt with a right of indemnity contained within a debenture in favour of the Bank and concluded this with regard to the clause in question:

> . . . the clause was not intended to encompass other proceedings not directly related to the enforcement of the Bank's own debenture. I also agree with . . . [the] submission that the effect of the ruling of the Chambers judge would be to permit the Bank to obtain full indemnity for other proceedings in which it would normally be entitled only to costs at a lower scale. It appears the Bank here is seeking to obtain indirectly what it would be unlikely to obtain directly in those other proceedings. (at pp. 21-22)

21 If, in the unlikely event that BOM or Lignum purport to add the amount of a bill under the *Legal Profession Act* relating to preparing for and attending at the November 28, 2003 application to the balance owing under their security, then Jackpine will be at liberty to apply for an order that GE pay the balance which BOM or Lignum purports to add to their security or that BOM and Lignum not be at liberty to add that amount to the balance owing under their security.

22 I am also satisfied that it would be unlikely that the indemnification provisions under the security of GE would allow GE to add to the balance owing by Jackpine under its security the amount of any bill under the *Legal Profession Act* relating to the November 28, 2003 application. However, it would not be possible to ascertain whether the fear of Jackpine is warranted in the absence of a review of that security.

23 In the unlikely event that GE will add any bill under the *Legal Profession Act* relating to this application to

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the balance owing under its security, Jackpine will then be at liberty to apply for an order that GE not be at liberty to add that amount to the balance owing under its security.

SHOULD BOM AND LIGNUM BE ENTITLED TO PARTY AND PARTY COSTS?

24 I am satisfied that BOM and Lignum should be entitled to Party and Party (Scale 3) Costs. GE was unsuccessful in its application. BOM and Lignum opposed that application and, ordinarily, the costs awarded should follow the event. However, in the circumstances of this case, I accept the submission of GE that BOM and Lignum should only be entitled to one set of costs relating to the preparation for and the attendance on November 28, 2003. First, Lignum did not file any materials. Second, it is not necessary to call upon counsel for either BOM or Lignum. Third, the interest of Jackpine were identical with the interest of BOM and Lignum so that, in the circumstances, it may well have been appropriate for BOM and Lignum to merely advise the Court through the counsel for Jackpine that they were supporting the position taken by Jackpine.

25 Pursuant to the power available to me under Rule 57(13.1) of the *Rules of Court*, I assess the one set of costs inclusive of fees, disbursements and government taxes at $680.00. Without further order, GE will not be at liberty to add that amount to the balance owing under the security granted to it by Jackpine. Similarly, without further order BOM and Lignum will not be at liberty to add the difference between one-half of $680.00 and the bill they may receive under the *Legal Profession Act* to the balances owing under their security from Jackpine.

CAN WHAT HAS BEEN REQUESTED BY JACKPINE BE AVAILABLE PURSUANT TO THE INHERENT JURISDICTION OF THE COURT?

26 Regarding the bills under the *Legal Profession Act* which may be received in due course by GE, BOM, or Lignum, I am satisfied that the provisions of the *Rules of Court* do not govern the situation, that the situation is governed by whatever contractual provisions exist between these three secured creditors and Jackpine, and that there is nothing which would allow me to conclude that the inherent jurisdiction of the court should be invoked to either prohibit or allow GE, BOM, and Lignum to add the amounts of any such bills to the balances owing under their security from Jackpine. Where what can be added to the balances owing under security has been negotiated or are part of a fixed form contract between debtor and creditor, there is no need to invoke the inherent jurisdiction of the court to interfere with what has been agreed in order to add further debt to what is owing by the debtor.

27 Regarding the costs of Jackpine, while I am satisfied that the provisions of Rule 57 are not broad enough to allow me to award against GE the amount of any bill under the *Legal Profession Act* which is rendered to Jackpine, I am satisfied that the inherent jurisdiction of the Court can be invoked to make such an award.

28 I am satisfied that Jackpine should be entitled to an order that the amount payable by it pursuant to a bill under the *Legal Profession Act* be paid by GE. However, that amount is not to be assessed summarily as GE is entitled to require an assessment of that bill. I am also satisfied that GE should not be in a position to add any balance assessed to the balance owing under its security.

29 Canadian courts have dealt extensively with the question of whether a "super priority" should be given for the fees and expenses of a monitor and for the legal fees of the company filing under *C.C.A.A.* in priority ahead of the secured creditors and without the consent of those creditors. However, this may well be the first time a Court has had to consider the questions of whether full indemnity sought by a company should be available directly from an unsuccessful applicant so that the company does not have to add the amount of any bill under the

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Legal Profession Act to its overall debt and of whether the unsuccessful party should not be in a position to add the amount of the bill under the *Legal Profession Act* it receives to the balance owing under its security.

30 In *United Used Auto & Truck Parts Ltd., Re* (2000), 73 B.C.L.R. (3d) 236 (B.C. C.A.), Mackenzie, J.A. on behalf of the Court reached the conclusion that an order granting "super-priority" could be made by relying upon the equitable jurisdiction of the Court and in the absence of any specific provisions in the *C.C.A.A.* In dealing with the purpose of the *C.C.A.A.*, Mackenzie J.A. cited with approval the observations of Gibbs, J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) where it was stated:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business . . . . When a company has recourse to the *C.C.A.A.* the Court is called upon to play a kind of supervisory role to observe the status quo and to move the process along to the point where a compromise or an arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11. (at p. 315)
>
> In the exercise of their functions under the *C.C.A.A.* Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. (at p. 320)

31 Mackenzie, J.A. also cited with approval the following statement of Duff, C.J.C. in *Reference re Companies' Creditors Arrangement Act (Canada)* (1934), 16 C.B.R. 1 (S.C.C.) at p. 2:

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

32 In dealing with the question of whether the reasonable restructuring costs including legal fees and disbursements should have priority over secured creditors, Mackenzie, J.A. in *United Used Auto & Truck Parts Ltd.* concluded that they should:

> These comments emphasize that the *C.C.A.A.*'s effectiveness in achieving its objective is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim. (at p. 241)
>
> The only reasonable conclusion in my opinion is that Parliament was aware of the court's general jurisdiction in equity and assumed that jurisdiction remained available except as inconsistent with the *Act*. (at p. 243)
>
> In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the CCAA. It is a time-honoured function of equity to adapt to new exigencies. (at p. 247)

33 Consistent with those decisions, is the decision in *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), where Lovecchio, J. dealt with the question of whether debtor in possession financing

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should rank in priority ahead of registered builders' liens and stated:

> . . . numerous decisions in Canada had supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objectives of the CCAA (at p. 310).

34 If the purpose of the *C.C.A.A.* is to facilitate the making of an arrangement so that a company is able to continue in business, then that purpose is not accommodated by uncertainty regarding which monitor will not only monitor the efforts of the company but will also assist the company in its efforts to produce an acceptable arrangement. The purpose of the *C.C.A.A.* is also not facilitated by adding to the debt owing by the company occasioned by an unsuccessful application being made which has the effect of delaying the activities of the monitor and the company and which has the effect of adding to the balances owed by the company to its own legal advisors, the monitor appointed, or to the creditors of the company.

35 When an application is made to replace one monitor with another but the application is unsuccessful, it will not always follow that the costs associated with such an application should be borne by the party requesting the change. However, this application of GE was without merit. In those circumstances, the company should not bear the actual cost of defending such an application. Successfully defending an application is of little solace to a company if all of the costs of defending and all of the costs of the unsuccessful applicant are merely added to an already stifling debt load.

36 The Court is called upon to play a role of observing that the status quo is maintained. Such an application also changes the status quo by the addition of substantial amounts to the debt balances which will have to be paid or which will be the subject matter of the arrangement ultimately proposed. It will be impossible for the Court to maintain the status quo as Jackpine attempts to gain the approval of its creditors for any proposed arrangement if it is necessary for Jackpine to fund its solicitors to deal with applications which detract from rather than facilitate the process of preparing an arrangement.

37 Accordingly, using a broad and flexible exercise of the inherent jurisdiction available to me, I order that Jackpine recover from GE the amount of any bill that Jackpine receives under the *Legal Profession Act*, that the amount paid by GE not be added to the debt owing by Jackpine to GE, and that GE not be at liberty to add to the balance owing under its security any account relating to the November 28 application it receives from its solicitors pursuant to the *Legal Profession Act*.

38 If only Party and Party costs were available to Jackpine as is requested by GE, then it would only mean that a lesser amount of further debt would be added to what is already owing by Jackpine. The facilitation of the process of preparing an arrangement is best met if no further debt is added to the balance owing by Jackpine as a result of this application by GE.

39 At the same time, I am satisfied that GE should be at liberty to require the assessment of any bill that the solicitors for Jackpine render. It would be unfair to GE and other than in accordance with the *Legal Profession Act* to make an Order setting the amount payable by GE to Jackpine at $6,200.00 without requiring the solicitors for Jackpine to render a bill under the *Legal Profession Act* containing a description of the nature of the services and of the matter involved and without enabling GE to require an assessment of that bill before the Registrar of the Court.

40 GE is entitled to require the assessment of any bill under the *Legal Profession Act* rendered by the solicitors for Jackpine: *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.). While the Court con-

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cluded that such an assessment was available under the applicable legislation of that Province, Turnbull, J.A. on behalf of the Court also stated: "The Court also had an inherent jurisdiction to approve or disapprove of any account during the continuation of the CCAA Order" (at p. 8). The provisions of the *Legal Profession Act* and the inherent jurisdiction available to me allow the order that I make to be made against GE.

41 On a referral, the Registrar may review the bill and issue a certificate or make a report and recommendation to the Court. I will order such an assessment before the Registrar if Jackpine and GE are not in a position to agree about the appropriate amount of any bill rendered. If an assessment is required, the Registrar will issue a Certificate as to the assessed amount.

SHOULD THE COSTS OF THE MONITOR BE RECOVERABLE?

42 To deal with the question of whether the legal costs of the Monitor should be recoverable as part of the super priority created under the Order appointing the Monitor, it is important to review the role of the Monitor. In *Siscoe, supra*, Turnbull, J.A. stated on behalf of the Court:

> The Monitor is an agent of the Court. As a result, the Monitor is responsible and accountable to the Court. He also owes a fiduciary duty to all the parties and an obligation to ensure that one creditor is not given advantage over any other creditor. (at p. 8).

43 In *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), Farley, J. dealt with an application to amend a bankruptcy petition to substitute a trustee and where a receiving order was sought immediately following the termination of proceedings under the *C.C.A.A.* In the context of the application to replace the trustee in bankruptcy named under the Petition, Farley, J. commented about the appointment of a trustee. I am satisfied that these comments are equally applicable to the responsibilities of a monitor under *C.C.A.A.* proceedings:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate. (at p. 247)

44 The application of GE involved a dispute between secured creditors about which accounting firm was best able to assist Jackpine in the process of preparing an arrangement which would be voted upon by all of the creditors of Jackpine and to monitor the financial situation and the progress of Jackpine until that arrangement could be placed before the creditors. There was a concern expressed by GE that P.W.C. would not be in a position to act in a neutral fashion. While I found that there was no evidence that this would be the case and while I was satisfied that P.W.C. was most able to assist Jackpine, the application was essentially a dispute between secured creditors.

45 In those circumstances, it was inappropriate for the Monitor to take a position on the application. While the Monitor should be in a position to advise the Court regarding the potential cost and disruption of a substitution, any such affidavit evidence should have been presented through the solicitor for Jackpine. The economic interest of P.W.C. to see that its appointment continued came into conflict with the requirement that the Monitor be an impartial officer of the Court.

46 In *Eron Mortgage Corp., Re* (1998), 53 B.C.L.R. (3d) 24 (B.C. S.C.), Tysoe, J. dealt with the question of whether the Court had jurisdiction to give a priority charge against the assets for the remuneration and expenses

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of a committee of creditors who had been elected to represent the interest of all investors. I am satisfied that the comments made in that decision are applicable in dealing with the question of whether the costs of the legal representation of the Monitor on November 28, 2003 should be a charge against the assets of Jackpine. Tysoe, J. stated as follows:

> The general principle which I extract from these authorities is that the Court does have the jurisdiction to order that trust assets be charged with the remuneration and expenses of a third party if the work done by the third party is of benefit to the trust property or is necessary for the management and preservation of the trust assets. Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it. (at p. 35)

47 I am satisfied that it was the economic interests of P.W.C. which were represented on November 28, 2003 and I am also satisfied that it would be inappropriate for Jackpine to bear the costs of that type of representation of P.W.C. I cannot conclude that the costs of appearing on behalf of P.W.C. on November 20, 2003 were for the benefit of the trust property or were necessary for the management and preservation of the trust assets. While any costs associated with the preparation of materials setting out the potential costs and disruption of a substitution will be available to the Monitor, P.W.C. will bear its own counsel costs for preparing for and attending on November 28, 2003. Any such costs are not to be included as part of the priority charge created by the Order appointing the Monitor.

Order accordingly.

END OF DOCUMENT

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TAB 17

2008 BCSC 446, 41 C.B.R. (5th) 49, [2008] B.C.W.L.D. 3192

2008 CarswellBC 712

Pine Valley Mining Corp., Re
In the Matter of the Companies' Creditors Arrangement Act,R.S.C. 1985, c. C-36, as amended
And In the Matter of the Business Corporations Act, R.S.B.C. 2002, c. 57, as amended
In the Matter of Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation (Petitioners)
British Columbia Supreme Court
N. Garson J.
Heard: April 9, 2008
Judgment: April 14, 2008
Docket: Vancouver S066791

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Proceedings: additional reasons to *Pine Valley Mining Corp., Re* (2008), 2008 CarswellBC 579, 2008 BCSC 356 (B.C. S.C.)

Counsel: J.R. Sandrelli, O. Jones for Pine Valley Mining Corporation

B.G. McLean, C. Armstrong for Tercon Mining PV Ltd.

W. Kaplan, Q.C. for Monitor

D.A. Garner for Petro-Canada

J.D. Bergman for CN Rail

Subject: Insolvency; Evidence

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

F Inc. was wholly-owned subsidiary of P Corp. -- P Corp. and F Inc. successfully petitioned for general stay of proceedings under Companies' Creditors Arrangement Act ("CCAA") -- Petition did not disclose inter-company debt as between petitioners -- Inter-company debt was revealed when Monitor appointed by Court in CCAA proceeding requested unconsolidated financial statements for each of petitioners -- P Corp. filed claim with Monitor stating that F Inc. was indebted to P Corp. in amount of $42 million -- Fourth report issued by Monitor to Court contained detailed view of transactions underlying P Corp. claim -- Monitor proposed to allow revised claim against F Inc. in amount of $27 million -- Some creditors objected to claim -- Application was brought for directions respecting process for determination of amount of P Corp.'s claim against F Inc. within proceeding under CCAA -- Function of Monitor was to determine validity and amount of claim on basis of evidence submitted -- Monitor's process in doing so was in no way akin to adversarial process -- Monitor was not entitled to deference

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in sense that would alter burden of proof ordinarily imposed on claimant -- P Corp. had burden of proving its claim -- Either party was at liberty to use Monitor's report or part of report at trial of matter as expert report provided necessary notice was given to other -- Section 12 of CCAA requires summary trial -- Section 12 of CCAA informed any decision court must make as to format of trial and that trial must be as section dictated unless to do otherwise would be unjust, or there was some other compelling reason against summary trial -- Claim could be tried summarily on reserved date -- Parties made additional submissions regarding admissibility of monitor's report -- Report entered as evidence, but conclusions were not admissible as expert opinion -- Monitor was court officer and neutrality should not be compromised.

Cases considered by *N. Garson J.*:

> *Bell Canada International Inc., Re* (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) -- considered
>
> *Canadian Airlines Corp., Re* (2001), [2001] 7 W.W.R. 383, 14 B.L.R. (3d) 258, 92 Alta. L.R. (3d) 140, 2001 ABQB 146, 2001 CarswellAlta 240, 294 A.R. 253 (Alta. Q.B.) -- distinguished

Statutes considered:

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

> Generally -- referred to

ADDITIONAL REASONS to judgment reported at *Pine Valley Mining Corp., Re* (2008), 2008 CarswellBC 579, 2008 BCSC 356, 41 C.B.R. (5th) 43 (B.C. S.C.), regarding admissibility of monitor's report in bankruptcy proceedings.

N. Garson J.:

1 These supplementary Reasons for Judgment concern the admissibility of a court appointed monitor's report, and the compellability of a monitor as an expert witness, at the summary trial of a contested application in this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended ("CCAA").

2 I issued Reasons for Judgment on March 14, 2008 (2008 BCSC 356 (B.C. S.C.)) concerning the procedure that would govern the summary trial of the claim of Pine Valley Mining Corporation ("PVM") against Falls Mountain Coal Inc. ("FMC"). Following delivery of those Reasons for Judgment, the Monitor applied for leave to make further submissions with respect to para. 15 of the Judgment. No party opposed the application to reopen the hearing. The order emanating from the Reasons for Judgment not having been entered, I granted leave to all parties to make further submissions concerning the admissibility of the Monitor's Report and the compellability of the Monitor at the summary trial.

3 This dispute concerns a claim, by PVM against its previously wholly-owned-subsidiary FMC, for approximately $42 million. The dispute centers on the question of whether payments made by PVM to FMC were in whole, or in part, loans or investments. If the latter, then PVM would rank after the general creditors in the CCAA proceeding. The facts which form the background to this inter-company claim are set out in my Reasons for Judgment at 2008 BCSC 356 (B.C. S.C.).

4 At para. 15 of those Reasons for Judgment I stated:

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> The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

5 At the subsequent hearing the parties made further submissions concerning the use to which the Monitor's Report could be put at the trial of the inter-company claim and whether the Monitor's conclusion as to the characterization of the payments made by PVM to FMC could be used as an expert opinion at the trial.

6 I am now satisfied that, for the most part, the parties have been able, with the assistance of the Monitor, to satisfy themselves as to the proper accounting of the inter-company claim. The remaining issue between the parties is whether the amounts so paid are properly characterized as debt or equity. No party is opposed to the admissibility, at the summary trial, of those portions of the Monitor's Report which detail the numerous transactions between PVM and FMC. What is now at issue is the question as to whether the Monitor's conclusions, that about $27 million dollars of the payments is properly characterized as debt owed to PVM and not as an equity investment by PVM in FMC, is admissible evidence at the summary trial and if so whether and under what terms the Monitor is compellable as a witness. In my earlier Reasons for Judgment, I did not differentiate between what I shall for convenience call the accounting portions of the Monitor's Report and his conclusions or opinion on the proper characterization of the payments.

7 Mr. Sandrelli, for PVM, wishes to rely on the Monitor's conclusions as contained in his Report. Mr. McLean, for Tercon on behalf of the general creditors, contends that if I permit PVM to use the entirety of the Monitor's Report as evidence, PVM will be obtaining "a leg up", and, in effect, reversing the burden of proof, notwithstanding that in my earlier Reasons for Judgment, I held that PVM carried the burden of proving its whole claim regardless of the Monitor's conclusions.

8 Mr. Kaplan, counsel for the Monitor, suggested the following directions, which he says take into account the special role of the Monitor as an impartial officer of the Court:

> 1. Either party may file with the Court the Monitor's 4th Report concerning the inter-company claim ("Monitor's Report") or the Notice of Revision concerning the PVM inter-company claim ("Notice of Revision"), at the hearing concerning the inter-company claim presently scheduled to commence May 28, 2008 (the "Hearing").
>
> 2. The Monitor's Report may be received into evidence at the Hearing as evidence of the following matters:
>
> (a) that the transactions referenced therein occurred on or about the date referenced in the Monitor's Report, and in the amounts referenced in the Monitor's Reports;
>
> (b) that the summaries of the Petitioners' accounting of dollar values of transactions over a given time period referenced in the Monitor's Report are accurate summaries of the dollar values of such transactions over such period of time as referenced in the Monitor's Report;
>
> (c) the Monitor's conclusions concerning whether a particular transaction was in the nature of a

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debt transaction or equity transaction can be received into evidence by the Court but such conclusions are not binding upon the Court; and

(d) that the Monitor's conclusion that a particular payment or receipt was a payment or receipt on behalf of either PVM or FMC, as the case may be, may be received into evidence at the hearing but that such conclusion is not binding upon the Court.

3. On or before_____, 2008, either party may deliver questions or inquiries to the Monitor in respect to the Monitor's Report, including, without limiting the foregoing, questions or inquiries concerning the following matters:

(a) details of the Monitor's accounting of the various transactions, including details of the Monitor's tracing of transactions through any bank accounts or accounting records of the Petitioners;

(b) documents relied upon by the Monitor in respect to the accounting of a particular transaction or transactions;

(c) the content of management input in respect to the accounting of any transaction or transactions; and

(d) details concerning the information or document requested from the companies by the Monitor in respect to any transaction, whether or not such information or documentation was provided to the Monitor and, if not, why not.

4. The Monitor shall deliver a supplementary report (the "Monitor's Supplementary Report") responsive to the questions posed to the Monitor by the parties within 10 days of receipt of the questions and circulate the Monitor's Supplementary Report to the parties and the Court. In the event the Monitor is unable to respond to a question the Monitor shall provide the reasons for such inability in the Monitor's Supplementary Report.

5. Any party is at liberty to deliver follow-up questions to the Monitor upon receipt of the Monitor's Supplementary Report and the Monitor shall make every effort to respond to such follow-up questions at the earliest reasonable time.

6. Either party may file the Monitor's Supplementary Report at the Hearing and the Monitor's Supplementary Report may be received into evidence at the Hearing on the same terms and conditions as described in paragraph 2 herein in respect of the Monitor's Report.

7. Either party may apply to the Court for further directions concerning examination of the Monitor at the hearing on the Monitor's Report or the Monitor's Supplementary Report.

8. The Monitor may be subject to examination at the Hearing of this matter, by the Court, at the Court's discretion or on the application of either party, in respect to any matter contained in the Monitor's Report or the supplementary Monitor's Report.

9 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]), Mr. Justice Farley discussed the question of the admissibility of a monitor's report, and the role of the monitor. He stated, at

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paras. 6, 7 and 8:

> 6 L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:
>
> > A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement -- "inquisition" or "inquest" -- suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
> >
> > Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).
>
> 7 Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."
>
> > Officers of the court [such as court appointed receivers (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.
>
> 8 L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Re Bakemates International Inc.*, [2002] O.J. No. 3569 (C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 5; *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1125 (Ont. S.C.J. [Comm. List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil* including the cite from *Innisfil*:
>
> > (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
> >
> > (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1985), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 103-2 where I stated:

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> As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter"(at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List -- cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines -- The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 In *Rescue! Companies' Creditors Arrangement Act*, (Toronto: Carswell, 2007) Janis P. Sarra, wrote at p. 269:

> **7. Monitor's Reports and the Issue of Compellability**
>
> As an officer of the court, the monitor has been found not to be compellable to give evidence in a proceeding, although the monitor reports to the court on a regular basis. The monitor's reports have been found to be "not evidence" and hence not generally subject to cross-examination; rather, as an officer of the court, the monitor is to act "lawfully, fairly and honourably". In Ontario, the court has held that insolvency officers will not generally be subject to cross-examination of their reports, while acknowledging that these court-appointed officers do occasionally make themselves available for examination

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in the spirit of co-operation and common sense.

The Ontario Supreme Court of Justice in *Bell Canada International Inc.* held that although the situation did not warrant it in the instant case, an officer of the court may be cross-examined on a report in exceptional or unusual circumstances. Such circumstances could include situations where the monitor refused to co-operate in clarifying a part of its report or in not expanding on any element in the report as may be reasonably requested. The Court held that the reasonability of a request must take into account the objectivity and neutrality of the officer of the court; specifying that: "woe betide any officer of the court who did not observe his duty to be neutral and objective". This judgment indicates that one of the monitor's duties is to clarify information to stakeholders based on a reasonableness test. Failing this, the court may in exceptional circumstances compel the monitor to be examined. It also indicates that the court's deference will depend on the monitor complying with its duty to be impartial, objective and fulsome in its report.

The monitor's report offers an opinion to the court as to the accuracy of the information or the wisdom of particular proposed actions. This is not problematic if the monitor is not acting as an advocate for the debtor corporation. However, where it is, it is unclear that the courts have yet generally recognized that this may be problematic for creditors and other stakeholders seeking to challenge the monitor's conclusions. This has implications for interim decisions during the course of *CCAA* proceedings, such as a sale of assets during the proceeding and the court's reliance on the monitor for its business judgment. Rarely has the court preferred the evidence of creditors or disregarded the opinion of the monitor.

In the *Canadian Airlines* proceeding, the noteholders sought to cross-examine the monitor on its liquidation analysis. It was the first time that such an issue had come before the court. Madam Justice Paperny of the Alberta Court of Queen's Bench concluded that cross-examination might not be necessary if the monitor provided further information. It directed the noteholders and dissenting shareholders to send written questions to the monitor, finding that if the need arose, the court would put questions to the monitor in the courtroom. The monitor subsequently answered almost 70 questions in two Special Reports and the issue became moot.

The Court's approach in *Canadian Airlines* reflected the public interest in full disclosure of the monitor's reasoning while protecting the monitor as an officer of the court. Monitors would generally be far less effective if they were at risk of being compelled to be cross-examined on each of their reports or opinions to the court.

However, the courts have cautioned that monitors' reports should not include information that really should be led as evidence by the debtor corporation in a *CCAA* proceeding. The use of the monitor's report to insulate the debtor from cross-examination may have implications for the dispute resolution process under the *CCAA* as the debtor may have a tactical advantage in the bargaining process where the monitor acts as advocate.

The Ontario Superior Court of Justice in *Bell Canada International* commented on this risk of the debtor shirking its disclosure obligations through the use of the monitor's report. It observed that there have been problems with motions supported by nothing other that [*sic*] the monitor's report. The Court held that if a matter is reasonably expected to be contentious or turns contentious, it is important to have an affidavit from the moving party and time to allow cross-examination. This represents recognition by the

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> court that the monitor may risk its impartiality or the perception of impartiality if its reporting role is used inappropriately to insulate parties from cross-examination.

11 Kevin P. McElcheran in *Commercial Insolvency in Canada* (Markham: Lexis Nexis 2005) states on p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

12 From these authorities and commentaries, I conclude that my discretion should be guided by the following principles:

> 1. Presumptively a monitor's report, such as the one here, is admissible in evidence at a hearing concerning the subject matter of the report.
>
> 2. In unusual circumstances an officer of the court, such as a monitor, may be cross-examined on his report.
>
> 3. The monitor must remain neutral as between the various stakeholders in a *CCAA* proceeding.
>
> 4. The court should strive to protect the monitor from close involvement in the adversarial process between the claimants.

13 In my previous Reasons for Judgment, I ordered that the Monitor's Report be admissible primarily in order that the Monitor's accounting work be before the Court, and so that the parties not be put to the time consuming and expensive process of duplicating the Monitor's work. Now that the parties have reached almost complete agreement as to the accounting, the question remains as to whether those portions of the Report containing the Monitor's conclusions should also be available to PVM as expert or opinion evidence.

14 It is open to either party to obtain an outside opinion, on the character of these payments, such opinion being based on the extensive accounting and investigation already done by the Monitor. Because the Monitor has done the "heavy lifting" so to speak, I do not think it would be particularly burdensome for either party, if they choose to do so, to obtain expert opinions on the characterization of the payments.

15 Nothing in these Reasons for Judgment should be taken as determining whether such an opinion would be considered an opinion on a question of law or mixed fact and law or is one on which the Court requires expert evidence. I would not wish these Reasons to be considered as in any way tying the hands of the trial judge to rule on the question of the admissibility of such a report. However it is necessary for me to rule on the question of the use that may be made of the Monitor's Report now, so as to enable the parties to adequately prepare for the summary trial.

16 Would the neutral role of the Monitor be compromised by permitting PVM to use his conclusions as expert opinion evidence?

17 I have concluded that the Monitor's 4th Report (and any supplementary reports concerning the inter-company accounting) is admissible for purposes of the trial, but his conclusion as to the characterization of the payments as debt or equity are not admissible as an expert opinion. In reaching this conclusion I have considered

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the fact that the Monitor is an officer of the Court. He is the eyes and ears of the Court. His role is to assist the Court. To permit either party to use his conclusions on the very question the Court must decide as opinion evidence offends the principle that he must remain entirely neutral as between competing claims of the various stakeholders. The Monitor must be insulated from the adversarial nature of the contested claim; he should not be fearful that, as a result of stating his opinions, he will become embroiled in the litigation in an adversarial way. I have already decided that the summary trial is a trial *de novo*. It is not an "appeal" from the Monitor's findings. I have already decided that PVM carries the burden of proving its whole claim. In this case, it is convenient, and perhaps necessary, to use the accounting portion of the Monitor's Report, for a fair and summary adjudication of the inter-company claim, but the same argument for convenience cannot be made out for the Monitor's characterization of the payments; and, in any event, to admit the Monitor's conclusions on that issue would be to expose the Monitor unnecessarily to the adversarial process. This issue differs from one in which the Court relies on the business judgment of the Monitor such as the approval of the sale of assets or a liquidation analysis as in the *Canadian Airlines Corp., Re*, 2001 ABQB 146 (Alta. Q.B.) case.

18 In the exceptional circumstances of this case, and particularly given that most of the accounting is no longer at issue, I remain of the view that those portions of the Monitor's Report in which he had painstakingly reviewed the accounts of the company are of great assistance to the parties and the Court and ought to be admissible. As to those findings, the directions suggested by the Monitor apply if the parties are unable, on an informal basis, to obtain any additional information that they need from the Monitor. However, paras. 2(c) and (d) as proposed by the Monitor will be removed from the directions. The parties should set a date for inclusion in para. 3 of the directions.

19 If further applications for pre-trial directions are necessary, they should be made to the trial judge assigned to this matter.

Order accordingly.

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TAB 18

34 C.B.R. (4th) 72

2002 CarswellOnt 790

Laidlaw Inc., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended
In the Matter of the Business Corporations Act (Ontario), R.S.O. 1990, c. B-16, as Amended
Laidlaw Inc. and Laidlaw Investments Ltd.
Ontario Superior Court of Justice [Commercial List]
Farley J.
Heard: February 28, 2002
Judgment: February 28, 2002
Docket: 01-CL-4178

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Counsel: David Burnham, Patrick Alpaugh, for Moving Parties

B. Zarnett, J. Carfagnini, B. Empey, for Laidlaw Inc., Laidlaw Investment Ltd.

D. Tay, for Ernst & Young Inc.

R. Orzy, K. Zych, for Laidlaw Bondholders Subcommittee

D. Byers, for Laidlaw Banks Subcommittee

R. Jaipargas, for Chubb and Federated Insurance

Subject: Corporate and Commercial; Insolvency

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

Companies' Creditors Arrangement Act plan of reorganization was in place -- Litigation was pending between company and other business -- Individuals brought motion for relief consisting of establishment of shareholders oversight committee and orders appointing committee as inspectors, requiring calling of annual meeting and companies to fund costs of committee -- Motion dismissed -- Under all foreseeable circumstances, shareholders would not have economic interests to protect -- Even if company was entirely successful in pending litigation, it would in all probability be "paper judgment" in that there would be no assets available to collect against -- If there was radical change in major parts of equation, plan of reorganization would have to be changed to reflect change and would have to come back before court -- In interim, monitor was charged with continuing task of looking out for reasonable interests of all stakeholders -- Saddling creditors with expense of committee would be

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inappropriate -- Creditors had great and abiding interest in maximizing value of enterprise -- Individuals had not met test of s. 229(2) of Canada Business Corporations Act -- No material benefit was to be gained from requiring annual meeting -- Interjecting committee into negotiations would be inappropriate -- Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 229(2) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises -- Under general corporate legislation

Companies' Creditors Arrangement Act plan of reorganization was in place -- Litigation was pending between company and other business -- Individuals brought motion for relief consisting of establishment of shareholders oversight committee and orders appointing committee as inspectors, requiring calling of annual meeting and companies to fund costs of committee -- Motion dismissed -- Under all foreseeable circumstances, shareholders would not have economic interests to protect -- Even if company was entirely successful in pending litigation, it would in all probability be "paper judgment" in that there would be no assets available to collect against -- If there was radical change in major parts of equation, plan of reorganization would have to be changed to reflect change and would have to come back before court -- In interim, monitor was charged with continuing task of looking out for reasonable interests of all stakeholders -- Saddling creditors with expense of committee would be inappropriate -- Creditors had great and abiding interest in maximizing value of enterprise -- Individuals had not met test of s. 229(2) of Canada Business Corporations Act -- No material benefit was to be gained from requiring annual meeting -- Interjecting committee into negotiations would be inappropriate -- Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 229(2) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by Farley J.:

> Brown v. Maxim Restoration Ltd., 1998 CarswellOnt 2265, 3 C.B.R. (4th) 225, 42 B.L.R. (2d) 243 (Ont. Gen. Div.) -- referred to
>
> Canadian Airlines Corp., Re, 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) -- referred to
>
> Ferguson v. Imax Systems Corp., 44 C.P.C. 17, 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188, 1984 CarswellOnt 155 (Ont. Div. Ct.) -- referred to
>
> Loewen Group Inc., Re, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) -- referred to
>
> T. Eaton Co., Re, 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) -- referred to

Statutes considered:

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

> Generally -- referred to

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

> Generally -- referred to

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s. 229(2) -- referred to

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

Generally -- referred to

MOTION by individuals for orders establishing shareholders oversight committee, appointment of committee as inspectors, requiring calling of annual meeting and requiring companies to fund costs of committee.

Farley J.:

1 It may be questionable whether the moving parties are technically shareholders of Laidlaw Inc. However it was determined to be appropriate to deal with this motion as if they were shareholders. Mr. Burnham, a non-lawyer, spoke for both Mr. Alpaugh and himself. They wished various relief:

> a) the establishment of a Shareholders Oversight Committee ("SOC") to represent the rights and interests of shareholders with the regard to all business activities of Laidlaw Inc. and Laidlaw Investments Ltd. from 1997 to the present, including through the SOC directly participating in the CCAA Plan of Reorganization, direct participation in the mediation process between Laidlaw and Safety-Kleen ("SK") relating to the pending litigation and review and approval of the proposed litigation settlement between Laidlaw and the bondholders;
>
> b) orders pursuant to the OBCA and the CBCA appointing the SOC as inspectors to investigate the activities of the board, officers, management, auditors and legal counsel of Laidlaw;
>
> c) an order requiring an annual meeting to be called by Laidlaw Inc. upon completion of the inspector's (SOC's) report in (b) above; and
>
> d) an order requiring the Laidlaw companies to fund the costs of the SOC, including the retainer of legal counsel and a forensic accountant.

2 Mr. Burnham quite fairly noted that, if in fact Laidlaw Inc. was so insolvent that the shareholders were so far under water that they had no reasonable expectation that they would come close to having a positive economic interest in the corporation, then the relief which he was seeking would not be appropriate. However, he pointed out that Laidlaw had a $6.5 billion claim against SK and that this was a flicker of hope that, if realized, could result in Laidlaw Inc. having a positive shareholder equity. It is of course important for the objective appreciation of this situation to realize that the $6.5 billion is not a sure thing -- in fact far from it. The Monitor Ernst & Young Inc. is a court-appointed officer which must objectively look out for and be concerned for the interests of all stakeholders -- including the shareholders in that capacity. However, both the Monitor and the investment-banking firm with extensive experience providing valuation services, Dresdner Kleinwort Wasserstein Inc., have concluded that on any reasonable scenario the shareholders are very significantly underwater. Further, it is realistic to note that creditors (Bondholders and Banks) will take a very severe "haircut" so that they will not come close to being paid out in full. Thus, under all foreseeable circumstances, it appears that the shareholders have no economic interest to protect.

3 What of the $6.5 billion claim against SK? Aside from the fact that SK has a $4.3 billion claim against Laidlaw, Laidlaw's claim against SK is unsecured and therefore junior to SK's secured debt. At the present SK's 2008 Notes, which are junior to the secured bank debt, are trading at less than five cents on the dollar. Thus,

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even if Laidlaw were entirely successful against SK, it appears that the "market" is confirming that it would in all probability be a "paper judgment" in the sense that there would be no assets available to collect against. However, if there were a radical change in major parts of this equation, then -- if, as and when that unexpected good fortune smiles upon Laidlaw -- it is possibly conceivable that the shareholders would have a *bona fide* economic interest in Laidlaw Inc. -- with the result that the Plan of Reorganization would have to be changed to reflect that. That would have to come back before the courts. In the interim the Monitor is of course charged with the continuing task of looking out for the reasonable interests of all stakeholders -- but looked at in a realistic way. That is, there must be an air of reality to the analysis.

4 It would be inappropriate to saddle the creditors (who would bear the burden of the costs of the SOC) with the expense of the SOC, at a time when their expected recovery is at a significant discount. See the view of the legal hierarchy of interests (creditors standing before or on top of shareholders) I discussed in *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]). See also Paperny J.'s views in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta Q.B.) at p. 22 concerning not involving shareholders where they do not have a true economic interest. See also *Loewen Group Inc., Re* [2001 CarswellOnt 4910 (Ont. S.C.J. [Commercial List])] released December 13, 2001.

5 I also note that the creditors in the subject case have a great and abiding interest in maximizing the value of the enterprise as in achieving the greatest out of the SK claim. As discussed above, I do not see any reasonable prospect for the shareholders to be on the cusp of economic value, but if they were, then they have the safeguards above discussed.

6 As for an investigation, I would note that the moving parties have not met the test of s. 229 (2) of the CBCA. See *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.) and *Brown v. Maxim Restoration Ltd.* (1998), 42 B.L.R. (2d) 243 (Ont. Gen. Div.). I understand that there is a class proceeding of shareholders in the works; it would not be appropriate to ask the creditors of Laidlaw to fund a shareholder investigation in any event.

7 With respect to an annual meeting, given that Laidlaw Inc. is heavily insolvent and well into the restructuring process, I do not see on the record before me that there is any material benefit to be gained from requiring an annual meeting under the corporate legislation, given the sad financial state of Laidlaw Inc. with the shareholders having no economic interest given their very significant underwater location on the depth gauge.

8 I would also note that it would be inappropriate to interject the SOC into negotiations (either re the Plan of Reorganization or the SK claim mediation or otherwise) as this could have a very disruptive effect on those processes.

9 Motion dismissed.

Motion dismissed.

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TAB 19

13 C.B.R. (3d) 10, 100 Nfld. & P.E.I.R. 114, 318 A.P.R. 114

1992 CarswellNfld 20

Stokes Building Supplies Ltd., Re
Re Application by STOKES BUILDING SUPPLIES LIMITED pursuant to Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Newfoundland Supreme Court, Trial Division
Halley J.
Heard: June 18, 1992
Oral reasons: June 23, 1992
Judgment: July 9, 1992
Docket: Doc. St. J. 2179/92

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Counsel: Barrie Heywood, for applicant.

Alexander MacDonald and Frederick Constantine, for Bank of Nova Scotia.

Edward P. Noonan, for D.H. Howden and Company Limited.

John Baker, for Coopers & Lybrand Limited.

Ronald Cole, for Vynakor Windows Inc., Constant Air Flow (Industrial Supplies) Ltd., and Pyrene Fire Security Inc.

Paul Coxworthy, for LaFlamme Windows.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act.

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Appointment of monitor -- Powers and qualifications of monitor -- Auditor of insolvent company inappropriate choice to be monitor because of lack of independence -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

As a result of the recession, a building supplies company began to have financial difficulties. When it became insolvent, it applied for protection under the Companies' Creditors Arrangement Act ("CCAA"). The court granted a stay of all actions and proceedings by creditors against the company. The company applied to have its auditor appointed to act as monitor.

Held:

The application was dismissed.

Under the CCAA, the court's role in protecting a company is to preserve the status quo and to facilitate a com-

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promise or arrangement between the shareholders and creditors of the insolvent company. The monitor, as an agent of the court, assists the court in this. In order to do so, however, the monitor must not be in a "conflict of interest" situation; that is, neither the shareholders nor the creditors should have any influence on the monitor. While the company's auditor had the necessary financial knowledge to carry out the duties of a monitor, the auditor lacked the necessary independence.

Cases considered:

> Canadian Imperial Bank of Commerce v. Quintette Coal Ltd. (1991), 1 C.B.R. (3d) 253, 53 B.C.L.R. (2d) 34 (S.C.) -- referred to
>
> Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) -- referred to

Statutes considered:

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

Rules considered:

Newfoundland, Supreme Court Rules, 1986 --

> R. 25
>
> r. 25.01(1)

Application for appointment of company's auditor to act as monitor.

***Halley J.*:**

1 This is an ex parte application by Stokes Building Supplies Limited ("Stokes") pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act") for a declaration that the applicant is a company to which the Act applies and for an order for a stay of proceedings against creditors.

2 The issue is whether the court should accede to the request of the applicant to appoint its auditor to act as monitor.

3 Stokes is incorporated under the laws of the province of Newfoundland and has its head office in St. John's. The company sells building materials and operates retail stores on Kenmount Road and Topsail Road in St. John's. The principal assets of the company include its inventories of building materials, accounts receivables, leases and leasehold improvements. The company employs approximately 180 employees and has been in business for fifty years.

4 The financial operations of the applicant became precarious last year. The applicant attributes its financial difficulties to the recession, the imposition of the federal goods and services tax on building materials and the bad debts of building contractors and other customers. In the first quarter of this year the applicant incurred a loss of $228,494. On the basis of its current financial liabilities, its immediate cash requirements, and its projected revenues, the applicant is unable to meet its current financial obligations and is therefore insolvent.

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5 The applicant has complied with the statutory conditions necessary to bring the company within the provisions of the Act. I am satisfied that on the basis of the material filed with the court that the public of this province have an interest in the continuation of the applicant's business for a period of time to permit the company to attempt to reorganize its financial affairs. A "stay" of all actions and proceedings by creditors against the applicant is therefore granted. The duration and the conditions of the "stay" shall be determined after hearing representations from all interested parties.

6 The applicant also applies to have the company's auditor ap pointed to act as monitor.

The Companies' Creditors Arrangement Act

7 This statute was enacted during the Great Depression. Although there have been two consolidations of the Act, its provisions are essentially the same as the original statute. The scheme of the Act is to permit an insolvent company to avoid bankruptcy by rearranging the rights of its shareholders and creditors to permit the company to continue as a "going concern" under judicial scrutiny until an agreement is reached between the interested parties.

8 In an article entitled "Arrangements under the *Companies' Creditors Arrangement Act*" (1991) 1 C.B.R. (3d) 135, David H. Goldman, David E. Baird, Q.C., and Michael A. Weinczok observed at p. 203 that:

> Prior to the 1980s, little was known about the benefits available to insolvent corporations under the *Companies' Creditors Arrangement Act*. Recently, the Act has become a significant aspect of Canadian insolvency practice. In large part, this new-found prominence is the direct effect of the liberal approach taken by courts to the interpretation of the statute. Given the willingness of Canadian courts to allow insolvent companies to submit plans of arrangement under the CCAA, and the likelihood of approval where such plans could result in increased benefit to the company and its creditors alike, utilization of the Act will likely increase. From the position of the insolvency practitioner, the opportunity to design a plan which enables a business to carry on, employees to retain their employment, and creditors to obtain an enhanced recovery is a rewarding challenge. A challenge which is limited only by the ingenuity of the draftsperson.

9 The Act provides that an insolvent company may avoid the distribution of its assets to creditors by making an application to the court for protection. If the court determines that the company has met the statutory conditions, it may declare that the company is entitled to protection against creditors. The court would then order a stay of proceedings which would restrain attempts by creditors to realize upon the security of the company or to enforce claims against the company during the reorganization period.

Judicial Supervision

10 After ordering a "stay", the court then assumes a very sig nificant role while the insolvent company attempts to rearrange its financial affairs. Gibbs J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) at p. 140 [W.W.R.] said:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

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11 Although the Act requires the court to perform a supervisory role for companies seeking to restructure their debt, it fails to specify the nature and extent of that supervision. Thackray J. in *Canadian Imperial Bank of Commerce v. Quintette Coal Ltd.* (1991), 1 C.B.R. (3d) 253, 53 B.C.L.R. (2d) 34 (S.C.) at p. 260 [C.B.R.] considered the court's supervisory role and held that the court's obligations were defined by the objectives set out in the Act. The duty of the court is to design a process which would "permit a corporation, through reorganization, to continue its business and thereby prevent its organization from being disrupted and its goodwill lost".

12 In order for a court to discharge its obligations during the reorganization period, it must have access to expert advice. Although there is no specific provision in the Act for the appointment of "experts", the courts have usually appointed monitors to act as agents of the court to help the court to discharge its obligations under the Act.

13 In this province the power of a court to appoint a monitor is also conferred by R. 25 of the Rules of the Supreme Court, 1986. Rule 25.01(1) provides that "[t]he Court may appoint a receiver in any proceeding in which it appears to be just and convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the Court thinks just".

14 In order to perform its supervisory role, the court would also have the power to appoint such other persons that it deems necessary for the purpose of carrying out the objectives of the Act. These appointments may be made either directly by the court or may be delegated to the monitor. This delegation is not an abrogation of the court's responsibility because the ultimate responsibility for the supervisory process is still vested in the court.

15 It is essential for the court to ensure that neither the shareholders nor the creditors have any influence on the monitor. As an agent of the court, the monitor must not be in a "conflict of interest" situation. The monitor's sole responsibility is to the court.

Powers of the Monitor

16 Under the provisions of the Act, the court's role is to preserve the status quo and to facilitate a compromise or arrangement between the shareholders and creditors of the insolvent company (the "Plan"). The powers vested in the monitor by the court will necessarily vary from case to case depending upon the circumstances.

17 On the basis of the facts set out in the application, I find that in order to discharge its supervisory role this court should delegate the following powers to the monitor, namely:

1. Collection of financial information during the reorganization period with periodic reports to the court, the shareholders and the creditors.

2. Supervision by the monitor of the funds of the company to ensure that there is compliance with the instructions placed on the company's finances by the court.

3. Supervision by the monitor of the assets of the company.

4. Supervision of the preparation of the plan between the shareholders of the company and its creditors.

5. Co-ordination of the process of the approval of the plan including negotiations with the interested parties.

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6. Calling and chairing of meetings of various classes of creditors and shareholders and meetings of shareholders and creditors.

7. Submission to the court of the plan made between the company and such of its creditors as the monitor deems appropriate for approval by the court.

Appointment of the Monitor

18 Before appointing a monitor, the court must determine whether the proposed candidate has the necessary expertise to discharge the obligations of the monitor. This assessment can only be made after the court has fully explored the powers that should be vested in the monitor to permit the monitor to adequately advise the court with respect to its obligations.

19 Since the Act deals with insolvent companies, it is important that the monitor have some expertise in insolvency. Trustees in bankruptcy have a unique professional expertise in the area.

20 In this case, the monitor is responsible for chairing meetings of creditors and shareholders. The monitor must also supervise the preparation of the plan and negotiate with all interested parties. This role of "negotiator" requires an expertise in negotiation and mediation skills.

21 The monitor must also consider the financial position of the insolvent company, analyze the plan and make recommendations to the court during the approval process. The monitor must therefore be able to analyze the financial data of the insolvent company during the reorganization period and during the foreseeable future.

22 Finally, the court must ensure that the monitor, as agent of the court, is independent of the parties. This type of examination can only be made after all interested parties have been given an opportunity to make representations.

23 While the auditor of the applicant possesses the necessary qualifications, there is a lack of the necessary "independence". The application to appoint the company's auditor as monitor is dismissed.

Application dismissed.

END OF DOCUMENT

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TAB 20

Indexed as:

Keddy Motor Inns Ltd. (Re)

Between
RoyNat Inc. and Royal Trust Corporation of Canada,
Appellants, and
Keddy Motor Inns Limited, Respondent

[1992] N.S.J. No. 98

90 D.L.R. (4th) 175

110 N.S.R. (2d) 246

6 B.L.R. (2d) 116

13 C.B.R. (3d) 245

32 A.C.W.S. (3d) 1085

299 A.P.R. 246

Action S.C.A. Nos. 02595 and 02598

Nova Scotia Supreme Court - Appeal Division
Halifax, Nova Scotia

Clarke C.J.N.S., Matthews and Freeman JJ.A.

Heard: February 7, 1992
Judgment: March 2, 1992

(32 pp.)

Company law -- Companies' Creditors Arrangement Act -- Validity -- Voting irregularities -- Late proxy vote -- Classification -- Fairness.

Faced with debts totalling $42,000,000 that threatened insolvency, the respondent brought proceedings under the Companies' Creditors Arrangement Act. The plan involved a division of the respondent's creditors into classes according to interest and a vote was passed approving the plan.

The plan was sanctioned by the Supreme Court. The appellants comprised the minority that opposed the plan. In this appeal they urged that the plan was invalid for irregularities. They argued that the trial judge should not have allowed the inclusion of a proxy vote that arrived late; that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote for the plan; and that the classification of the creditors was unfair.

HELD: The appeal was dismissed. While late proxy votes are to be discouraged, there is nothing in the Act that precludes the approval of late-arriving proxy votes. The evidence showed that there could have been a better classification than that adopted in the plan. However, the present classification did not give rise to any substantial injustice. Classification order was made prior to the order sanctioning the plan. In the absence of appeal from the classification order, the debtor and its creditors were entitled to rely upon it as a foundation for the plan. The Act contemplates negotiations between the debtor company and creditors based on the best terms they can get. The appellants failed to participate in negotiating favourable terms for themselves in the hope that the plan would fail for non-approval. The emerging plan accorded some creditors preferential treatment at the expense of the appellants but this was done within the fair and equitable process laid down in the Act.

STATUTES, REGULATIONS AND RULES CITED:

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

Daniel M. Campbell, Q.C., for Appellant RoyNat Inc.
Peter G. MacKeigan and Gregory Cooper, for Royal Trust Corporation of Canada.
John D. Stringer, Richard Freeman and Roy F. Redgrave, for Keddy Motor Inns Limited.
Gerald R.P. Moir, for Central Guaranty Trust Company.

THE COURT: Appeal dismissed from order sanctioning plan of arrangement under Companies' Creditors Arrangement Act between hotel chain and creditors per reasons for judgment of Freeman J.A.; Clarke C.J.N.S. and Matthews J.A., concurring.

FREEMAN J.A.:-- Two secured creditors are seeking to overturn the Supreme Court order sanctioning a hotel chain's plan of arrangement under the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36, on grounds of voting irregularity and unfair practices.

Faced with debts totalling $42,000,000 that threatened to overwhelm it, the respondent, Keddy's Motor Inns Limited, brought proceedings under the Act. Under a series of court orders creditors' actions were stayed, creditors divided into classes according to interest, and a schedule

established requiring a plan to be voted on by November 2, 1991.

Following the vote approving the plan as amended at the meetings, it was sanctioned on application to Mr. Justice Nathanson of the Trial Division.

The issues on the appeal from his decision are that he should not have allowed the inclusion of a proxy vote that arrived late, resulting in approval of the plan by the class of capital lease creditors; that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote for a plan confiscatory of secured creditors' rights; and that the creditors had been unfairly classified.

The appellants must overcome obstacles including strong creditor approval of the plan, a well reasoned decision by Mr. Justice Nathanson and able submissions on behalf of both respondents.

The scheme of the Act is contained in s. 6:

> 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 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;

Important features are that the majority as defined in the Act can bind the minority, that the final plan is defined by the vote of the creditors at the meetings, and that modifications can be negotiated up to the time of voting.

The right of majority creditors of a class to bind the minority is an extraordinary one, reflecting a willingness on the part of Parliament to deprive some creditors of their contractual rights in the interest of the survival of the economic unit comprised of the ailing corporation and its creditors. Fairness is preserved by the requirement for court sanction. But fairness must be understood within the spirit of the statute.

The Act itself, apart from the jurisprudence which has developed around it, is little encumbered by detail or nicety and provides minimal direct guidance as to procedures to be followed. It is intended to provide distressed businessmen and their creditors with a means of reaching an accommodation of benefit to both, and to the public generally. Writing for the British

Columbia Court of Appeal, Mr. Justice Gibbs described the Act in Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1991] 2 W.W.R. 136 at p. 142:

> "The CCAA was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the only consequence of the only insolvency legislation which then existed--the Bankruptcy Act and the Winding-up Act. Almost invariably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the CCAA, to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business."

The Act was considered by the Supreme Court of Canada soon after its enactment in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., [1934] S.C.R. 659 in which Cannon, J. described it as follows:

> "Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency' proceedings with the object of preventing a declaration of bankruptcy and the sale of these assets. If the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part, provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation ..."

The Act fell into disuse until recent years but now appears to be enjoying a resurgence. McEachern, C.J.B.C., discussed its purpose in the influential case of Northland Properties Limited et al. v. Excelsior Life Insurance Company of Canada et al. (1989), 73 C.B.R. 195 (B.C.C.A.):

> " ... 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."

Nathanson, J. recognized that court sanction for the plan required that the court be satisfied as to three criteria which have evolved through the case law and which were stated in the Northland

Properties case.

1. There must be strict 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 Companies' Creditors Arrangement Act.
3. The plan must be fair and reasonable.

Each of the six classes of creditors voted in favour of the plan by the majority required under the Act. The creditors did not vote as a whole. The votes cast at the class meetings--including the proxy vote at issue in this appeal--showed 92 per cent of the creditors representing 86.6 per cent of the value of the claims favored the plan.

After three days of hearings in November, 1991, Mr. Justice Nathanson sanctioned the plan. It provides for three unprofitable hotel or motel properties to be sold or transferred to mortgagees, and the eight profitable "core" properties to be retained. Interest rates on the core properties were standardized at eleven per cent and amortization periods at 25 years. Numerous variations were arrived at through negotiations, as contemplated by the Act, to make the plan acceptable to the majority of creditors. Many creditors received concessions of particular interest or benefit to themselves, that were not made to their class of creditors as a whole.

Central Guarantee, the largest creditor, was added as respondent in this appeal. It was owed $16,600,000 secured by mortgages on hotels in Halifax, Moncton and Fredericton. Relying on provisions of its security contracts, it negotiated for monthly payments of $66,000 to cover municipal taxes and for payment of its legal fees of $25,000 as a protective disbursement out of a trust fund held for renovation expenses. The appellants did not receive equivalent benefits. It does not appear that they engaged in negotiations with the respondents to improve their positions, although they would have been free to do so. They did not expect the plan to be approved.

The appellants, in voting against the plan, were in the minority in the secured creditor class. They were among the few secured creditors who were fully secure. Royal Trust held a first mortgage for $985,000 on a hotel at Shediac Road, Moncton, and RoyNat, Inc., held a first mortgage for $3,750,000 on Keddy's Saint John hotel. Both properties are valued in excess of the first mortgages. The appellants claim their position has worsened because their interest rates were reduced from 13 per cent, the amortization periods were increased, and they are precluded from realizing on their security during the five-year currency of the plan. They also object that some creditors negotiated benefits for themselves which the appellants did not receive. They say that they should not be bound by a majority of creditors voting out of self-interest in hope of realizing the benefits they had negotiated for themselves.

Moreover, they say the class of secured creditors is too broad, and that they are unfairly grouped with creditors secured by non-core properties, and by mechanics' lienholders. They should not, they say, be bound by the votes of secured creditors with whom they have no community of

interest.

I will dispose of the classification of creditors issue first. Similar arguments were considered by Forsyth, J. of the Alberta Queens' Bench in Norcen Energy Resources Limited and Prairie Oil Royalties Company Ltd. v. Oakwood Petroleums Ltd., (1988), 72 C.B.R. 20. He discussed the "commonality of interests test" described in Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B. 573 (C.A) in which Lord Esher stated:

> "... If we find a different state of facts among different creditors which may differently affect their minds and their judgments, they must be divided into different classes."

Bowen, L.J. stated that a class:

> "... must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

Forsyth, J. also referred to the "bona fide lack of oppression test" considered in the widely cited case of Alabama, New Orleans, Texas & Pac. Junction Co., Co., [1891] 1 Ch. 2123 (C.A.). Lindley, L.J. stated at pl. 239:

> "The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority border to promote interests adverse to those of the class whom they purport to represent.

Forsyth, J. considered an article by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganizing of Major Financial and Commercial Debtors," Canadian Bar Association -- Ontario Continuing Legal Education, 5th April 1983, at pl. 15 and summarized it as follows:

> "These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the 'identity of interest' proposition as a starting point in the classification of creditors necessarily results in a 'multiplicity of discrete classes' which would make any reorganization difficult, if not impossible,

to achieve.

> In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the Hongkong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors."

There is undoubtedly merit in the arguments of the appellants in the present case. Better classifications could no doubt be arranged with the benefit of hindsight. It might have been beneficial if secured creditors of core properties were in a separate class from secured creditors of non-core properties and holders of mechanics' liens. However the Act does not require more than a single class of secured creditors, and I am satisfied the present classification of creditors does not give rise to any substantial injustice. Classification was by a court order following a hearing at which the creditors were entitled to be heard. That order was made earlier than and distinct from the order sanctioning the plan. The classification order was never appealed, and the 21-day appeal period expired before the class meetings. The creditors and the debtor company were entitled to rely upon it as a foundation for the plan. It is not specifically included in the present appeal because it was not subject to collateral attack in the proceedings before Nathanson, J. who was bound by it. The proper procedure for attacking the classification order was by way of appeal from that order, not the sanctioning order. Nevertheless, because of the overall supervisory duty of the court to ensure fairness of the plan, it is my view that we could intervene with respect to the classification order if necessary to avert substantial injustice. I am not satisfied the present circumstances warrant this court's intervention. I would reject the grounds of appeal based on classification.

The ground of appeal first stated by the appellants is their assertion that a late-arriving proxy vote should not have been counted in the voting for the plan for the class of capital lease creditors. Without that vote that plan would have been defeated. The assumption of the appellants appears to be that rejection of a class plan would defeat the entire plan, or at least render it unfeasible, but that is contrary to the intention of the Act and to s. 7.03 of the plan as sanctioned. They assert a right to appeal from the result of voting for a plan approved by another class of creditors because approval of that plan was essential to the overall plan which is binding on them. Without endorsing that reasoning, the duty of this court, once again, is to consider whether the trial judge erred in assessing the fairness of the plan. This includes jurisdiction over the votes of all classes of creditors; if the impugned vote is a nullity it must be rejected.

Meetings of the six classes of creditors took place November 1 and 2, 1991. The meeting of the capital leasing creditors was held the first day. The original draft of the entire plan, including the plan for that class, and written statements of amendments were before the creditors. Disclosures of results of the most recent negotiations were made orally at the meeting, having the effect of amending the plan to include them.

Marcus Wide of Coopers & Lybrand, the court appointed monitor, acted as chairman of all the meetings. He called for a motion of "closure" of the meeting following the vote. That is, he sought a motion prior to the vote to take effect after the vote. The minutes disclose that such a motion was made and seconded but do not show that it was voted on. After this motion the creditors and their proxies cast their votes and dispersed. There was no motion for adjournment. The ballot box was sealed. The votes were not to be counted until after the last class meeting the next day. The Bruncor proxy in favour of Martin MacKinnon, Keddy's representative, was received by Mr. Wide at 5:08 p.m. on November 1. Mr. Justice Nathanson said that Mr. Wide

> "... declined to include and count the vote in the final tabulation of votes. However, reluctant to deny a legitimate - creditor an opportunity to express its view concerning the plan, he brought the matter to the attention of the court in the monitor's final report".

The Monitor's report on the result of the vote by the capital lease creditors, and the controversial proxy, is as follows:

> 2. Capital Lease Creditors -- failed to approve the plan

	For	Against
Value of creditors voting	$679,148	$261,509
Percentage	72	28

Number of creditors voting	8	1
Percentage	89	11

> The Monitor wishes to advise the Court that a proxy, instructing Mr. Martin MacKinnon to vote in favour of the plan, was received from Bruncor Leasing Inc., a capital lease creditor in the amount of $212,959, on the afternoon of November 1, 1991, subsequent to the meeting for that class, but not before the final meeting of creditors and while the ballots were still in sealed boxes. The instruction regarding proxies circulated with the notice of Meeting provides as follows:
>
> > A proxy may be deposited with, faxed or mailed to and received by the monitor at any time up to the respective creditor meeting, or any adjournment thereof, or may be

> deposited with the chairman of the meeting immediately prior to the creditors meeting, or any adjournment thereof.
>
> This vote has therefore not been tabulated.
>
> Had the vote been tabulated the Capital Lease Class of Creditors would have approved the plan with 77.3 of the value of the votes cast in that class and 90 per cent of the number.

Mr. Justice Nathanson cited In re Alabama, New Orleans, Texas and Pacific Junction Railway Company, [1891] 1 Ch. 213 at p. 245 as authority for the statement that the vote required for approval of a plan is "a condition precedent to the jurisdiction of the court." He stated that "if the vote is not in accord with the statutory requirement, the court cannot exercise its jurisdiction under the statute to sanction the plan. Strict compliance with the statutory requirement is mandatory."

The Act provides statutory requirements as to the majorities necessary to approve a plan by a class of creditors, but no guidance as to the manner of voting. The words "present and voting either in person or by proxy at the meeting or meetings" of the creditors or a class of creditors have been referred to by counsel as a voting directive. In context, however, they merely define the creditors to be considered in determining whether the requisite majorities for approval of the plan have been met.

The somewhat unusual procedure of "closing" the meeting by motion prior to the vote presumably fixed the plan in the form it had attained up to the moment of closure and cut off further discussion while the creditors turned their attentions to the actual process of voting. Voting is as much a function of the meeting as discussion of the plan; while the voting was in progress the meeting necessarily continued in existence. Counting the ballots is as much a function of the vote as casting them. Apart from the security measure of sealing the ballot box, no step was taken, no motion moved nor voted on, to end the meeting or to close the voting, between the casting of the votes and the counting of them.

The meeting must still have been an existing, though fictitious, entity at the time the votes were counted; the count necessarily occurred within the context of the meeting. The continuation of the meeting and the acceptance of the late proxy vote finds support in the case law. See Shaw v. Tati Concessions Limited, [1913] 1 Ch. 292, Washington State Labour Council v. Federate American Insurance Company, Wash. 474 P. 2d 98 (S.C. En Banc).

Counsel for the appellants complain that the proxy was obviously solicited from Bruncor by representatives of Keddy's. However they specifically acknowledged that they do not allege it was induced by improper side deals or secret benefits.

While it was obviously intended that proxies should be produced prior to the meetings, there appears to be nothing in the Act, nor in the orders, nor in the voting instructions of the monitor, to preclude the tabulation of a proxy vote submitted prior to the counting of ballots. The common law applies. That is stated in Company Meetings by J.M. Wainberg, Q.C. 2nd ed., 1969 at p. 72 in his discussion of Rules of Order:

> When a poll is demanded, it shall be taken forthwith. If the poll is on the election of a chairman or on a motion to adjourn, the votes shall be counted forthwith, and the result declared before any further business is conducted. On any other question the count may be made at such time as the chairman directs, and other business may be proceeded with pending the results of the poll. Up to the time the poll is declared closed and the chairman (or the scrutineers) begin examining ballots, any qualified voter may vote.

The vote was carefully conducted, with due attention to fairness and security. I am not satisfied that prejudice was suffered by creditors of any other class as a result of the counting of the vote of a creditor qualified to vote in every respect save for tardiness. It is important that creditors not be disenfranchised for technical reasons; approval of a plan is an expression of the collective will of the creditors, and it is important that be as broadly based as possible. It must be borne in mind that this was a vote by creditors under the Companies' Creditors Arrangement Act, not a meeting of municipal councillors or a company board of directors. Clear evidence of illegality within the spirit and purpose of the Act, not mere irregularity, is necessary to invalidate the ballot. If the ballot was not invalid, it must be counted.

As McEachern, C.J.B.C. said in Northland,

> "As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority."

Nevertheless, late proxies are not desirable. They create uncertainty, and there exists a perceived possibility for abuse. The reason for holding the counting of the votes until all creditors had voted was to ensure that classes with the latest meetings would not have the negotiating advantage of knowing how other classes had voted. Chairmen of creditors' meetings would be well advised to have the ballots counted promptly after they are cast and then to have the meeting properly adjourned. There would be no need to announce the results until after the last meeting.

I am not satisfied the appellants have demonstrated that Mr. Justice Nathanson erred at law in approving the Bruncor ballot. I would dismiss this ground of appeal.

The remaining grounds of appeal include the allegation that the plan for secured creditors was actually a number of plans tailored to individual creditors. This ground is closely related to the classification issue. The commonality of interests test is no longer strictly applied because of its

unwieldiness. It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment--as opposed to equitable treatment--is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

The other grounds to be considered within the general heading of unfairness include allegations that votes of secured creditors obtained by inducements should have been excluded, that the plan was not fair and reasonable among secured creditors and that the process employed by the respondent was inherently unfair.

The instances complained of are set forth in Mr. Justice Nathanson's decision and need not be repeated here. In dealing with them generally, he remarked that what the appellants overlooked was "that their objections must be examined in the light of what is in the best interests of the class of secured creditors to which they belong and of the creditors as a whole."

He summarized his conclusions about the complaints as follows:

> "... some of the complaints are relatively inconsequential, others have another context which is not stated. What appears on the surface to be the whole truth is, in reality, of less moment ..."

He stated that he applied the following principles, which he derived from the case law:

1. Negotiations between the debtor company and creditors are salutary and ought to be encouraged.
2. Secret or side deals or arrangements are improper. Their impropriety can be ameliorated by making full disclosure in a timely manner.
3. There is no authoritative definition of what constitutes full disclosure or timely manner; therefore, these may be questions of fact to be determined in each individual case.
4. Members of a class of creditors must be treated fairly and equitably. Where different members are treated differently, all members of the class must have knowledge of the plan overall and for the particular class.

Mr. Justice Nathanson made the following findings:

> "I find that the debtor company made full disclosure in a timely manner by setting out the essential characteristics of the proposed plan, that is, all material information needed by a creditor in order to make a fair

> and informed judgment, in the draft plan as filed, in the two addenda circulated to the members of the class, and in the oral communications made during the meeting which could not have been made in writing at an earlier time because of the continuance of negotiations with various creditors. I also find that the members of the secured creditors class had full knowledge of the plan in its application to all members of that class and generally in its application to all creditors of all classes.
>
> I find that the members of the secured creditors class are treated fairly and equitably in the plan as amended. Some sacrifices will be made, but the evidence discloses that at least some of those sacrifices are of windfalls which might accrue if the plan is not approved and the sacrificing creditors are able to realize on the security which they hold.
>
> I hold that the proposed plan is fair and reasonable. It is a bona fide and creditable attempt to achieve a result which is generally fair to the creditors ..."

The burden on the appellants to show otherwise is a very heavy one. In considering fairness Mr. Justice Nathanson was in the last analysis exercising his discretion in addition to identifying and applying rules of law and making findings of fact. This court has ruled repeatedly, on sound authority, that it should only interfere with discretionary findings by a trial judge if serious or substantial injustice, material injury or very great prejudice would otherwise result. See, for example, McCarthy v. Acadia University (1977), 18 N.S.R. (2d) 364-; Exco Corporation v. Nova Scotia Savings and Loan et al. 59 N.S.R. (2d) 331; Coughlan et al. v. Westminer Canada Holdings Ltd. et al. (1989), 91 N.S.R. (2d) 214; Minkoff v. Poole and Lambert (1991), 101 N.S.R. (2d) 143; and the authorities cited therein.

When the judicial discretion is exercised in favour of sanctioning a plan proposed by a debtor company but in a very real way created by a resounding majority vote of its creditors, the burden on the appellants becomes even heavier.

Nevertheless, there remain some matters of serious concern which the appellants have raised, including the fact that the respondent Central Trust Guaranty did not support the plan until arrangements had been made for paying its legal costs and for monthly instalments of municipal taxes. If these could be characterized as inducements to procure its vote, unfairness would be apparent.

A creditor which withholds its support from a plan because it has failed to address legitimate concerns arising from its contractual relationship with the debtor company is perfectly within its right to insist on improvements. The Act encourages just this kind of negotiation. It is not material

whether agreement occurs soon after the first draft of the plan is circulated, so the resulting amendments can also be circulated to creditors, or whether a last-minute compromise is reached moments before the vote. The disclosure to be made in the latter instance will be necessarily sketchier than the one made in the former.

On the other hand a creditor whose legitimate concerns have been met on a basis similar to that of other creditors in its class, but which continues to insist on a benefit to which it is not entitled as the price of its vote, is attempting to commit the debtor to an unfair practice which could invalidate the whole plan. The distinction between the two situations must be drawn by the trial judge, and there will be occasions when it is a very difficult and murky one.

The benefit derived by the Relax Company in the Northlands case is an example of the first instance. So are the benefits negotiated by the Central Guaranty Trust in the present case. It seems clear that when other complaints of instances of unfairness were found by Mr. Justice Nathanson to involve matters of substance, he was able to consign them to the first category. I am not satisfied that he was wrong in doing so.

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. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority. Lack of disclosure, however, can transform an intrinsically fair alteration in the terms of a plan into an unfair secret deal which invalidates a plan. As a general rule the plan must include all of the arrangements made between the debtor company and the creditors; in principle, undisclosed arrangements cannot be part of the plan because they are not what the creditors voted for. Nathanson, J. found there is no authoritative definition of full or timely disclosure -- these were questions of fact. Consequences of inadvertent and innocent non disclosure and imperfect or inadequate disclosure must be assessed. This involves a fine sifting of all factors to tax the skill of a trial judge; I am not satisfied Nathanson, J. committed reversible error in his analysis nor in his conclusion that all material information had been disclosed.

Another concern of the appellants, and of this court, is that regardless of any benefits they did not receive but which were negotiated by other secured creditors in their own interests, they are left worse off under the plan than they were under the provisions of their own security contracts. The appellants had taken pains to protect their own interests when they made the loans, and they would be repaid if they were left the freedom to realize on their security.

In his decision on a classification order in Re NsC Diesel Power Inc. (1990), 97 N.S.R. (2d) 295 Mr. Justice Davison cites with approval an article by Stanley E. Edwards in the Canadian Bar Review (1947) Vol. 25 at p. 587. He quotes Mr. Edwards at p. 595 as follows:

> "There can hardly be a dispute as to the right of each of the parties to receive under the proposal at least as much as he would have received if there had been no reorganization. Since the company is insolvent this is the amount he would have received upon liquidation.

At p. 594 Mr. Edwards said

> "A further element of feasibility is that the plan should embrace all parties if possible, but particularly secured creditors, so that they will not be left in a position to foreclose and dismember the assets after the arrangement is sanctioned as they did in one case."

The one major disadvantage the appellants suffer is the loss of the present right to realize on their security. They may well consider that right has been confiscated from them. It is essential to the purpose of the Act to bring about such a result, but it must be done fairly.

With an exception involving a government agency which had not been receiving a commercial rate of interest, all the secured creditors have their interest rates reduced to the current market level of eleven per cent, amortization periods increased, and in one case, principal and interest blended. However the appellants' security is unimpaired, and apart from the reduced interest, they stand to recover as much as they would have if the reorganization had not taken place. Their worst disadvantage is that they are delayed in recovering under their security, which appears to be a necessity if the plan is to succeed. There is nothing to suggest that Keddy's, or the other creditors, sought to take advantage of them. Rather, they were asked to accept what appears to be the minimum disadvantage consistent with a plan which might permit the company's survival. And, had they chosen to negotiate, they might have improved the terms.

In the long term creditors in the position of the appellants should be required to suffer no loss, and when such appears likely courts must be vigilant to protect them in keeping with the spirit of the Act.

At first blush the reduction of their interest rates from approximately 13 per cent to 11 per cent appears to represent a greater loss than can fairly be imposed upon them. However what they are entitled to is not what they would recover if the contract were to be continue to its fulfilment as originally contemplated. What they are entitled to, as Mr. Edwards points out, is what they would recover from an insolvent company upon liquidation.

That is, they would be entitled to recover the outstanding balance they are owed plus interest to date. The reduced interest rate relates to future interest. On liquidation they may be presumed to reinvest their recovered capital at present market rates. The eleven per cent rate fairly represents the present market rate they would likely obtain on reinvestment of the funds. The other disadvantages of which they complain are merely delays in recovery for which they will be compensated by interest. They have suffered inconvenience but no injustice. They have not been treated unfairly within the spirit of the Act.

The plan originally proposed by Keddy's was unacceptable to many of the creditors, although it would appear to have been offered in good faith. Keddy's had to try to offer an acceptable plan, without any certain knowledge of the matters of chief concern to the individual creditors. If there had been no room for movement the plan would predictably have failed. What appears to be controversial is that a process of negotiations took place within a compressed time frame between Keddy's and the creditors, in which the concerns of the creditors were considered. It does not appear that advantages negotiated by any creditor were offset by substantial disadvantages to another, nor does it appear that the advantages were so great as to constitute substantial unfairness even viewed in their worst light. In keeping with the purposes of the Act, substance must prevail over merely theoretical or technical considerations. The process took place in the open, and the other creditors were reasonably well advised of all amendments that were agreed to, with the possible exception of some last minute changes of a relatively minor nature that escaped detailed disclosure. There appears to have been no deliberate intention to conceal or mislead.

The appellants were aware of the process but, in the belief that the plan would fail, did not fully participate. They were under no duty to negotiate for better terms. However, their choice not to do so does not entitle them on these facts to destroy a plan so strongly supported by the other creditors. The plan does not treat the creditors equally, but it treats them equitably. In my view both the plan and the process by which it was achieved were not perfect, nor beyond criticism, but they were roughly fair and within the objectives of the Act, as Nathanson, J. determined.

Considered as a whole, the concerns of the appellants are understandable. But when they are examined within the framework of the purposes and objectives of the Companies' Creditors Arrangement Act they lack sufficient substance to justify interference by this court with the plan sanctioned by Mr. Justice Nathanson.

I would dismiss the appeal. As the issues involved in this appeal were not previously considered by this court, the parties should bear their own costs.

FREEMAN J.A.
Concurred in:
CLARKE C.J.N.S.
MATTHEWS J.A.

---- End of Request ----
Print Request: Current Document: 1
Time Of Request: Tuesday, September 22, 2009 16:56:59

TAB 21

Indexed as:

T. Eaton Co. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of the T. Eaton Company Limited, applicant

[1999] O.J. No. 4216

14 C.B.R. (4th) 288

92 A.C.W.S. (3d) 375

Court File No. 99-CL-3516

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: October 20, 1999.
Judgment: October 24, 1999.

(16 paras.)

Contracts -- Remedies for breach -- Damages -- Specific performance -- When available.

Motion by National Retail Credit Services Co. for specific performance. T. Eaton Co. entered into a Card Licence and Services Agreement and a Trademark Licence Agreement with National. National was thereby granted an exclusive licence to provide credit card services for Eaton. Subsequently, Eaton and Sears Canada entered into a Share purchase Agreement which was the foundation of Eaton's plan of arrangement under the Companies Creditors Arrangement Act (CCAA). Eaton then repudiated the licence agreements. National moved against Eaton and Sears for specific performance of the licence agreements.

HELD: Motion dismissed. The licences did not confer a proprietary interest on National. Customer lists, trademarks and other intellectual property remained the exclusive property of Eaton. National

could be adequately compensated in damages and so specific performance was not an available remedy. National had no higher claim under the CCAA proceedings than any other unsecured creditor.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Counsel:

Justin R. Fogarty, for National Retail Credit Services Company.
Robert J. Arcand, for Cambridge Shopping Centre Limited, Oxford Development Group Inc., Grosvenor International Canada Limited and Laing Property Corporation.
Edmond Lamek, for Richter & Partners Inc., the Monitor.
Jay A. Carfagnini, for The Cadillac Fairview Corporation Limited.
Patricia Jackson and Michael Rotsztain, for Sears Canada Inc.
John MacDonald, for The T. Eaton Company Limited.

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1 **FARLEY J.** (endorsement):-- The National Retail Credit Services Company ("N") moved for a direction of specific performance by the T. Eaton Company Limited ("E") and Sears Canada Inc. ("S") of the Card Licence and Services Agreement dated February 13, 1998 ("Card Deal") and the Trademark Licence Agreement dated April 17, 1998 ("Trademark Licence"). E and S have entered into a Share Purchase Agreement which will form part of the foundation of E's plan of arrangement under the CCAA.

2 N submitted that, notwithstanding E's repudiation of the Trademark Licence (as well as the Card Deal; in Amended and Restated Purchase Agreement dated February 16, 1998 and the Transition Agreement dated April 4, 1998), N be entitled to use E's tradęmarks and related intellectual property to collect all outstanding receivables of N owed by customers of E and generated by the customers using the E credit card. During the hearing I confirmed with counsel for E and S that there would be no impediment to N referring in any collection procedure to the name "The T. Eaton's Company Limited". It is unfortunate that this aspect had not been clarified before. With this confirmation it seems to me that N may suffer some modest inconvenience in its collection operations but no material difficulty which requires any remedy outside of a claim for damages.

3 What then of E's repudiation of the agreements with N whereby N was to be the E private label credit card program provider. Pursuant to the Card Deal, E granted N for a 10 year term "the exclusive licence to provide all of the requirements of Cards Services of (i)[E] and its affiliates ..."

N paid E a significant amount of money for this grant. "Card Services" are defined as follows in s. 1.1 of the Card Deal:

> "Card Services" means the services provided by Supplier to administer, operate, manage and regulate the credit granting, payment processing, and transaction authorization facilities provided under this Agreement; such services include but are not limited to the production and issuance of Cards, the distribution and receipt of applications for Cards, the review and approval or denial of applications for Cards, the granting of credit to Cardholders, the preparation and mailing of statements, the receipt and collection of payments from Cardholders, the adjudication of claims, the provision of balance protection insurance, the collection, management and communication of Customer information, the maintenance and timely provision of non cash transaction records, the payment of Net Settlements to TECO, the maintenance of the Database and all cardholder related records, the authentication of Bank Card transactions by electronic or other means, the operation of the Authorization System including the authorization of Transactions, the operation and monitoring of systems and related facilities and resources for carrying out the above referenced activities, and the operation and administration of Cardholder Credit Balances together with such other services as may be agreed to from time to time by TECO and Supplier.

Thus N has the right to and is providing a credit type of service for the benefit of E.

4 I note that s. 7.4 of the Card Deal provides for the dispute mechanism for disputes or claims "between the parties arising out of or in relation to this Agreement". Essentially the parties N and E are to negotiate and if resolution is not forthcoming to refer the matter to a single arbitrator with the Arbitration Act being invoked. It seems to me that the Claims Procedure as to N's claim for damages as a result of E's repudiation essentially fulfils this provision. I note that s. 7.4(d)(vii) provides that "nothing herein will prevent a Party who gave notice under this Section 7.4(d) from applying for injunctive relief pending such arbitration proceeding." I shall deal with this motion in that light since in large respect it is a claim for a mandatory injunction.

5 In Re Blue Range Resource Corp. [1999] A.J. No. 788 (Q.B.), leave to appeal granted on other grounds [1999] A.J. No. 978 (C.A.), LoVecchio J. held that the debtor company could terminate (in the sense of repudiate, see infra) certain gas supply contracts under a stay order made pursuant to s. 11 of CCAA as long as that did not affect the purchaser's right to make a claim in damages against the debtor company. He stated at paras. 36-8:

> 36. The purpose of the CCAA-proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A

> common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.

When LoVecchio J. speaks of "the variation of existing contractual relationships", it is clear that he means that the "variation" is simply a breach of the contract and not that there is a sanctioned revision to the contract.

> 37. A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' right to claim for damages.
>
> 38. The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathize with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

I agree with that analysis. See also Re Armbro Enterprises Inc. (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div); Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce (1992), 11 C.B.R. (3d) 161 (Ont. Gen. Div.); Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.) and generally as to the purpose of the CCAA, Re Lehndorff General Properties Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at p. 31.

6 The question of fairness is one that must await the sanction hearing, provided that the plan of arrangement survives the debtor vote. In Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245 (N.S.C.A.), Freeman J.A. for the court stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to service 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 the 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. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority (emphasis added).

In any CCAA (and its "affiliated" legislation) situation, one has to be cognizant of the function of a balancing of the prejudices. Positions must be realistically assessed and weighed, all in the light of what the alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands. (I wish to make it clear that I am speaking generally about the approach to the CCAA and not specifically about this case as now is not the time to deal with the sanction questions).

7 It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases, and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would Constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.

8 Is there something peculiar to the Card Deal and the other agreements which would dictate another result or amelioration in favour of N? Firstly N points to s. 8.3 of the Card Deal which sets out the three provisions pursuant to which E could terminate the Card Deal (and E's obligations thereunder) before the expiration of the 10 year term. None of those provisions come into play. However, s. 8.3 contemplates a termination by E as permitted under the Card Deal. That is not what E has done. E has repudiated the Card Deal and contrary to a permitted termination, E is to be subject to liability for such a repudiation.

9 Secondly, N points out that pursuant to the terms of the Card Deal, E is not permitted to assign it without N's prior written consent. However, E's arrangement with S is not an assignment of the Card Deal.

10 Thirdly, N submits that the Card Deal and other agreements grant it a licence which vests in N as licensee a right which constitutes personal property in the hands of N as licensee citing Re Foster (1992), 89 D.L.R. (4th) 555 (Ont. Gen. Div.) at p. 560 and Sugarman v. Duca Community Credit Union Ltd. (1998), 38 O.R. (3d) 429 (Gen. Div.) at p. 445-6. However, it should be noted that these

cases are PPSA cases and under that legislation there is a very expanded view of "personal property" in which there may be a security interest. That definition does not come into play in a CCAA proceeding. See National Trust Co. v. Bouckhuyt (1987), 61 O.R. (2d) 640 (C.A.) and Canadian Imperial Bank of Commerce v. Hallahan (1990), 39 O.A.C. 24 (C.A.) for examples where similar licenses to those in Foster and Sugarman were found not to constitute "personal property" for the purposes of the PPSA or the Fraudulent Conveyances Act and the Assignment and Preferences Act.

11 It seems to me that where the (exclusive) licence granted to N by E is analyzed in the context of the Card Deal overall, it is not, in the traditional property sense, a licence (sometimes expressed as a licence with a grant). The Card Deal in my view does not purport to transfer, or have the effect of transferring, any type of proprietary interest to N. Rather N is permitted to provide certain services to the customers of E while others are not. In the Card Deal, N and E have expressly and it would appear exhaustively provided for the aspects as to which each holds a proprietary interest in certain assets. There is no statement in the Card Deal that the "exclusive licence" granted by E to N is in itself proprietary in nature in that it creates directly or indirectly a proprietary interest for N's benefit. Examples of proprietary claims spelled out in the Card Deal in the sense that each side merely maintains what it had and not what it is granted are as follows:

- s. 6.1(c) the Confidential Information (as defined in s. 6.1(a)) of each of the parties is proprietary to that party;
- s. 6.1(g) Confidential Information in the possession of either party is to be returned on request by the other party;
- s. 6.2 the trademarks and other intellectual property of E remain E's property, although licensed (in the sense of being permitted by E to be used by N) to N in order to facilitate the performance by N of its obligations under the Card Deal; (s. 5.1 of the trademarks licence also confirms that E is the exclusive owner of the trademarks and all goodwill associated thereunder);
- s. 6.4 the cardholder lists are and remain the property of E; N may use the lists solely for the purposes of providing Card Services under the Card Deal and for certain other specified purposes, including the sale of defined financial products to those Cardholders.

Thus contrary to N's assertion that the assets used in the credit card operations are "vested" in N, both the customer lists and trademarks (the property relevant for the provision of the credit card operations remain exclusively the property of E.

12 Even if the grant to N of the right to provide the Card Services were construed as a traditional licence, it does not appear to me that N thereby acquires a property interest in such a right. The true nature of an (exclusive) licence is leave or permission to do such a thing, which would otherwise be unlawful (and a contract not to give leave or permission to anyone else to do the same thing. It confers no interest or property in the thing. See Heap v. Hartley 1889, 42 Ch. D. 461 (C.A.) at pp.

468-9 per Cotton L.J.

13 Can N insist on specific performance of the Card Deal and other agreements, assuming for the purpose of this analysis that we ignore the clear jurisprudence discussed above in Blue Range and the other cases which is to the effect that a debtor company in CCAA proceedings may be permitted to repudiate contracts but of course it will be subject to the damages which may arise from such repudiation, and such damages will have to be accommodated within the plan of arrangement being proposed (as may be awarded) for the creditors to vote upon? In essence, specific performance is only available where the non-repudiating party cannot be adequately compensated in damages for the breach. Here N and E have expressly agreed that a breach of the confidentiality provisions of the Card Deal would not be compensable in damages (and through negotiation, N, E and S have reached a modus vivendi as to the confidentiality provisions.) While N and E were free to expressly deal with other breaches of the arrangements in the same way, they did not do so; this is a strong indication of the parties' view that other breaches of the arrangements would be susceptible to compensation by way of damage claims. In fact, N has retained KPMG to prepare such an identification of damages which it now asserts is what it is entitled to. Where, as in this case, the non-repudiating party (N) cannot carry out the contract without the co-operation of the party who has refused to perform (E) and such co-operation is withheld or rendered impossible, the only remedy is a suit for damages; it is not a question of electing to accept the repudiation. See G.H.L. Fridman, The Law of Contract (3d ed., 1994; Toronto, Carswell) at p. 614 and p. 794; Shibamoto & Co. v. Western Fish Producers Inc. (Trustee of) (1991), 43 F.T.R. 1 (Fed. T.D.) at p. 24, affirmed (1992), 145 N.R. 91 (Fed. C.A.). See also the going dark anchor tenant in the mall cases which I have previously decided (e.g. Chatham Centre Mall Limited v. New Miracle Foodmart Inc. (1994), 40 R.P.R. (2d) 124) and Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd. [1997] 3 All E.R. 297 (H.L.); Centre City Capital Ltd. v. Bank of East Asia (Canada) [1997] O.J. No. 5218 (Gen. Div.) and R.J. Sharpe, Injunctions and Specific Performance (2nd ed, Toronto, Canada Law Book) at s. 7.450 for the inappropriateness of granting a mandatory injunction where the court would in effect be required to constantly supervise the activities mandated to be performed. Since there is no assignment of the Card Deal contemplated to S or any other contractual or other relationship between S and N established, it would not seem that N can seek specific performance as against S.

14 I note that Eatons submits that N's request for specific performance is illogical:

> If this relief were to be granted, the inevitable result would be the bankruptcy of Eaton's because the success of the Plan depends on the Sears Agreement, and in order to satisfy the conditions of the Sears Agreement, Eaton's must terminate the Card Services Agreement with NRCS. Not only would a bankruptcy result in diminished recoveries for all creditors, there would be no ongoing business to which NRCS could provide services under the Card Services Agreement.

While there may be some business practicality to the foregoing, logically, vis-à-vis E, all the S

Purchase Agreement provides is some "extra" recovery to put into the plan of arrangement. Conceivably, a plan might be approved even without that additional funding. Claimants however given a choice between "more" and "less", usually prefer more. How that all works out and the relative sharings will be the subject of rough-and-tumble negotiations discussed in Keddy supra. It should also be noted that the purpose of the CCAA is not that there be a reorganization of the debtor company so that it survives no matter what; the fairness of the plan must be determined.

15 E will have to deal with the mechanics of how to accommodate N's damages as assessed in the plan of arrangement including the restructuring contemplated thereunder. It is understood that as per LoVecchio J.'s observations in Blue Range it is extremely unlikely in any CCAA plan that claims generally will be paid off at 100 cents on the dollar. That N may be paid off (as other creditors) in a "devalued currency" if the plan is approved does not give N any higher right to relief in this motion.

16 N's motion is therefore dismissed.

FARLEY J.

cp/s/qlmcc/qlalm

TAB 22

Indexed as:

Cadillac Fairview Inc. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36
AND IN THE MATTER OF a plan of compromise or arrangement of Cadillac Fairview Inc. and all other companies set out in schedule "A" attached hereto with head offices or assets in the City of Toronto, Province of Ontario

[1995] O.J. No. 320

Court File No. B348/94

Ontario Court of Justice (General Division)
Commercial List - Toronto, Ontario

Farley J.

Heard: February 13, 1995.
Judgment: February 13, 1995.

(6 pp.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Extension of time to file plan.

This was an application that a Companies' Creditors Arrangement Act plan be accepted as filed and directions be given as to procedures for holding the meetings re creditor approval. Some of the creditors requested that the matter be adjourned to explore alternatives, including other proposals and liquidation.

HELD: The application was allowed. The parties agreed to certain procedures which were not set out in the decision. The request for the adjournment was denied as this would merely delay a process that already allowed for negotiation and discussion.

Counsel:

Lyndon A.J. Barnes and Fred Myers, for Cadillac Fairview Inc.
David R. Byers and James C. Davis, for Mortgage Lenders Steering Committee.
Alex Ilchenko, for Citibank Canada.
Steven L. Graff, for Eaton's.
Robert L. Armstrong and Derrick Tay, for Montreal Trust Co. and R.M. Trust Co. as trustees.
Steven Sharpe, for Whitehall and Goldman Sachs.
W.A. Kelly, Q.C., J.C. Orr and Helen A. Daly, for JMB Advisors.
J.L. McDougall and John Fabello, for Cambridge Leaseholds.
T.M. Dolan and B. Ryan, for the Toronto Dominion Bank.
R.N. Robertson and Peter Roy, for Subordinated Debtholders Steering Committee.
Russell Laishley, for Peat Marwick Thorne.
H.B. Borlack, for Elliot & Associates.
Steven Weisz, for the CIBC.
Dennis O'Connor, for Blackstone Real Estate Advisors L.P. and Ontario Teachers' Pension Plan Board.
T. O'Sullivan, for Morgens Waterfall.

ENDORSEMENT

1 **FARLEY J.**:-- The applicants sought an order today that their CCAA plan (Exhibit C to Masson affidavit of February 8, 1995) as revised, amended, modified or supplemented from time to time ("Plan") be accepted as filed and directions be given as to procedures for holding the meetings re creditor approval.

2 The directions may be worked out as a result of discussions which are ongoing as I write out these reasons. I will deal with them on my return to court when I read my endorsement. I would note that the creditor classification matters will be dealt with at a later time which is reasonable in the circumstances.

3 Mr. Scott for the Syndicate, supported by Mr. O'Sullivan for Morgens Waterfall, requested that there be an adjournment of several days to allow as was said in paragraph 20 of the Sauntry affidavit of February 13, 1995:

> 20. At the end of the [Friday, February 10, 1995] meeting and after the presentations of BOT, Cambridge and Goldman/Sachs and the comment and advice of the advisors to the Syndicate Lenders, it was agreed unanimously by those Syndicate Lenders present that they were implacably opposed to the BOT Proposal and the Cadillac Fairview Plan as presently constituted and they concluded that a brief additional period of time should

be sought to explore the alternatives, including other proposals and liquidation.

4 I note specifically that Goldman/Sachs and those other Syndicate members who had material Subdebt who were present were asked to leave before this vote. There is no indication as to specific numbers at the time of the vote so that it is unclear as to just how strong the unanimous vote taken was. As well it is said that those voting were implacably opposed to the Plan as presently constituted. This is not a ship scuttling motion since it is clear that this group of the Syndicate wants a change to the Plan as presently constituted. They are not bringing a motion to bring the CCAA process to a halt by saying that it is doomed to failure now. Clearly everyone including CF (perhaps excluding BOT as Mr. O'Connor did not rise) indicated that they wished further discussions (including this Syndicate Group). Thus it appears that everyone is welcoming the **rough and tumble negotiation** process as discussed at p. 258 of Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245 (N.S.) (C.A.) where it was said:

> A creditor which withholds its support from a plan because it has failed to address legitimate concerns arising from its contractual relationship with the debtor company is perfectly within its right to insist on improvements. The Act encourages just this kind of negotiation. It is not material whether agreement occurs soon after the first draft of the plan is circulated, so the resulting amendments can also be circulated to creditors, or whether a last-minute compromise is reached moments before the vote. The disclosure to be made in the latter instance will be necessarily sketchier than the one made in the former.
>
> ...
>
> 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. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority. Lack of disclosure, however, can transform an intrinsically fair alteration in the terms of a plan into an unfair secret deal which invalidates a plan. As a general rule the plan must include all of the arrangements made between the debtor company and the creditors; in principle, undisclosed arrangements cannot be part of the plan because they are not what the creditors

voted for.

5 I do however note that in these circumstances that there should be no illusion that the plan as presently constituted will remain as is -- that result would be highly unusual in these circumstances. Thus I do not see the danger of it being perceived that this (present) plan is artificial reality which by its artificiality would allow some participants to be misled. It should be taken as a basis upon which to negotiate so that, if it is in fact possible, to achieve an "Alliance Totale" which process will require bi-lateral and multi-lateral discussions.

6 To adjourn a few days would merely be to put in a stutter-step to a process which already allows negotiation and discussion steps. It would be to prolong inappropriately the process. Under the present set up proposed no one is being jammed in a time sense provided they are willing to concentrate on the problem.

7 Mr. Scott raises the spectre of the Titanic which should not have been allowed to leave port lest it run afoul of the iceberg. I am certain that discussions will focus on how to get the CF ship safely through Iceberg Alley -- keeping in mind that it is the dangerous big icebergs (which are so treacherous underwater) as opposed to the little growlers which have to be avoided. True enough that the iceberg sank the Titanic, but what became of that famous iceberg? Who knows what will happen to the CF ship and the icebergs of 1995.

8 I am therefore of the view that CF should be allowed to take this further step as contemplated by the December 23, 1994 order. I have no doubt that there will continue to be discussions, negotiations and likely changes. This filing of the Plan -- which is subject to revision, amendment, modification or supplement -- brings CF a step closer to its fate -- which may be a happy or a sad one.

FARLEY J.

NOTE:

Various changes were agreed to be made to the draft order. I will be provided with a redraft this afternoon for my fiat.

FARLEY J.

qp/d/gta/tld/DRS/DRS/DRS

---- End of Request ----
Print Request: Current Document: 1
Time Of Request: Tuesday, September 22, 2009 16:58:39

TAB 23

Case Name:

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

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto
Between
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

[2008] O.J. No. 2265

43 C.B.R. (5th) 269

2008 CarswellOnt 3523

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

47 B.L.R. (4th) 74

Court File No. 08-CL-7440

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: May 12-13 and June 3, 2008.
Judgment: June 5, 2008.

(158 paras.)

Insolvency law -- Proposals -- Court approval -- Effect of proposal -- Voting by creditors -- Application by the investors represented by the Pan-Canadian Investors Committee for approval of a Plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders -- Plan was opposed by a number of corporate and individual noteholders on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases -- Application allowed -- Releases sought as part of the plan, including the language exempting fraud, were permissible under the Companies' Creditors Arrangement Act and were fair and reasonable -- Companies' Creditors Arrangement Act.

Application by the investors represented by the Pan-Canadian Investors Committee for third-party structured asset-backed commercial paper for approval of a plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders. Plan was opposed by a number of corporate and individual noteholders, primarily on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases. Between mid-2007 and the filing of the plan, the applicant Committee had diligently pursued the object of restructuring not just the specific trusts that were part of the plan, but faith in a market structure that had been a significant part of the Canadian financial market. Claims for damages included the face value of notes plus interest and additional penalties and damages that might be allowable at law. Information provided by the potential defendants indicated the likelihood of claims over and 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.

HELD: The releases sought as part of the plan, including the language exempting fraud, were permissible under the CCAA and were fair and reasonable. The motion to approve the plan of arrangement sought by the application was allowed on the terms of the draft order. The plan was a business proposal and that included the releases. The plan had received overwhelming creditor support. The situation in this case was a unique one in which it was necessary to look at larger issues than those affecting those who felt strongly that personal redress should predominate.

Statutes, Regulations and Rules Cited:

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

Counsel:

B. Zarnett, F. Myers, B. Empey for the Applicants.

For parties and their counsel see Appendix 1.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- 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 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. [Editor's note: Appendix 3 was not attached to the copy received from the Court and therefore is not included in the judgment.]

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 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 fund[2]

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 in-

ference 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 then 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 (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.*, [1995] O.J. No. 595, 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 and 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 decision[7] 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 con-

> sidered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.
>
> [19] In the case at bar, all of such considerations, in my view must lead to the conclusion that the Plan is fair and reasonable. On the evidence before this court, the Applicants have no assets and no funds with which to fund a distribution to creditors. Without the Contributed Funds there would be no distribution made and no Plan to be sanctioned by this court. Without the Contributed Funds, the only alternative for the Applicants is bankruptcy and it is clear from the evidence before this court that the unsecured creditors would receive nothing in the event of bankruptcy.
>
> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.
>
> [21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

66 I recognize that in *Muscletech*, as in other cases such as *Vicwest Corp. (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 *Re Canadian Airlines Corp., 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-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums 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 Tysoe 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 subclasses 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 Woodwards 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 *United States v. Energy Resources* 495 US545 (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 *Michaud v. Steinberg Inc.*[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, trans-

form 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 Mme. 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.*, [2003] B.C.J. No. 1335, 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] [cites 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,* [1998] 1 S.C.R. 27, 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, [1985] 1 S.C.R. 662, 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, [1986] S.C.C.A. No. 29).

[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 perservered [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, 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 "siloed" 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 statue 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.

C.L. CAMPBELL J.

* * * * *

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

* * * * *

APPENDIX 1

PARTIES AND THEIR COUNSEL

Counsel	Party Represented
Benjamin Zarnett Fred Myers Brian Empey	Applicants: Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper

Donald Milner Graham Phoenix Xeno C. Martis David Lemieux Robert Girard	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	Respondents: 4446372 Canada Inc. and 6932819 Canada Inc., as Issuer Trustees
Craig J. Hill Sam P. Rappos Marc Duchesne	Monitor: Ernst & Young Inc.
Jeffrey Carhart Joseph Marin Jay Hoffman	Ad Hoc Committee and PricewaterhouseCoopers Inc., in its capacity as Financial Advisor
Arthur O. Jacques Thomas McRae	Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
Henry Juroviesky Eliezer Karp	Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
Jay A. Swartz Nathasha MacParland	Administrator of Aria Trust, Encore Trust, Newshore Canadian Trust and Symphony Trust
James A. Woods Mathieu Giguere Sébastien Richemont Marie-Anne Paquette	Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montreal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., L'Agence Métropolitaine de Transport (AMT), Domtar Inc., Domtar Pulp and Paper Products Inc., Giro Inc., Vêtements 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 Hosseini William Scott	Asset Providers/Liquidity Suppliers: Bank of America, N.A.; Citibank, N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services Inc.; Swiss Re Financial Products Corporation; and UBS AG
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 M. Mercer Geoff R. Hall	Canadian Banks: Bank of Montreal, Canadian Imperial Bank of Commerce, 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. Sheikh	Coventree Capital Inc.
Kenneth Kraft	DBRS Limited
David E. Baird, Q.C. Edmond Lamek Ian D. Collins	Desjardins Group
Allan Sternberg Sam R. Sasso	Hy Bloom Inc. and Cardacian Mortgages Services Inc.
Catherine Francis Phillip Bevans	Individual Noteholder
Howard Shapray, Q.C. Stephen Fitterman	Ivanhoe Mines Inc.
Kenneth T. Rosenberg Lily Harmer	

Massimo Starnino	Jura Energy Corporation, Redcorp Ventures Ltd. and as agent to Ivanhoe Mines Inc.
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 Junior Sirivar	NAV Canada
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 Kent	The Bank of Nova Scotia
James H. Grout	The Goldfarb Corporation
Tamara Brooks	The Investment Dealers Association of Canada and the Investment In-

	dustry Regulatory Organization of Canada
Sam R. Sasso	Travelers Transportation Services Inc.
Scott A. Turner	WebTech Wireless Inc. and Wynn Capital Corporation Inc.
Peter T. Linder, Q.C. Edward H. Halt, Q.C.	West Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., UTS Energy Corporation, Nexstar Energy Ltd., Sabre Tooth Energy Ltd., Sabre Energy Ltd., Alliance Pipeline Ltd., Standard Energy Inc. and Power Play Resources Limited
Steven L. Graff	Woods LLP
Gordon Capern Megan E. Shortreed	Xceed Mortgage Corporation

* * * * *

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

[Editor's note: Appendix 3 was not attached to the copy received from the Court and therefore is not included in the judgment.]

cp/e/ln/qlkxl/qlklb/qlbdp/qltxp/qlesm/qlbrl/qlcas/qlhcs

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.

4 *Olympia and York Dev. Ltd. v. Royal Trust Co* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

5 *Canadian Red Cross Society (Re),* [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932.

6 *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16, 2006 CarswellOnt 6230.

7 *Muscletech Research and Development Inc. (Re)*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029.

8 *Vicwest Corp. (Re)*, [2003] O.J. No. 3772 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.

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.

12 *Stelco Inc. (Re)*, [2005] O.J. No. 4883.

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.

14 *Muscletech Research and Development Inc. (Re)*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029.

15 *Michaud v. Steinberg Inc.* 1993 CanLII 3991 (Q.C. 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 *Derry v. Peek*, (1889) 14 A.C. App. Cas., 337 (H.L.).

22 Continental Insurance Co. v. Dalton Cartage Co., [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559.

23 *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, 89 B.C.A.C. 288.

24 *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 40 B.L.R. (2d) 1, 63 O.T.C. 1. (S.C.J.).

25 See *Ecolab Ltd. v. Greenpeace Services Ltd.*, [1996] O.J. No. 3528 per Ground J.

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Print Request: Current Document: 1
Time Of Request: Tuesday, September 22, 2009 17:00:05

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,

Laskin, Cronk and Blair JJ.A.

August 18, 2008

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

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to

accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

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

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15 C.B.R. (5th)

307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); Stelco Inc. (Re), [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); consd

Other cases referred to

Cases referred to

Air Canada (Re), [2004] O.J. No. 1909, [2004] O.T.C. 1169, 2 C.B.R. (5th) 4, 130 A.C.W.S. (3d) 899 (S.C.J.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, 113 A.C.W.S. (3d) 52, REJB 2002-30904; [page515] Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Gen. Div.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, 23 A.C.W.S. (3d) 976 (C.A.); Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.); Country Style Food Services (Re), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée, [2003] J.Q. no 9223, [2003] R.J.Q. 2157, J.E. 2003-1566, 44 C.B.R. (4th) 302, [2003] G.S.T.C. 195 (C.S.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106, 54 A.C.W.S. (3d) 504 (Gen. Div.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101, 23 A.C.W.S. (3d) 1192 (C.A.); Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, 75 D.L.R. (3d) 63, 14 N.R. 503, 26 C.B.R. (N.S.) 84, [1977] 1 A.C.W.S. 562; Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256 (S.C.); Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.); Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16 (S.C.J.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149 (Gen. Div.); Ravelston Corp. (Re), [2007] O.J. No. 1389, 2007 ONCA 268, 31 C.B.R. (5th) 233, 156 A.C.W.S. (3d) 824, 159 A.C.W.S. (3d) 541; Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46, [1934] 4 D.L.R. 75, 16 C.B.R. 1; Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1, [1935] 1 W.W.R. 607 (P.C.), affg [1933] S.C.R. 616, [1933] S.C.J. No. 53, [1934] 1 D.L.R. 43; Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 2000 ABCA 238, [2000] 10 W.W.R. 314, 84 Alta. L.R. (3d) 52, 266 A.R. 131, 9 B.L.R. (3d) 86, 20 C.B.R. (4th) 46, 99 A.C.W.S. (3d) 533 (C.A.)[Leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 60, 293 A.R. 351]; Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006; Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.); Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Society of Composers, Authors and Music

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House of Commons Debates (Hansard), (20 April 1933) at 4091 (Hon. C.H. Cahan)

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

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

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

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

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

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

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

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings

under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

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

B. Facts

The parties

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

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

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

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

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

[12] The Canadian market for ABCP is significant and administratively complex. As of August

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

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

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

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

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP [page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

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

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

Hence the "liquidity crisis" in the ABCP market.

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

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

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

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

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

The Plan

(a) Plan overview

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

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

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

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

(b) The releases

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

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in

tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

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

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

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

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

The CCAA proceedings to date

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

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

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6.

Hearings were held on May 12 [page523] and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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

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

[38] The appellants attack both of these determinations.

C. Law and Analysis

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

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

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

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to

sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.1 The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

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

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

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

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

[46] These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters",2 and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

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

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the

> statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Québec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.
>
> [49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

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

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

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

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

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

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

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out

the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

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

The statutory wording

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

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

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

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

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]
>
> . . . . .

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

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

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

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal

for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

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

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

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants) would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

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

affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

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

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes6 and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the

releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

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

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

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

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

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

apart from involving the Company and its Notes.

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

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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

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

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

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg,7 of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

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

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

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

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

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

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced

funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

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

> In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent

> corporate proposal or arrangement.

(Footnote omitted)

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

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

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

(Citations omitted; emphasis added)

See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the

Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

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

(Emphasis added)

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

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

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the

directors].

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

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

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

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

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA

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

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

The 1997 amendments

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

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

it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

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

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

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

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

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants'

argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

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

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p. 661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters

> pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

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

Conclusion with respect to legal authority

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

(2) The Plan is "fair and reasonable"

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

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

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

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

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

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader aecarve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

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

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

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

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

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

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

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

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

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

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

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

D. Disposition

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

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation [page549]

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
(7) Mario J. Forte, for Caisse de Dépôt et Placement du Québec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service
(16) James A. Woods, Sébastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport

(AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

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

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

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TAB 24

5 C.B.R. 367, [1924] 3 W.W.R. 850, [1925] 1 D.L.R. 27

1924 CarswellAlta 70

Irma Co-operative Co., Re
In re Irma Co-Operative Company, Limited
In re Love and Knudson
Alberta Supreme Court
Tweedie, J.
Judgment: November 25, 1924

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Counsel: G. H. Allen, for trustee.

J. R. Love, for contributory in person.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate -- Payment by contributories for shares.

Corporations --- Winding-up -- Under Dominion Act -- Scope and application of Act -- General.

I. Company -- Shareholders as Contributories -- Liability for Immediate Payment of Amounts Unpaid on Shares -- Bankruptcy Act, Sec. 36(2), 1 C.B.R. 41, Sec. 36(3), 1 C.B.R. 41, 585 -- Contract with Company Postponing Payment -- Effect of Sec. 47, Companies Ordinance -- Set-off of Dividends.

In the case of the bankruptcy of a company incorporated under The Companies Ordinance, 1901, ch. 20, the trustee may enforce immediate payment by shareholders therein of the amount unpaid on their shares even though under the contract between them and the company such amount is not yet payable. The shareholders are not entitled to set off against such liability any dividends owing to them.

II. "Unjust" -- Meaning of, in Sec. 36(9) Bankruptcy Act, 1 C.B.R. 40.

"Unjust" in sec. 36(9) of The Bankruptcy Act, which provides that "If the contributory considers the demand excessive or unjust he may apply to the Court to reduce or disallow it," means illegal, i.e., that the contributory is under no legal liability.

III. Constitutional Law -- Validity of Sec. 36(3), Bankruptcy Act, 1 C.B.R. 41.

Quaere whether sec. 36(3) of The Bankruptcy Act would be ultra vires in the case of a company which is not subject to such a provision as sec. 47 of The Companies Ordinance.

IV. Companies -- Sec. 47, Companies Ordinance -- Meaning of "Being Wound Up" -- Whether Insolvency Legislation.

In sec. 47 (quoted in the judgment) of The Companies Ordinance, 1901, ch. 20, the words "being wound up" do

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not refer to a winding-up under any particular Act as in the sense of a dissolution but mean a winding-up of the company in the sense of a realization of the assets, a distribution of the proceeds among the creditors and an adjustment of the rights of shareholders among themselves, and, therefore, a company may be "being wound up" in this sense under The Bankruptcy Act as well as under either the Dominion or provincial winding-up Acts.

Said sec. 47 is not insolvency legislation.

An application on behalf of the authorized trustee pursuant to subsec. 8 of sec. 36 of The Bankruptcy Act, 1919, ch. 36, as amended by sec. 9 of The Bankruptcy Act Amendment Act, 1920, ch. 34, [1 C.B.R. 42] under Bankruptcy Rules 124 and 125 [1 C.B.R. 217] for several summary judgments against J. Russell Love and Fred W. Knudson, alleged contributories -- hereinafter referred to as contributories -- for the amount owing by each on the shares held by them respectively in the Irma Co-operative Company, Limited, authorized assignor. Judgment for trustee without costs against contributories; costs of trustee to be paid out of estate.

Tweedie, J. **[after stating nature of application]:**

1 The company in question was incorporated for provincial purposes under *The Companies Ordinance*, 1901, Ord. N.W.T., ch. 20, which was re-enacted as *The Companies Act*, R.S.A., 1922, ch. 156: the liability of the shareholders was limited, as hereinafter indicated, to the amount unpaid on their respective shares: its head office was situated, and it carried on business within the province of Alberta. On July 19 and on October 9, 1920, the contributories, Love and Knudson, each, upon forms used by the company for that purpose, made application, pursuant to the terms of the issue, for five shares of the par value of $25 each, of the capital stock of the company. The applications, except as to date and signature, are similar and purport to be for shares in a company with a "non-personal liability" as well as one in which the liability was "limited by shares." The shares were to be paid for "$5.00 with application. $_____ every two months until the whole amount has been paid," and the directors were authorized to register them forthwith as shareholders.

2 The use of the words "non-personal liability" indicates that the company is one in which the liability of a shareholder in respect to any unpaid balance on his shares is limited under sec. 67 of *The Companies Ordinance, supra*, to the proceeds realized from the sale of shares by the company and forfeiture of moneys previously paid on account thereof. The company in question was incorporated for trading purposes and the above limitation applies only to mining companies incorporated under secs. 63-67 of the Ordinance and the liability of the shareholders is not restricted in the way indicated by the use of those words. In regard to the amount of the instalments being left blank it was admitted by counsel, on behalf of the trustee, that while the amount payable every two months was omitted from the application, the application was made and accepted upon the understanding that such payment was to be $5.

3 The applications were accepted on behalf of the company, and the shares were duly allotted to the applicants and they became and continued to be and were at the time of the authorized assignment registered shareholders of the company.

4 The cash payment of $5 was made by each at the time of the application and subsequent to the authorized assignment and the demand for payment hereinafter referred to, Love paid on June 30, 1922, on account of his shares, $30.76, and Knudson on November 1, 1922, on account of his, $50. Beyond these amounts nothing has been paid.

5 On January 21, 1922, the insolvent company made an authorized assignment to the Canadian Credit Men's

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Trust Association as authorized trustee. On June 2, 1922, pursuant to sec. 36(6) of *The Bankruptcy Act*, [1 C.B.R. 42] the authorized trustee made a demand, which was duly served, upon each of the alleged contributories for the sum of $120, being the amount unpaid on their respective shares. The sum demanded was made up of instalments which were in arrears and payable prior to or at the time of the making of the authorized assignment, instalments which became due and payable subsequent thereto and prior to the demand, and instalments which would become payable under the terms of the agreement under which the shares were issued at dates subsequent to the demand. The contributories failed to comply with the demand and after the expiration of thirty days, from the date of service thereof -- the time fixed by sec. 36(8) of the Act [1 C.B.R. 42] as the time within which payment must be made -- the trustee commenced the proceedings.

6 In their respective answers to the demands, which answers were wholly informal and contained in letters, the contributories raised for consideration four points, as follows:

7 (a) Their liability as contributories;

8 (b) The right of the trustee to demand and enforce payment forthwith of instalments which, by the terms of the agreement in accordance with which the shares were acquired were not at the time of the demand nor at the time of this application payable.

9 (c) Their right to have disallowed by the Court the demand in so far as it affects instalments which are not yet due on the ground that the demand is unjust; and,

10 (d) The right to set off against the demand unpaid dividends in respect of their shares, which dividends had been declared out of profits and were payable prior to the time of the making of the assignment.

11 As to (a), their liability as contributories: Section 36(2) of *The Bankruptcy Act* [1 C.B.R. 41] reads as follows:

> 36. (2) Every shareholder or member of a corporation or his representative shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company or otherwise; such shareholder or member will hereinafter be referred to as the "contributory".

12 The provisions of this subsection are very wide and dispense with the necessity of fixing the list of contributories by an order of the Court as required under various other statutes which have to do with the winding-up of companies. By the words of the subsection shareholders and members of corporations, or their representatives, are declared to be "contributories", and are liable to the extent provided therein.

13 The instalments, whether past due or not, represent "the amount unpaid on his (or their) shares of the capital" which constitute "a liability to the corporation" in respect of their shares and they are contributories within the meaning of the section. They are contributories by virtue of the statute itself, without the necessity of any order of the Court.

14 As to (b), the right of the trustee to demand and enforce payment forthwith: As between the company itself and the shareholder the latter would be bound to pay only in accordance with the terms of the agreement under which the shares were issued.

> A shareholder is bound, indeed, to pay the full amount unpaid on his shares, but he is not bound (unless,

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> indeed, the terms of issue so provide) to pay up at once. He is only bound to pay *in accordance with the articles, e.g.*, by instalments, according to the terms of issue, or in response to calls:

Palmer's Company Law, 10th ed., p. 146; *Alexander v. Automatic Telephone Co.* , [1900] 2 Ch. 56, 69 L.J. Ch. 428, 82 L.T. 400, 48 W.R. 546, 16 T.L.R. 339.

15 Subsection 3 of sec. 36, of *The Bankruptcy Act* as amended 1921, ch. 21, sec. 57 [1 C.B.R. 41, 585], provides, however, as follows:

> 36. (3) The amount which the contributory is liable to contribute shall be deemed an asset of the corporation and a debt payable to the trustee forthwith upon the making of a receiving order against the corporation or on the execution by the corporation of an authorized assignment.

16 What is the effect of this subsection upon the liability of the shareholder? Notwithstanding the fact that the Parliament of Canada has, under sec. 91(21) of *The B.N.A. Act*, exclusive jurisdiction over "Bankruptcy and Insolvency", it is contended that the provisions of this subsection making the amount unpaid on their respective shares "a debt payable to the trustee forthwith" is *ultra vires* of the Parliament of Canada in so far as it purports to impose upon a shareholder an obligation to pay forthwith instalments which by the express terms of the agreement under which the shares were acquired are not yet due and payable. The basis of the contention is that it varies a contract and is substantive legislation in respect of a civil right, concerning which the Legislature of the province has exclusive jurisdiction (sec. 92(13) *The B.N.A. Act*) to effect a result which is not reasonably necessary for, nor incidental to, the administration of an estate under *The Bankruptcy Act*.

17 In view of the provisions contained in *The Companies Ordinance* in regard to the liability of members or shareholders of companies it is not necessary to determine the question of *ultra vires* for the purpose of this case. The agreement, under which the shares were acquired, must be construed in the light of the Ordinance under which the company (authorized assignor) was incorporated. It is clearly the intention of the Ordinance that the rights of creditors of a company incorporated under it should be protected by making speedily available for the satisfaction of their claims the nominal capital of the company to the extent of the unpaid balance on that portion for which shares have been issued.

18 Section 44 renders a shareholder liable, to the extent of the amount unpaid on his shares, to a creditor who has an execution against a company which has been returned unsatisfied in whole or in part; sec. 17 imposes a "liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned."

19 Section 47 provides as follows:

> 47. In the event of a company formed under this Ordinance or any other Ordinance of the Territories being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company and the costs, charges and expenses of the winding up and for payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications following, that is to say:
>
> (*d*) In the case of a company limited by shares no contribution shall be required from any member exceeding the amount if any unpaid on the shares in respect of which he is liable as a present or past

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member.

20 The liability which is imposed by this last section is, as indicated by subsec. (*d*), not an additional liability to that which the shareholders are under for the unpaid balance of their shares but relates to the same obligation, the one assumed by a shareholder when he becomes such. This was the construction placed upon the corresponding section of *The Companies Act*, 1862 (Imp.), sec. 38, by Lindley, L.J., in *In re Pyle Works* (1890), 44 Ch. D. 559, at p. 584, 59 L.J. Ch. 498, 62 L.T. 887, 38 W.R. 674.

21 It is suggested that this sec. 47 of the Ordinance can be effective only in the case of a company which is in the course of "being wound up" under a winding-up Act so called, such as *The Winding-up Act*, R.S.C., 1906, ch. 144, or *The Companies Winding Up Act*, R.S.A., 1922, ch. 170, and that it has no application to a proceeding under *The Bankruptcy Act, supra*, or in any event it can be effective only in regard to solvent companies which are being wound up voluntarily, otherwise it would be insolvency legislation and *ultra vires* of the Legislative Assembly.

22 The section imposes the liability to contribute in the case of any company incorporated as therein provided "being wound up." These last words do not refer to a winding-up under any particular Act as in the sense of a dissolution. A complete winding-up may be a condition precedent to a dissolution (See *The Companies Winding Up Act, supra*, secs. 3, 34-36.) The words as here used mean a winding-up of the business of the company in the sense of a realization of the assets, a distribution of the proceeds amongst the creditors and an adjustment of the right of shareholders amongst themselves. A company may be wound up just as effectively in this sense under *The Bankruptcy Act* as under either of *The Winding-up Acts, supra*, and, if desirable, proper proceedings by way of an application to the Court may be taken for the dissolution of the company.

23 Nor is this section, in my opinion, insolvency legislation. It was within the competency of the legislative body enacting it. It is a provision of *The Companies Ordinance, supra*, under which the company was incorporated and has to do with the liability of a shareholder *ab initio*, and is one in contemplation of which all articles of association of companies incorporated under the Ordinance, and all agreements entered into by such companies under which shares are issued, must be deemed to have been made. It has to do with liability assumed by shareholders at the time when they become such, rather than the administration of the affairs of insolvent companies. The provisions of this section are similar to the provisions contained in sec. 38, *The Companies Act*, 1862, referred to above, which section was included under the general heading of "Liability of Members." It was subsequently re-enacted as sec. 123, *The Companies (Consolidation) Act*, 1908 (Imp.), ch. 69, in which it is included for convenience, no doubt, in Part IV., which has to do with the winding-up of companies. The effect of the section is that upon the happening of a contingency, namely, the winding-up of a company, any provisions, whether contained in the articles of association or an express agreement whereby the payment for the shares in whole or in part is delayed beyond the commencement of the winding-up proceedings, are abrogated and the shareholder is bound to pay in accordance with the terms prescribed by the statute governing the winding-up.

24 The liability of the shareholders to pay for their shares in this case arose at the time they became shareholders of the company. The time at which they would pay for their shares was determined by the agreement under which the shares were purchased. This section (47) sets aside those terms, but does not release the shareholder from liability to pay for his shares. They are in the same position as if no agreement had been entered into, ordinary subscribers to whom shares had been allotted and in connection with which a balance remains unpaid. The terms and conditions upon which that obligation is to be discharged, the procedure for the enforcement of the payment and the distribution of the moneys realized, is left to be determined in accordance with legisla-

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tion enacted by a competent legisla tive authority which, in the case of an insolvent corporation, is the Parliament of Canada, whether that legislation be such as is contained in *The Winding-up Act* or under *The Bankruptcy Act*, as in this case. The contributories being liable for the payment of the balance unpaid on their respective shares in accordance with the terms laid down in the statute under which the authorized assignor is being wound up *The Bankruptcy Act*, and subsec. 3 of sec. 36 [1 C.B.R. 41, 585] of that Act, having constituted these balances debts "payable to the trustee forthwith ** on the execution ** of an [the] authorized assignment," the trustee is entitled to judgment for the full amount of the unpaid balance, unless effect is to be given to the contentions of the contributories, which remain to be considered.

25 As to (c), their right to have the demand disallowed on the ground that it is unjust: Sec. 36, (9) of *The Bankruptcy Act* [1 C.B.R. 42] provides as follows:

> If the contributory considers the demand excessive or unjust he may apply to the court to reduce or disallow it.

26 It is suggested that the demand should be disallowed for the reason that it proceeds to enforce the payment of instalments before the time agreed upon with the company when they became shareholders.

27 As I have already indicated, the trustee is entitled to demand payment immediately. To hold that it would be unjust to allow him to enforce his demand would be to say that the right which was given to him by statute was unjust and to relieve against it would practically amount to setting aside the statute, which the Court has no power to do. I do not think that "unjust" is used here in the sense contended for. It is probably intended to give an opportunity to those who are registered in the books of the company as shareholders, and consequently summarily made contributories by the Act, to show cause why on legal or equitable grounds they should have their names removed from the register and thus be relieved from their liability as contributories. "Unjust" here means illegal in the sense that there is no legal liability. If the contributories desired to be relieved on the ground of hardship the Court has power in the exercise of its discretion, under Bankruptcy Rule 127 [1 C.B.R. 218], to stay the issue of execution upon such terms as to security or otherwise as it sees fit. I can see no reason for staying the executions in this case. It is the duty of the trustee to realize as speedily as possible the assets of the estate and to distribute the proceeds amongst the creditors.

28 As to (d), their right of set-off: The right of set-off is provided for in sec. 28 (1) of *The Bankruptcy Act* [1 C.B.R. 35] which provides:

> 28. (1) The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the recovery of debts due to the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

29 The law of set-off applicable is that in force in the various provinces which, in regard to the right of a shareholder to set-off against his liability for unpaid balance on his shares dividends out of profits to which he is entitled, is that contained in sec. 47 (*g*) of *The Companies Ordinance, supra*, which provides:

> 47. (*g*) No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company.

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30 There is in this case clearly a competition between shareholders and a large body of creditors who are not members of the company, and the contributories are not entitled to set-off against their liability for the unpaid balance of their shares moneys which are owing to them by way of dividends.

31 Having determined the questions raised by the contributories adversely to them, the trustee is entitled to judgment for the full amount of the demand, less any amounts which may have been paid on account thereof, which I find to be on account of Love $35.76, and on account of Knudson $55.

32 There will be no order for costs against the contributories and the trustee will have his costs out of the estate.

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TAB 25

8 C.B.R. (3d) 306

1991 CarswellOnt 219

Inducon Development Corp., Re
Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re INDUCON DEVELOPMENT CORPORATION and INDUCON URBAN PROPERTY CORPORATION
Ontario Court of Justice (General Division), Commercial List
Farley J.
Heard: December 16-17, 1991
Judgment: December 17, 1991
Docket: Doc. B364/91

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Counsel: G.B. Morawetz and N.C. Saxe, for applicant.

H. Underwood and W.M. Black, for Confederation Life Insurance Co.

I. Marks, for Bank of Montreal.

M. Hartman, for Aetna Life.

G. King and D. Grieve, for Royal Bank of Canada.

P. Griffin, for Prudential Assurance Co. Ltd.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act.

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Purpose of statute -- Ex parte applications -- Interference with rights of creditors -- Major secured creditor opposing application but not having lost all confidence in management of corporation -- Short stay granted -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

At an application for protection under the Companies' Creditors Arrangement Act, a major secured creditor indicated that it could not envisage any circumstances under which it would be prepared to support the type of plan being proposed by the corporation. However, the opposing creditor did not indicate that it had lost all confidence in the management of the debtor corporation; in fact, it had enjoyed an extensive and lengthy arrangement with the corporation as co-owner and mortgagee of various properties.

Held:

A short stay was granted with a further extension contingent upon the opposing creditor changing its negative position.

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The Companies' Creditors Arrangement Act ("CCAA") is designed to be remedial; it is not, however, designed to be preventive. The CCAA should not be the last gasp of a dying company; it should be implemented at a stage prior to the death throe.

While it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances when only an outline is possible. However, absent most unusual and rare circumstances, there should be a plan outline at a minimum or the germ of a plan.

Ex parte applications are possible under the legislation. However, they face a very high hurdle in explaining why there was no notice to major interested parties in advance. Interested parties should at least be able to appear so that they can indicate a position or rely upon the comeback clause to seek relief from any protection given. However, having received the benefit of notice, other parties should not take inappropriate advantage with a pre-emptive strike. The CCAA is to be remedial in all respects; there must be an opportunity for the applicant company to put forward its case. Creditors should not take advantage, if notice is given, to precipitate action they would ordinarily not have been able to take had they had no notice. In such a case, relief should be granted on a nunc pro tunc basis. If the company has reasonable grounds to fear a pre-emptive strike being precipitated by notice, lack of notice is justified. If there is no notice, the comeback clause should initially be short (for example, 24 hours for the first week). There should always be a comeback clause in any CCAA order. Service of the order on interested parties must always be forthwith in the most expeditious and efficient fashion.

It is desirable to see if the debtor company can get support for the plan from major players. It is fruitless to proceed with a plan that is doomed to failure at a further stage.

CCAA protection should not interfere with perfecting notice such as power-of-sale proceedings, but it should have impact with respect to suspending the actual transaction.

Cases considered:

> Hongkong Bank of Canada v. Chef Ready Foods Inc. (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) -- referred to
>
> Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) -- referred to
>
> Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. Elan Corp. v. Comiskey) 41 O.A.C. 282, 1 O.R. (3d) 289 -- referred to
>
> NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) -- referred to

Statutes considered:

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

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

Application for relief under Companies' Creditors Arrangement Act.

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Farley J. **(orally):**

1 These are my reasons and disposition of the application by Inducon Development Corp. and Inducon Urban Property Corp. (referred to jointly as the "companies of Inducon") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A.").

2 It was indicated that the subsidiary, Inducon Urban Property Corp., was so integral and intertwined with the parent Inducon Development Corp. that the C.C.A.A. proceedings should be looked at on a joint basis. Both companies individually appear to meet the threshold test of C.C.A.A.: namely, both are insolvent; they have trust deeds with debentures outstanding (while to a degree they may be termed "instant debentures", the subscription money apparently is in the bank accounts of the companies); and there is a general proposal that there would be a compromise or arrangement between the companies and their creditors, including debenture holders, which would involve distress preferred shares and interest deferral.

3 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 indicates at p. 112 [C.B.R.] that one should have regard as to whether the meeting of the creditors would be productive; i.e., would there be the possibility of the vote at the meeting being positive? In the present situation, it was candidly acknowledged at first blush that the Confederation Life group ("Confederation") would likely comprise one voting class and that in any event overall Confederation somewhat exceeds 25 per cent in value of all creditors.

4 Confederation has indicated that it cannot envisage any circumstances under which it would be prepared to support the type of plan being proposed by Inducon. However, I note that at the hearing last night, it was mentioned that the parent company (235 Yorkland Boulevard Ltd. -- referred to as "235") is willing to forego its claims for $3.2 million and that there were active negotiations with a potential rescuer, Dr. Tse or his company ("Tse"). However, it appears that these discussions with Tse have been rumoured since September of this year. It was indicated at this hearing that Tse apparently required that Inducon be under the protection of C.C.A.A. before proceeding further. However, on checking last night after court, counsel for Inducon this morning advised me that the Bank of Montreal obtained security over this $3.2 million on December 8, 1991. This offer appears to be somewhat questionable, given its now secondary position. It is important to note that Confederation did not indicate that it has lost all confidence in the management of Inducon; in fact, it has enjoyed an extensive and lengthy arrangement with Inducon as co-owner and mortgagee of various properties.

5 The Bank of Montreal also opposed any plan that would expose it to more contribution than the four-per-cent management fee of the headleased properties. There was no expression as to whether the Bank of Montreal would be in a class of its own so as to also obtain a veto power.

6 The elements of the possible rescue and the element of the deferral were not discussed by Confederation and in particular the deferral appeared to be news to the latter. It is not clear as to what position Confederation might take if there were a rescue situation actually in hand. It may be that such events may be of some persuasion to Confederation and to the Bank of Montreal, which now appears to be labouring somewhat. I do note that apparently, vis-à-vis Confederation, there was no urgency with respect to the major mortgage defaults, which occurred in December of 1990 and March of 1991.

7 I understand that Inducon has been scrambling in the past week to see whether it could elicit support from major creditors for a restructuring. The Royal Bank is the largest creditor (approximately double that of Confederation). It neither supported nor opposed the C.C.A.A. application. It wanted more information and proposed a

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monitor in conjunction with a creditors' committee to authorize expenditures during any C.C.A.A. protection.

8 The purpose of there being, absent unusual circumstances, the practice of a debtor company notifying major interested parties in a C.C.A.A. application is to avoid the general problem of ex parte orders, that is, orders obtained without any input from (major) interested parties (no matter how short the notice is). In my view, given this opportunity for input, the creditors should not take advantage of such notice to precipitate action they would ordinarily not have been able to take had they had no notice. This includes, in my view, the groundlease landlord, who appears to have caught wind of this matter. There should be relief from that sort of "unfairness" on a nunc pro tunc basis in the circumstances.

9 As to the right to convert mortgage interest to ownership or engage in shotgun buy/sell and similar matters, I am of the view that, given their nature in the circumstances (particularly the short 21-day shotgun period), the *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) reasoning especially at p. 13 [C.B.R.] and *Hongkong Bank of Canada v. Chef Ready Foods Inc.* (unreported judgment, B.C. C.A., released October 29, 1990) [now reported at 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136], also at p. 13 [of the unreported judgment] should prevail to stay these from taking place during the C.C.A.A. protection period. That is not to say that these preliminary matters, such as notice, cannot take place. I would view the 37-day period for power-of-sale proceedings notice in the same vein.

10 As to the question of secured creditor or ownership rights, I do not think that *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) at p. 6 [C.B.R.] fully distinguishes C.C.A.A. from the *Bankruptcy Act*, R.S.C. 1985, c. B-3.

11 I think perhaps it is helpful, not only in this situation but also in other situations, to put down what I personally believe to be some appropriate ground rules. I say this lest it be thought in a particular case that anyone can come in at the last moment with what I will characterize as "previously undisclosed" information, and in that respect attempt to avoid a C.C.A.A. veto. Given the circumstances of last-minute, previously undisclosed information which might dissuade Confederation as to its opposition, any C.C.A.A. protection would be contingent upon "235" or third parties funding the fees of the monitor.

12 There are also some other aspects of C.C.A.A. which I would discuss, but I stress that these are not exhaustive. Firstly, it is an elderly statute; it was put into effect in 1933. It suffers from that disadvantage of timing. Many of the Victorian statutes and pre-Victorian statutes are more generally cast and therefore very flexible. On the other side of 1904, C.C.A.A. suffers as well from not being an up-to-date statute that takes specific notice of modern-day complexities. It is probably a ripe candidate for an overhaul, but one wonders if and when this might take place, given the unfortunate history of the long-awaited revised bankruptcy legislation.

13 Secondly, C.C.A.A. is designed to be remedial; it is not, however, designed to be preventative. C.C.A.A. should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 Thirdly, while it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be a requisite for the germ of a plan.

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15 Fourth, ex parte applications are possible under the legislation. In my view, they face the very high hurdle as to why there was no notice to major interested parties in advance, so that at least the latter can appear at the time of the application to indicate whether they are amenable to support, they are dead against or they take no position at that particular time, relying upon the comeback clause to seek any relief from the possible protection given. Having received the benefit of notice, other parties should not take inappropriate advantage with a pre-emptive strike. C.C.A.A. is to be remedial in all respects; there must be the opportunity for the company to put forward its case that it could have if it had not given notice. If the company has reasonable grounds to fear a pre-emptive strike being precipitated by notice, the lack of notice would be justified. In my view, if there is no notice, the comeback clause should initially be very short (for example, 24 hours for the first week). There should always be a comeback clause in any C.C.A.A. order. Service of the order on interested parties must always be forthwith in the most expeditious and efficient fashion.

16 Fifthly, it is desirable to see if the debtor company can get support for the plan from major players. It is of course, as indicated in *Nova*, supra, fruitless to proceed with a plan that is doomed to failure at a further stage.

17 Sixthly, it seems to me that C.C.A.A. protection should not interfere with perfecting notice such as we have here with respect to the shotgun clause and power-of-sale proceedings, but it should have impact with respect to suspending the actual transaction.

18 In this particular situation, I think it is an uphill struggle for Inducon, given Confederation's present attitude prior to this hearing, which may now be joined in by the Bank of Montreal. However, given the complexity of the situation, the short time now requested (January 30, 1992 being a backdown from March 31, 1992) for protection and the possibility of possible new factors being considered, it appears to me that it would be of advantage to grant Inducon very short-term C.C.A.A. relief, but not to the extent of any transferral of pre-mortgage service cash flow from positive projects to negative projects or to general corporate purposes during this period. The relief will be effective until 5:00 p.m. on December 19, 1991 to give Inducon time to persuade Confederation to take a non-veto position.

19 If Inducon succeeds in convincing Confederation, the C.C.A.A. protection may continue to January 30, 1992, but subject to the comeback clause allowing for any adjustment or variation of that relief. An order will have to be finalized in that event.

Stay granted.

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TAB 26

15 C.B.R. (5th) 288, 204 O.A.C. 216, 78 O.R. (3d) 254

2005 CarswellOnt 6283

Stelco Inc., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT
TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"
APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED
Ontario Court of Appeal
Laskin, Rosenberg, LaForme JJ.A.
Heard: November 2, 2005
Judgment: November 4, 2005
Docket: CA M33099, C44332

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Proceedings: affirming *Stelco Inc., Re* (2005), 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List])

Counsel: Robert W. Staley, Alan P. Gardner for Appellants, Informal Committee of Senior Debentureholders

Michael E. Barrack, Geoff R. Hall for Respondent, Stelco Inc.

Robert I. Thornton, Kyla E.M. Mahar for Respondent, Monitor

John R. Varley for Respondents, Salaried Active Employees

Michael C.P. McCreary, David P. Jacobs for Respondents, USW Locals 8782 and 5328

George Karayannides for Respondent, EDS Canada Inc.

Aubrey E. Kauffman for Respondents, Tricap Management Ltd.

Ben Zarnett, Gale Rubenstein for Respondents, Province of Ontario

Murray Gold for Respondents, Salaried Retirees

Kenneth T. Rosenberg for Respondents, USW International

Robert A. Centa for Respondents, USWA

George Glezos for Respondents, AGF Management Ltd.

Subject: Insolvency

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

Debtor was steel manufacturer under protection of Companies' Creditors Arrangement Act -- Increase in steel prices made debtor's operations increase profitability, but did not guarantee long term financial success -- Debtor reached agreements with certain creditors, which included unpopular 10.75 break fee arrangement with one creditor -- Debtor's motions for permission to enter into agreements with creditors and order for meeting relating to agreements, and extension of stay were granted -- Trial judge found meaningful dialogue should take place between creditors and shareholders regarding plan -- Certain creditors appealed -- Appeal dismissed -- Court had jurisdiction to approve agreements -- Agreements did not mean that creditors could not vote approval -- Broad terms and conditions may be imposed as part of stay, and status quo need not be preserved, but restructuring facilitated -- Creditors still free to exercise rights regarding agreements at meeting -- Plan was not doomed to fail -- Arguments regarding shareholder benefits were premature and to be discussed if court sanction of plan required.

Cases considered by *Rosenberg J.A.*:

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

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

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) -- considered

Stelco Inc., Re (2005), 2005 CarswellOnt 743, 7 C.B.R. (5th) 310 (Ont. S.C.J. [Commercial List]) -- referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) -- considered

Statutes considered:

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

Generally -- considered

s. 6 -- referred to

s. 11 -- referred to

s. 11(4) -- considered

s. 13 -- pursuant to

APPEAL by certain creditors from judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]), granting motions by creditor for extension of stay granted un-

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der *Companies' Creditors Arrangement Act*, permission to enter plan, and order for meeting regarding plan to convene.

***Rosenberg J.A.*:**

1 This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the *CCAA* and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the *CCAA* proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the *CCAA* process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge.

2 Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

The Facts

3 Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the *CCAA* on January 29, 1994. Thus, the *CCAA* process has been going on for over twenty months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11of the *CCAA* gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

4 While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (*i.e.* they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

5 In an attempt to successfully emerge from *CCAA* protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the Ontario Agreement), an agreement with The United Steelworkers International and Local 8782 (the USW Agreement), and an agreement with Tricap Management Limited (the Tricap Agreement). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

6 The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to $10.75 million depending on the circumstances. Tricap will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that

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the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice to seek court approval of agreements of this importance. The appellant submits that the motions judge had no jurisdiction to make these orders.

7 There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the *CCAA* process.

8 Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors meeting on November 15th to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

9 Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap".

10 Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

11 Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

12 Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons:

> The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

Leave to Appeal

13 The parties agree on the test for granting leave to appeal under s. 13 of the *CCAA*. The moving party must show the following:

> (a) the point on appeal is of significance to the practice;
>
> (b) the point is of significance to the action;

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(c) the appeal is *prima facie* meritorious; and

(d) the appeal will not unduly hinder the progress of the action.

14 In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the *status quo* but authorize key elements of the proposed plan of arrangement. The point is of obvious significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap Agreement, that could further deplete the estate. The appeal is *prima facie* meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, the appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

15 For these reasons, I would grant leave to appeal.

Analysis

Jurisdiction generally

16 The thrust of the appellant's submissions is that while the judge supervising a *CCAA* process has jurisdiction to make orders that preserve the *status quo*, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for the business judgement of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the *CCAA*. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

17 Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

18 In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the *CCAA* provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the *CCAA* process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at para. 10:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan

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> company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo *and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.* Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11. [Emphasis added.]

19 In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgement of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

20 The argument that the orders are coercive and therefore unreasonably interfere with the rights of the creditors turns largely on the potential $10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

21 Further, the motions judge both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15th whether this plan will be approved.

Doomed to fail

22 The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), at 310 Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

23 However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Ont. Gen. Div.), at 369:

> The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. *The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry.* All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally.... [Emphasis added.]

24 It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business

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judgment of the Stelco board as a way out of the *CCAA* process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the *CCAA* proceedings.

25 The motions judge said this in his reasons:

> It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

26 I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the *CCAA* process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. *The company's role in the restructuring*, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supra*, at para. 5, "to make order[s] so as to effectively maintain the *status quo* in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.* [Emphasis added.]

27 The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

28 The position of the appellant also fails to give any weight to the broad range of interests in play in a *CCAA* process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

> In the *CCAA* context, Parliament has provided a statutory framework to extend protection to a company

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> while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, *thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.* The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [Emphasis added.]

29 For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

30 The equity holders support the position of the appellant. They point out that the Stelco *CCAA* situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005 [2005 CarswellOnt 743 (Ont. S.C.J. [Commercial List])], the motions judge recognized this unusual state of affairs:

> In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporations was so for under water, is very substantially diminished. For example, the old shares may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above.

31 The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

Disposition

32 Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

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

I agree.

***LaForme J.A.*:**

I agree.

Appeal dismissed.

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TAB 27

1992 CarswellOnt 159

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada
BARGAIN HAROLD'S DISCOUNT LIMITED v. PARIBAS BANK OF CANADA, QUEBEC EQUITY CAPITAL AND COMPANY, LIMITED PARTNERSHIP, 967471 ONTARIO LIMITED, CCFL HIGH YIELD FUND AND COMPANY, LIMITED PARTNERSHIP, K MART CANADA LIMITED, 967473 ONTARIO LIMITED and 967472 ONTARIO LIMITED
Re AN INTENDED ACTION: PARIBAS BANK OF CANADA v. BARGAIN HAROLD'S DISCOUNT LIMITED, ROYAL BANK OF CANADA, CCFL HIGH YIELD FUND and COMPANY, LIMITED PARTNERSHIP, and K MART CANADA LIMITED
Ontario Court of Justice (General Division), Commercial List
Austin J.
Heard: February 26, 1992
Judgment: February 28, 1992
Docket: Doc. B49/92

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Counsel: Aubrey E. Kauffman, for Bargain Harold's Discount Limited and Quebec Equity Capital and Company, Limited Partnership.

H. Lorne Morphy, Q.C., and Richard Conway for Paribas Bank of Canada.

C. Francis, for Royal Bank of Canada.

D.V. MacDonald, for CCFL High Yield Fund and Company, Limited Partnership and Royal Insurance Company of Canada.

K. McElcheran, for K Mart Canada Limited.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangements Act -- Application of Act.

Corporations -- Arrangements and compromises -- Companies' Creditors Arrangement Act -- Application by debtor corporation for order under s. 11 opposed by several secured creditors -- No reasonable prospect of debtor being able to devise acceptable plan -- Opposing creditors satisfying burden of proof -- Application dismissed -- Receiver-manager appointed with power to make assignment in bankruptcy -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

The debtor corporation applied for an order under s. 11 of the Companies' Creditors Arrangement Act ("CCAA."). It was opposed by a number of secured creditors.

Held:

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The application was dismissed.

The burden of proof to show why the application should or should not be granted was on the opposing creditors. The fact that the opposing creditors alleged that there was no plan that they would approve did not put an end to the matter. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders and the public generally. Where it is obvious that no plan will be found acceptable by the required percentage of creditors, the application should be refused. There must be a reasonable chance that a plan will be accepted.

In this case, there was no reasonable prospect of the debtor corporation being able to devise a plan or arrangement which would meet the approval requirements of s. 6 of the CCAA. The debtor corporation did not know the precise nature of the problem which brought about its present financial circumstances. According to its own auditors, the cause or causes might never be known. The debtor corporation also had no specific idea as to how its operation could be salvaged, other than to suggest "downsizing". There was no reason to believe that a downsizing could be done any more efficiently by the debtor corporation than by a receiver. Furthermore, no source of funding to permit the debtor corporation to continue in business had been suggested and there was a complete loss of confidence by the creditors in the management of the debtor corporation.

The appointment of a receiver-manager was to be effective immediately. The receiver was to have power to make an assignment in bankruptcy should it be so advised. A major asset of the debtor corporation consisted of leases and a trustee in bankruptcy would have much wider powers to deal with leases than a receiver did.

Cases considered:

First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) -- applied

Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (1989), 102 A.R. 161 (Q.B.) -- referred to

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

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. Ultracare Management Inc. v. Gammon) 1 O.R. (3d) 321 (Gen. Div.) -- referred to

Statutes considered:

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

s. 3(a)

s. 6

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

Application for order under s. 11 of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Austin J.:

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1 This is an application by Bargain Harold's Discount Limited for an order under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ["C.C.A.A."]. It is opposed by a number of secured creditors. Paribas is the first secured creditor in terms of priority. It has either com menced an action or intends to do so and in that action has brought a motion for the appointment of a receiver and manager.

2 Bargain Harold's is an Ontario corporation. It operates a chain of "convenience discount stores." There are presently 160 stores in Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland. One hundred and fourteen of the stores are in Ontario. All stores are in leased premises. There are about 1,600 full-time employees and 2,360 part-time employees.

3 Bargain Harold's was established in 1969. The business was acquired by K Mart in 1985. K Mart substantially increased the number of stores. Through a leveraged buy-out, ownership changed in October 1990. The shares are presently held 80 per cent by Quebec Equity, 10 per cent by CCFL and Royal Insurance, and 10 per cent by management.

4 As at December 28, 1991, based on unaudited internal draft financial statements, Bargain Harold's had current assets totalling $83,295,619, and fixed assets of $20,237,638, a total of $103,533,257.

5 The same sources showed the major secured creditors as follows:

1. Paribas	-	$ 7,500,000
2. Royal Bank	-	$ 8,100,000
3. CCFL/RICC	-	$ 29,500,000
4. K Mart	-	$ 12,000,000
Total	-	$ 57,100,000

6 By January 31, 1992, again based on internal data, the debt to Paribas had decreased to $5,000,000 and the debt to the Royal Bank had increased to $13,500,000, making the total overall $60,000,000.

7 Unaudited internal records indicated that as at December 28, 1991, the unsecured creditors and equipment lessors were as follows:

1. Trade Creditors	-	$51,782,000
2. Capital Equipment Lease Obligations	-	$ 4,227,000
3. Others	-	$16,811,000
Total	-	$72,820,000

8 It is admitted by the applicant that its financial situation has deteriorated since December 28, 1991.

9 During the period October 1990 to December 1991, the new owners instituted a program of store reformatting and acquired computerized point-of-sale systems with centralized computer facilities. These, with other capital expenditures, cost a total of $15,000,000. According to the uncontradicted evidence, this was some $7,000,000 in excess of what was permitted by the applicant's arrangement with Paribas.

10 According to the applicant, its "immediate financial difficulties" arise from five sources:

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(1)the $15,000,000 expenditure;

(2)undetected errors in the management information system;

(3)excess inventory building due to reduced sales;

(4)inadequate analysis of financial data relating to operating margins; and

(5)external economic conditions.

11 The detail provided indicates that subsequent to June 30, 1991, management relied heavily on its new information system. Bargain Harold's fiscal year end is December 31. It was not until the year-end audit, which is still in progress, that it was discovered that the gross margin on sales for the second half of fiscal 1991 was lower than that which management believed had been achieved and was projecting. From July 1991 on, management conducted its affairs and recorded its results on the basis of erroneous gross market assumptions. This led to the acquisition of excess inventory. The situation was aggravated by the increasingly poor retail market.

12 One result of this admitted mismanagement is that the applicant has defaulted in principal payments of $11,500,000, together with interest, owing to CCFL/RICC. The applicant is also making payments to trade suppliers on an extended basis and certain suppliers are refusing to ship further inventory. There is insufficient working capital to pay obligations as they become due.

13 The purchase of the business in 1990 was financed in part by a revolving line of credit in the amount of $7,500,000 provided by Paribas. The Royal Bank provided a similar line in the amount of $20,000,000. In the fourth quarter of 1991, the applicant's relationship with Paribas and the Royal Bank deteriorated markedly. Effective January 1, 1992, Paribas reduced its credit facility from $7,500,000 to $5,000,000 and the Royal Bank reduced its credit facility from $20,000,000 to $15,000,000. The Royal Bank's position is guaranteed by K Mart.

14 In October 1991, an attempt was made to raise $15,000,000 in equity. According to the applicant, this was to finance further expansion. Again, according to the applicant, when its accounting and financial problems were discovered this attempt was abandoned. According to the evidence of Paribas, Bargain Harold's financial agents had discussions with potential purchasers in various cities, including Toronto, Montreal, Winnipeg, and New York. They were not successful.

15 The applicant has been negotiating with some or all of the secured creditors for some time, weeks if not months. Until very recently, K Mart was prepared to advance a further $5,000,000 under certain conditions. That arrangement fell through on February 19. On February 20, the applicant issued debentures of $100 each to each of 967471 Ontario Limited and 967472 Ontario Limited in order to qualify under s. 3(*a*) of the C.C.A.A. No issue is taken with these "instant" debentures.

16 On February 21, 1992, the Royal Bank demanded payment in full by March 6. K Mart has indicated its intention to honour its guarantee. On February 21, 1992, Paribas demanded payment in full by March 13.

17 No specific plan is put forward. Counsel for Paribas was critical of the applicant in this regard. The applicant's response was that negotiations with creditors had broken down so recently that there simply was no time to prepare a plan. There may be some merit in that response.

18 Evidence from Paribas states that at the time of the purchase in 1990, it was widely recognized that Bargain Har-

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old's was not and had not been profitable. Whether the business was profitable in the period October 1990 to June 30, 1991, and if so, to what degree, is not revealed in the material filed. It may be that that is simply unknown.

19 As of October 2, 1991, Bargain Harold's was predicting a half-a-million-dollar profit for 1991. On October 3, that figure was changed to a loss of $3 to $4 million, on October 8, to a loss of $2.2 million, on November 14, to a loss of $4 million, on December 6, to a loss of $8 million, and on February 19, to a loss of $20 million.

20 Of particular significance is the following paragraph from the affidavit of Michael Gosselin of Paribas:

> On February 20, 1992, I met with representatives of Coopers & Lybrand to attempt to obtain an accounting of the loss. It was suggested to me that up to $7,000,000 of the additional $12,000,000 loss might be attributable to a defect in the recording of proper margins on goods sold which were undetected by management for six months. However, the auditors could not confirm that this was the cause of this unanticipated loss and, more importantly, stated that they might never be in a position to unequivocally confirm the causes. The remaining $5,000,000 loss could not be explained at all by Coopers & Lybrand who advised that their forensic accountants have been asked by CCFL and QECC to investigate the situation.

Coopers & Lybrand were the applicant's auditors. Translated to another medium, this language suggests that the patient is bleeding to death, but the doctors are unable to determine why.

21 It must be kept in mind that this affidavit was sworn February 26 and, as with so many of these applications, there has been no opportunity for cross-examination although an affidavit was filed in response to Gosselin's.

22 All that the applicant suggests is that it proposes to "downsize its business operation generally." In his submissions, counsel for the applicant pointed to Quebec Equity and to CCFL as substantial shareholders and potential sources of financing. Although both of those respondents supported the application, no commitment of any kind was forthcoming from either of them.

23 The applicant itself proposed the appointment of a monitor. The nominee was Price Waterhouse Limited. In this regard, counsel for the two sides had co-ordinated their efforts and it was agreed that in the event a receiver was appointed, either now or later, it should be Price Waterhouse. This makes a good deal of sense in terms of continuity and cost.

24 The applicant proposed a relatively detailed scheme of administration and monitorship. The applicant also proposed a very short time, i.e., until March 31, 1992, for the filing of a plan of compromise or arrangement with its creditors. This short period would be attractive in that it would minimize the risk to the secured creditors. However, having regard to the nature of the business and to the fact that re-financing and the sale of the business have been explored as recently as October 1991, the period suggested is unrealistic.

25 It is perhaps significant that in the interim the applicant seeks the power to "proceed with an orderly liquidation" of the assets, with termination of employment of such of its employees and the termination of such supplier arrangements as is appropriate. The applicant also wishes to have the right to seek offers for the assets in whole or in part.

26 The application is supported by Quebec Equity and CCFL/RICC, and opposed by Paribas, Royal Bank and K Mart. It was argued on behalf of the applicant that Royal Bank need not be considered, because it will be paid out in any event on March 6. It was clear that it would be paid out not by the applicant but by K Mart, which would simply step into the shoes of Royal Bank.

27 The position of Paribas, Royal Bank and K Mart was that default had occurred, the enterprise was losing money,

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but nobody knew how much, all sides had lost any confidence in management, and they, as the leading secured creditors, would be prejudiced by any delay in the appointing of a receiver.

28 In terms of prejudice, it is significant that K Mart supports the position of Paribas rather than the position of the applicant. It is significant because K Mart has guaranteed the applicant's debt to the Royal Bank and remains as a covenantor on approximately 111 of Bargain Harold's leases. On the other hand, there is at least the possibility that K Mart's position is dictated in part by the fact that, to some extent, it might be regarded as a competitor of Bargain Harold's.

29 Paribas is concerned about its security position in part because the cause of the $20,000,000 loss has yet to be identified with reasonable certainty, and may never be identified. The $20,000,000 figure itself is not certain. Because the management information systems in place appear to be incapable of providing timely and accurate financial information, Bargain Harold's may continue to operate in a significant loss position. As these losses are incurred, they would directly erode the value of Paribas' security. In particular, if supplier, landlord and employee liabilities are kept current by Bargain Harold's, then continuing operating losses would directly and immediately erode the amount and value of the inventories, these being Paribas' primary source of security. On the other hand, if Bargain Harold's defaults in payment of government or employee liabilities, those liabilities may gain priority over Paribas' position as senior secured creditor.

30 In Bargain Harold's business, inventory turns over rapidly. This factor, combined with continuing operating losses, could result in large inventory shrinkages over a very short period of time. In addition, because of the mismanagement of inventory, Paribas is concerned about the quality of inventory that will remain on the shelves as the financial position of the company continues to deteriorate. The more valuable and quickly resalable goods will be turning over rapidly, but the less valuable goods will remain on the shelves.

31 Bargain Harold's launched its C.C.A.A. application first. Its material is replete with admissions of mismanagement. Counsel for Paribas was very critical of the applicant's material and pointed out a number of instances of what he described as non-disclosure. In my view, nothing turns on this point. It can be explained by the shortness of time available to the applicant after the collapse of negotiations and by the fact that the applicant and Paribas, understandably, have two quite different perspectives of the mismanagement.

32 The original material of the applicant had a great deal to say on the subject of mismanagement, but nothing on the question of improving that management. The material of Paribas was then served and, in response, an affidavit of C.R. Middleton, sworn February 26, was delivered. That affidavit states that:

> There will be major changes to existing senior management of Bargain Harold's to be implemented immediately upon granting the relief being sought by Bargain Harold's.

Why the acquisition of new management was conditioned upon the making of a C.C.A.A. order was not explained. There was no identification of the proposed new management, nor any statement from her, him or them, as to plans for the future.

33 The applicant has brought itself within the ambit of the legislation in that it is insolvent, it has outstanding trust debentures, and it seeks to make an arrangement with its creditors, including the holders of those debentures. While the lack of any plan may be surprising in view of the length of the negotiations, it may be that it had no reason to expect the negotiations would not succeed.

34 During the course of the hearing, I raised the question of the onus on an application under the C.C.A.A. As might have been expected, the applicant relied upon the fact that the C.C.A.A. is remedial legislation and is to be given a broad

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and liberal interpretation. Counsel for Paribas argued that as Bargain Harold's was applying to the court for the exercise of its discretion, the onus was on Bargain Harold's. In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, 41 O.A.C. 282, at pp. 306, 307 [O.R.], Doherty J.A. said:

> Because of that 'broad constituency' the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: ...

Accepting that approach, the onus is really on Paribas et al. to show why the order should not be granted.

35 The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 (Q.B.), per Marshall J. at p. 164 ¶21.

36 As Doherty J.A. said in *Elan* at p. 317b [O.R.]:

> As I see it, the key to this analysis rests in the measurement of the risk to the Bank inherent in the granting of the s.5 order. If there was a real risk that the loan made by the Bank would become undersecured during the operative period of the s.5 order, I would be inclined to hold that the Bank should not have that risk forced on it by the court.

37 As to the degree of persuasion required, Doherty J.A. in *Elan* said at p.316 [O.R.]:

> I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: Edwards, 'Re-organizations under the Companies' Creditors Arrangement Act', *supra*, at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the court very uncertain at the time the initial application is made.

38 *In Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.), Hoilett J., at p.330 f [O.R.], suggests that the test is whether the plan, or in the present case, any plan, "has a probable chance of acceptance."

39 These two standards are in conflict, *Ultracare* requiring the probability of success, and *Elan* requiring something less. Having regard to the nature of the legislation, I prefer the test enunciated by Doherty J.A. in *Elan*. In *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p.238, I expressed the view that the statute required "a reasonable chance" that a plan would be accepted.

40 A court must be concerned with the nature of the evidence presented in cases such as this. The applicant's main affidavit was sworn on February 25, Paribas' affidavit on the 26th, and the applicant's in response on the 26th. There has been no opportunity for cross-examination. As a consequence, there is a very heavy responsibility on counsel and the court must be mindful of the frailties of the evidence.

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41 Section 6 of the C.C.A.A. requires approval of the plan or arrangement by a majority in number representing three-fourths in value of the creditors. Where there are different classes of creditors, the section requires a majority in number representing three-fourths in value of the creditors in each class. Having regard to the evidence presented and its shortcomings, I am unable to conclude that there is any reasonable prospect of the applicant being able to devise a plan or arrangement which would meet the approval requirements of s.6 of the Act. Amongst the most important elements in reaching this decision is the fact that the applicant still does not know the precise nature of the problem which brought about its present financial circumstances. According to its own auditors, the cause or causes may never be known. There is also the fact, probably related to this first element, that the applicant has no specific idea how its operation can be salvaged, other than to suggest "downsizing." There is no reason to believe that that downsizing can be done any more efficiently by the applicant than by a receiver.

42 Next is the need to borrow still more money from the Royal Bank in order to continue in business at all. The fact that the Royal Bank may be paid out on March 6 is irrelevant. In order to carry on during the proposed stay period, the applicant requires funds. No source other than the Royal Bank, or in its shoes, K Mart, has been suggested. More to the point, perhaps, no offer has been made by QECC or by CCFL, both of whom are substantial shareholders and both of whom, it was argued, are in a position to assist in refinancing.

43 Another factor is the failed or abandoned attempt to raise $15 million in October 1991. Yet another is the complete loss of confidence in the management of the company. To this is added the failure of the applicant to suggest who the new management might be.

44 The only proposal suggested by way of an alternative to a C.C.A.A. order was the appointment of a receiver and manager. As in *Cango*, there is no reason to believe that if a receiver were appointed, any more unemployment would result than if the present applicant were left in charge.

45 At the conclusion of the hearing of this matter on February 26, I indicated my intention to reserve my decision. Counsel for the applicant indicated that as its financial difficulties were now a matter of public knowledge, some order should be made to protect the company pending my decision. As counsel were unable to agree on anything, I made an interim order under s.11 of the C.C.A.A. and appointed Price Waterhouse monitor for the interim period. That order and monitorship is now terminated.

46 An order will go dismissing the C.C.A.A. application. An order will also go appointing Price Waterhouse as receiver and manager of the applicant, effective immediately. If there is any difficulty in settling the form of order, I may be spoken to. Although the question was not raised during the course of argument, the order should confer upon the receiver the power to make an assignment in bankruptcy should it be so advised. A major asset of Bargain Harold's consists of leases. A trustee in bankruptcy has much wider powers to deal with leases than does a receiver.

47 The matter of the expertise of Price Waterhouse in this area of business was not addressed. It is an area where a great deal of money can be lost in a very short time. If Price Waterhouse does not presently have expertise in this field, it should acquire it forthwith.

48 The draft order which appears at Tab 1 of the receivership motion record deals with the costs of Paribas on that motion. I may be spoken to by letter as to the costs, including quantum, of all parties to the C.C.A.A. application.

Application dismissed.

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36
AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Court File No: CV-09-7966—00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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