2008 CarswellSask 358, 2008 SKCA 73, 43 C.B.R. (5th) 42, [2008] 8 W.W.R. 607, 311 Sask. R. 186, 428 W.A.C. 186

Stomp Pork Farm Ltd., Re

National Bank of Canada (Appellant) and Stomp Pork Farm Ltd. (Respondent) and Farm Credit Canada, Cargill Limited and Meyers Norris Penny Limited, Monitor (Respondents)

Saskatchewan Court of Appeal

Sherstobitoff, Lane, Jackson JJ.A.

Heard: May 13, 2008
Judgment: May 22, 2008
Written reasons: June 5, 2008
Docket: 1627

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Proceedings: reversing in part *Stomp Pork Farm Ltd., Re* (2008), 2008 SKQB 179, 2008 CarswellSask 267 (Sask. Q.B.); additional reasons to *Stomp Pork Farm Ltd., Re* (2008), 41 C.B.R. (5th) 126, 2008 SKQB 152, 2008 CarswellSask 207 (Sask. Q.B.)

Counsel: Jeffrey Lee, Linda Widdup for National Bank of Canada

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Ian Sutherland for Cargill Limited

Gary Meschishnick for Meyers Norris Penny Limited

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles

S owed N $20.5 million secured on S's current assets — N had priority over current assets to extent of $18 million and thereafter shared priority with F, with N's share, over and above $18 million — S became insolvent and applied and received initial order under Companies' Creditors Arrangement Act for stay of proceedings until April 18, 2008 — Order directed F to provide debtor-in-possession ("DIP") financing facility to S — N applied for order substituting it as DIP lender and allocating DIP financing equally between current assets and fixed assets as initially proposed by S and supported by N — Judge ordered monitor to file report with court analyzing S's situation and providing its recommendations on fair and equitable allocation of DIP's lender charge and any future DIP financing — Judge con-

firmed original decision to secure super-priority for DIP financing on current assets and directed that any future DIP financing be secured 75 percent on current assets and 25 percent on fixed assets — N appealed both decisions — Appeal allowed in part — Court left in place chambers judge's decision with respect to allocation of priority for DIP financing that had already been advanced, but set aside allocation of priority with respect to future DIP financing — Court refused leave pertaining to interim order as court was highly unlikely to intervene and intervention would upset significant arrangement that was already in place — Court granted leave to appeal order pertaining to future DIP financing as court was satisfied that appeal was prima facie meritorious — Appeal was allowed with respect to future financing as there was no immediate urgency and it was premature to make allocation of priority between secured creditors and such allocation appeared speculative.

Cases considered by *Jackson J.A.*:

Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 1999 CarswellAlta 809, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Cavendish Shopping Centre Co. v. Bertrand (May 18, 1993), Doc. C.A. Montreal 500-09-000761-932 (Que. C.A.) — referred to

Charles Osenton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) — referred to

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 72, 2005 SKCA 78, 2005 CarswellSask 416 (Sask. C.A. [In Chambers]) — referred to

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Minister of National Revenue v. Temple City Housing Inc. (2008), 2008 ABCA 1, (sub nom. *Temple City Housing Inc., Re)* 415 W.A.C. 4, (sub nom. *Temple City Housing Inc., Re)* 422 A.R. 4, (sub nom. *R. v. Temple City Housing Inc.)* 2008 G.T.C. 1128 (Eng.), [2008] G.S.T.C. 2, [2008] 2 C.T.C. 67, 2008 CarswellAlta 2 (Alta. C.A.) — referred to

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

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

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to

Temple City Housing Inc., Re (2007), 2007 CarswellAlta 1806, 2007 ABQB 786, [2007] G.S.T.C. 188, [2008] 2 C.T.C. 61 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — referred to

s. 13 — considered

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally — referred to

APPEAL from judgment reported at *Stomp Pork Farm Ltd., Re* (2008), 2008 SKQB 179, 2008 CarswellSask 267 (Sask. Q.B.), ruling on cost allocation of debtor-in-possession financing between current and fixed assets.

***Jackson J.A.*:**

I. Introduction

1 The broad issue in this appeal is the extent to which a Chambers judge has the authority to allocate priority among the assets of pre-filing creditors for debtor in possession ("DIP") financing early in the process of proceedings under the *Companies' Creditors Arrangement Act*[FN1] ("the *CCAA*"). In the result, the Court left in place the Chambers judge's decision with respect to an allocation of priority for DIP financing that had already been advanced, but set aside the allocation of priority with respect to future and, as yet not required, DIP financing, with reasons to follow. These are those reasons.

II. Facts and Decisions under Appeal

2 The facts are well set out in the two decisions of the Honourable Madam Justice A.R. Rothery under appeal such that I will provide a brief sketch only.

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3 Stomp Pork Farm Ltd. ("Stomp") is the second largest commercial hog producer in Saskatchewan owning 27,000 breeding sows.[FN2] Its two principal lenders are National Bank of Canada ("NBC") and Farm Credit Canada ("FCC").

4 As of March 24, 2008, Stomp owed NBC approximately $20.5 million secured on Stomp's current assets, which comprise livestock inventory and accounts receivable (the "Current Assets"). NBC has priority over the Current Assets to the extent of $18 million and thereafter shares priority with FCC, with NBC's share, over and above the $18 million, being 15%.

5 As of March 27, 2008, Stomp owed FCC approximately $28.5 million secured on Stomp's land, buildings and improvements (the "Fixed Assets"). NBC also holds a security interest in 15% of the Fixed Assets.

6 Due to a variety of factors including high feed prices and currency rate challenges, Stomp became insolvent. On March 27, 2008, it applied *ex parte* and received an initial order under the *CCAA* for a stay of proceedings until April 25, 2008. The *ex parte* initial order was amended on March 28, 2008. This amended order will be called the "Initial Order."[FN3]

7 The Initial Order directs FCC to provide a DIP financing facility of $3 million to Stomp repayable in 30 days to be secured in the following manner: (i) an administration charge to a maximum of $100,000 to be allocated on a basis of a 50% charge on Current Assets and a 50% charge on Fixed Assets; and (ii) the balance to be secured 100% on the Current Assets including an expected payment of $1.5 million from the Canadian Agricultural Income Stabilization Program — AgriStability Targeted Payment. Paragraph 34 of the Order reads:

> 34. This Court Orders that the DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the inventory (including all livestock and breeding livestock) and accounts receivable of the Applicant, and the Canadian Agricultural Income Stabilization Program-Agri-Stability Targeted Payment (the "Security"), which charge shall not exceed the aggregate amount owed to the DIP Lender under the Commitment Letter, filed. The DIP Lender's Charge shall have the priority set out in paragraphs 45 and 48 hereof.[FN4]

8 On April 2, 2008, NBC applied for an order substituting it as the DIP lender and allocating the DIP financing equally between the Current Assets and Fixed Assets as initially proposed by Stomp on March 27, 2008 and supported by NBC. In the alternative, NBC asked that the DIP lender's charge be allocated against Stomp's assets according to the recommendation of the Monitor in a formal written report to be prepared.

9 Rothery J. agreed to adjourn the reconsideration application pending completion of a report by the Monitor analyzing Stomp's situation[FN5] and providing its recommendations on the fair and equitable allocation of the DIP lender's charge and any future DIP financing.[FN6] As part of this exercise, the Monitor was directed to consider the proportionate amounts of total aggregate indebtedness of Stomp to each of NBC and FCC and the relative liquidation values and fair market values of Stomp's Current Assets and Fixed Assets.[FN7]

10 On April 23, 2008, Rothery J. confirmed her original decision to secure the super-priority for the DIP financing on the Current Assets and directed that any future DIP financing be secured 75% on the Current Assets and 25% on the Fixed Assets (the "April 23 Order").[FN8] The April 23 Order reads:

> 1. The application by National Bank for an Order varying the Initial Order so as to modify the allocation of the DIP Lender's Charge provided for in the Initial Order as it pertains to the FCC DIP Facility shall be and is hereby dismissed.
>
> 2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the

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assets of Stomp Pork Farm Ltd. on a cost allocation of 75% to current assets of Stomp Pork Farm Ltd. and 25% to fixed assets of Stomp Pork Farm Ltd.[FN9]

11 NBC applied immediately for leave to appeal both decisions relating to the Initial and April 23 Orders and for an order that the application for leave to appeal be expedited and heard by a panel of three judges of the Court, who would go on to hear the appeal proper if leave were granted. Chief Justice Klebuc granted such an order on April 28, 2008 directing that the leave application be expedited and added to the list of appeals to be heard during the regular sittings of the Court on May 13, 2008.

12 On May 13, 2008, the Court refused the application for leave to appeal the Initial and April 23 Orders insofar as they pertain to the initial DIP financing. The Court granted leave to appeal the April 23 Order as it pertained to an allocation of priority for future DIP financing. Upon announcing these decisions, counsel for NBC indicated that he wished to consult with his client. On May 14, 2008, counsel advised that NBC's position was that the appeal be allowed and the April 23 Order be amended by substituting para. 2 of that order with the following:

> 2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 50% to current assets of Stomp Pork Farm Ltd. and 50% to fixed assets of Stomp Pork Farm Ltd.[FN10]

In the alternative, NBC submitted that if the Court were prepared to allow the appeal but were not prepared to grant this form of relief, the appropriate course of action would be that para. 2 of the April 23 Order be vacated in its entirety.

13 On May 22, 2008, the Court advised the parties that it was allowing the appeal from the April 23 Order, as it pertained to future DIP financing, and vacating para. 2 of the April 23 Order in its entirety with reasons to follow.

III. Reasons

1. Reasons for Refusing Leave Pertaining to the Interim Order

14 The Court's jurisdiction to hear this appeal is found in s. 13 of the *CCAA*:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.[FN11]

15 In a series of cases emanating first from British Columbia[FN12] and then from Quebec,[FN13] Alberta [FN14]and Ontario,[FN15] there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general.[FN16] The test is often expressed as a four-part one:

> 1. whether the issue on appeal is of significance to the practice;
>
> 2. whether the issue raised is of significance to the action itself;
>
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
>
> 4. whether the appeal will unduly hinder the progress of the action.[FN17]

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16 There can be no question that the issues raised in this appeal are of significance to the practice. The general question of the allocation of priority between the DIP financer, which is a pre-filing creditor, and the other existing creditors has been little explored by the existing jurisprudence. The particular questions of whether the restructuring judge can allocate priority before the outcome of the restructuring is known, and whether he or she may do so with respect to certain assets and not others, appear to be matters of first instance.

17 Nor can it be questioned that the appeal is of significance to the action. By the decision pertaining to interim financing, NBC has had its priority position significantly affected. Beyond the impact on NBC, however, given the large amount of funding involved, whichever decision the Court were to make on this appeal would be significant to the restructuring. Given the procedure that has been followed, it also cannot be seriously contested that the appeal would unduly hinder the action.

18 It is the third factor, however, that is determinative in deciding whether leave to appeal should be granted in relation to the initial DIP financing.

19 Notwithstanding the fact that the leave application and the appeal proper were heard together, the parties were advised at the commencement of the appeal that the Court would consider the question of leave independently from the merits of the appeal. Admittedly, in a case such as this one, where leave to appeal and the appeal proper are heard together, the line between when a judge grants leave and when a court decides the appeal blurs as the court turns more quickly to questioning counsel on the merits of the appeal and the impact on the restructuring than might otherwise occur in Chambers. There can be no question, however, but that the procedure followed in this case provided a rapid result for the parties.

20 With respect to the initial financing, these factors became controlling for the Court. Rothery J. had before her an application made by the debtor requesting a $3 million facility to be provided by NBC to be secured as a super-priority charge allocated 50% against Current Assets and 50% against Fixed Assets. NBC made its position clear that it was prepared to advance the funds if a priority allocation were made in this manner only. FCC opposed this motion. All parties before the Court, however, agreed that it was imperative funds be advanced within hours if arrangements were to be made for Cargill Ltd. to supplement dwindling food stocks to permit the animals to be fed. It appeared to Rothery J. that the only other possible DIP financer before the Court was FCC. Rothery J. ordered FCC to make a $3 million facility available by the next morning, which facility was to be secured primarily on the Current Assets, but in the event that FCC refused to provide that facility, NBC would be permitted to become the DIP financer, in accordance with its proposal, with a 50/50 allocation against Current and Fixed Assets. In sum, Rothery J. was required to make an order, on extremely short notice, with submissions from all parties including NBC, that immediate financing was required.

21 That brings us to the proceedings adjourned to April 23, 2008 wherein Rothery J. agreed to reconsider the allocation following receipt of full argument and the Monitor's Report. Rothery J. reconsidered her decision and confirmed it. On this occasion, she wrote:

> [1] In my fiat of April 7, 2008, cited at 2008 SKQB 152, I directed the Monitor to file a report with the court "to provide its recommendations on the fair and equitable allocation of any future DIP financing," as stated in paragraph 16 of that fiat. National Bank of Canada ("NBC") had brought a motion for me to vary the debtor-in-possession ("DIP") financing charge, and takes the position that the DIP financing provided by Farm Credit Canada ("FCC") may retroactively be allocated in accordance with the Monitor's recommendations.
>
> [2] With respect to FCC's DIP facility, which expired April 22, 2008, my conclusion remains the same as it was when I initially granted the order for FCC's DIP facility. That is, as stated in para. 15 of the April 7, 2008, fiat, "the initial order placed the risk with the security that immediately benefitted from it, that is, the current assets." My conclusions on the risk allocation for that first DIP facility have not been changed by the Monitor's report. Op-

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positely, the Monitor's report supports my assessment that most of the FCC DIP facility was used to ensure that the pigs continued to be fed and that they were prepared for market. This short term DIP facility was equitably allocated among the creditors to the CCAA application. Any application to vary my original order pertaining to the FCC DIP facility is hereby dismissed.

[3] The issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique. Indeed, it was the focus of much argument by counsel at the initial order proceeding. Any DIP financing proposed was on the basis of a specific allocation between current and fixed assets. The court was required to decide prior to the initial order being made. The factual background is outlined in my April 7, 2008, fiat.[FN18]

22 We accept these reasons. At this stage of the proceedings, we might add or emphasize these factors: (i) the only DIP lenders available to the Court were pre-existing filing creditors; (ii) no pre-existing filing creditor was prepared to step forward to provide financing secured on all of the assets of the debtor without a priority allocation being made and incurring the risk that such a decision would entail; (iii) all parties appeared to agree that financing was crucial to ensure the aims of the *CCAA*; and (iv) some $2.2 million of the $3 million facility were ultimately required and had already been expended by the time the appeal was heard. On this last point, we accept the argument of FCC that to change the priorities with respect to funds already expended this early in the process plants an unwelcome seed of uncertainty in the process contemplated by the *CCAA*.

23 In sum, the Court refused leave with respect to the initial DIP financing as the Court would be highly unlikely to intervene and intervention would upset a significant arrangement that was already in place.

2. Reasons for Granting Leave to Appeal the Order Pertaining to Future DIP Financing

24 When we turned to consider whether leave should be granted with respect to the April 23 Order as it pertains to future financing, however, other considerations came to the fore. As with the orders pertaining to the initial financing, the issues raised are of significance to the practice and to the action and the appeal would not unduly hinder the progress of the action, but with respect to future financing the Court was satisfied that the appeal was *prima facie* meritorious. Thus, leave was granted with respect to this part of the April 23 Order.

3. Reasons for Allowing the Appeal Pertaining to Future DIP Financing

25 The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. As Dr. Sarra has said:

> There have been a number of judicial pronouncements on the role of the appellate courts during a *CCAA* proceeding. The British Columbia Court of Appeal in *Doman Industries Ltd.* held that where an order is made by the judge who is supervising the *CCAA* proceedings of the insolvent company from the beginning, the court will be very reluctant to grant leave to appeal the order. The appellate court will exercise its power sparingly when asked to intervene with respect to decisions made during the course of a *CCAA* proceeding, as the *CCAA* judge is undertaking a careful and delicate balancing of numerous interests; and appellate proceedings may upset that balance and frustrate that process. The appellate courts have held that they will be cautious about intervening in *CCAA* proceedings at an early stage, particularly where the order contains a come-back clause that allows parties to bring their concerns regarding a decision to the judge supervising the *CCAA* proceeding.[FN19] [Emphasis added.]

In this Court, leave has been refused in recent times based on these principles. See: *Community Pork Ventures Inc. v.*

Canadian Imperial Bank of Commerce[FN20] and *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[FN21]

26 Notwithstanding this high level of deference, as Dr. Sarra indicates, appellate courts will intervene in certain cases:

> Appellate courts will accord a high degree of deference when asked to interfere with the exercise of discretion of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion or there is a fundamental question of the lower court's jurisdiction. Leave will be refused by the appellate court [if] the appeal is of no general significance to the practice and where granting leave would disrupt the proposed plan that has been approved by the creditors.[FN22] [Emphasis added]

27 As Newbury J.A. stated in *New Skeena Forest Products Inc., Re*,[FN23] discretionary decisions in this area are not immune from review. Quoting from Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [FN24] she wrote:

> [20] ... At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:
>
> > But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]
>
> (See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)[FN25] [Emphasis added]

28 It is now well established that a superior court supervising the restructuring of an insolvent corporation under the *CCAA* may confer upon a lender, providing DIP financing to the insolvent corporation, the benefit of a court-ordered "super-priority" charge on the assets of the insolvent corporation and that, in certain circumstances, the DIP lender's charge may rank in priority to the existing security held by secured creditors of the insolvent corporation. It is sufficient to cite as an example in support of this proposition the most recent decision on point: *Temple City Housing Inc., Re*[FN26]

29 While the above aspect of the law appears settled, few reported decisions consider the question of the appropriate allocation of DIP financing as between major secured creditors of the corporate debtor. Some principles are, however, more clear than others. The leading decision is *Hunters Trailer & Marine Ltd., Re*[FN27]

30 The basic determination that a *CCAA* judge must make in deciding how to allocate the DIP financing charge amongst the assets of the debtor is what allocation would be most equitable, a task that is left initially to the discretion of the *CCAA* judge:

> 15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the *CCAA*. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the *CCAA* costs. That is not to say that equity call for an equal allocation of costs.[FN28]

The equitable allocation of a DIP financing charge will need to balance, among other things, the creditors' various

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positions, the purpose of the DIP financing in particular and the *CCAA* regime in general:

> ... The court, in balancing prejudices, will weigh the possibility of a going-concern solution that potentially creates long-term upside value for numerous stakeholders, with the risk of further depletion of value that may be able to satisfy claims on a short-term basis. This balancing of interest and prejudice is at the heart of most financing judgments. Notwithstanding these potential benefits to all stakeholders, absent careful scrutiny of the terms of the DIP financing agreement, granting access to short-term capital can increase the risk of harm to stakeholders if the terms approved by the court lead to a *CCAA* plan that prejudices their interests more than a liquidation outcome.[FN29] [Emphasis added.]

31 In *Hunters Trailer & Marine Ltd.*, the Court altered the allocation of the charge in relation to DIP financing near the end of the process, noting that the restructuring process was for the benefit, or potential benefit, of all creditors, including the creditor whose only security was in the real property. The Court appeared to allocate the charge on the basis of the extent of the benefit, or potential benefit, to the creditor of the DIP financing in relation to the assets over which it held a security:

> [20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from *CCAA* proceedings. The *CCAA* recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.
>
> .....
>
> [22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.
>
> [23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.
>
> [24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.
>
> [25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered *CCAA* costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the *CCAA* proceedings there could have been no certainty as to the sale price of the land or UMC's share of the *CCAA* costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of *CCAA* costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.
>
> [26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of

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> calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.[FN30]
>
> [Emphasis added]

Dr. Sarra makes the following observation about *Hunters Trailer*:

> The court's recognition of the need for an equitable allocation is aimed at a mid-ground between one creditor bearing all the costs and all creditors sharing equally. The notion that financing is a potential benefit to all creditors is critical to the equitable allocation of costs.[FN31]

32 Turning to the case at hand, only some statements may be made with certainty. There is in place a *pari passu* agreement between the principal lenders NBC and FCC. The nature of this arrangement is discussed fully in the decisions under appeal.

33 The estimated liquidation value of the Current Assets of Stomp, identified by the Monitor, ranges from a low of $12,949,616 and a high of $12,974,232.[FN32] The estimated liquidation value of the Fixed Assets of Stomp, identified by the Monitor, ranges between a low of $11,056,000 and a high of $13,004,000.[FN33]

34 The Monitor's Second Report concluded with the following recommendation as to the equitable method of allocating the DIP Lender's Charge:[FN34]

> There is no prescribed formula and any means of calculating the allocation of a DIP Lenders Charge will be arbitrary. Section 9 outlines that 93.6% of DIP financing is projected to apply towards Current Assets. However, it is important to appreciate that the Fixed Assets stand to gain a significant increase in value through a successful CCAA.
>
> All things considered, it is suggested that allocating the cost of the DIP Lenders Charge equally to Fixed Assets and Current Assets is a fair and equitable approach.
>
> Applying the 85/15 split under the *Pari Passu* agreement would result in NBC's share being 57.5% and FCC responsible for 42.5% of the DIP Lenders Charge.
>
> [Emphasis added]

FCC, as might be expected, resists the Monitor's conclusion that it will derive any benefit from the restructuring, on the basis that it is prepared to ride out the current economic cycle, with or without hogs, until such time as the Fixed Assets can be sold. There is, of course, no evidence of this and the Monitor's Report appears at this time to be the best evidence of a contrary position.

35 When Rothery J. made her initial decision, she was presented with no case law and little evidence beyond that which was necessary to demonstrate that if an order were to be made under s. 11 of the *CCAA*, it had to be accompanied by a DIP financing order. Then, by April 23, indeed by April 7, the DIP funds had been expended in accordance with a priority regime that accorded FCC priority. The same points cannot be made in relation to the future DIP financing.

36 With respect to future financing, there is no immediate urgency and, with the benefit of case law, evidence and the Monitor's Reports, it can be said that it is premature to make an allocation of the priority between the secured

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creditors, and indeed such an allocation appears speculative at this time.

37 None of the parties before this Court, including Stomp and FCC, argued in support of a split of 75% and 25%. With the benefit of full argument, it became apparent to all that the question of how to allocate the priority of the future DIP financing would best be left to further negotiation, and decision if necessary, as the restructuring process unfolds.

38 NBC and FCC will each bear their own costs. If there is any issue with respect to the costs of the other parties, an application may be transmitted to the panel through the office of the Registrar.

Appeal allowed in part.

FN1 R.S.C. 1985, c. C-36.

FN2 Appeal Book, Vol. 2, pp. 180a and 182a, Affidavit of Ivan Stomp sworn March 26, 2008, paras. 4, 5 and 19.

FN3 Appeal Book, pp. 13a-35a, Amended Ex Parte Initial Order issued March 28, 2008.

FN4 *Ibid.*, p. 27a.

FN5 2008 SKQB 152 (Sask. Q.B.), para. 15.

FN6 *Ibid.* para. 16.

FN7 *Ibid.*

FN8 2008 SKQB 179 (Sask. Q.B.), paras. 2 and 10.

FN9 April 23 Order, Appeal Book, p. 169a.

FN10 Letter dated May 14, 2008 to the Registrar, Court of Appeal.

FN11 *CCAA*, *supra* note 1.

FN12 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]).

FN13 *Cavendish Shopping Centre Co. v. Bertrand*, [1993] Q.J. No. 860 (Que. C.A.) [hereinafter Steinberg].

FN14 *Multitech Warehouse Direct Inc. (Re)* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 1999 ABCA 255, 244 A.R. 103 (Alta. C.A.); *Canadian Airlines Corp., Re* (2000), 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers]).

FN15 *Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.).

FN16 See, for example, *Multitech*, *supra* note 14 at para. 3, summarizing *Steinberg*, *supra* note 13.

FN17 *Blue Range*, *supra* note 14 at para. 4; *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 13; *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 422 A.R. 4 (Alta. C.A.) at para. 12.

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2008 CarswellSask 358, 2008 SKCA 73, 43 C.B.R. (5th) 42, [2008] 8 W.W.R. 607, 311 Sask. R. 186, 428 W.A.C. 186

FN18 2008 SKQB 179 (Sask. Q.B.), *supra* note 8.

FN19 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 89 [footnotes omitted].

FN20 2005 SKCA 78 (Sask. C.A. [In Chambers]).

FN21 2007 SKCA 72 (Sask. C.A.)at para. 49, [2007] 9 W.W.R. 79 (Sask. C.A.).

FN22 Sarra, *supra* note 19 at 89 [footnotes omitted].

FN23 2005 BCCA 192, [2005] 8 W.W.R. 224 (B.C. C.A.).

FN24 [1941] 2 All E.R. 245 (U.K. H.L.).

FN25 *New Skeena*, *supra* note 23.

FN26 2007 ABQB 786 (Alta. Q.B.), affirmed *Temple*, *supra* note 17. The Court also notes that Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007, but it is not in force as the *Act* it amends, being *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 is not yet in force. When these amendments come into effect, they will confirm an authority that the courts have been exercising for some time.

FN27 , (2001), 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.).

FN28 *Ibid.*

FN29 Sarra, *supra* note 19 at 96-97 [footnotes omitted].

FN30 *Hunters Trailer*, *supra* note 27.

FN31 Sarra, *supra*, note 19 at 112.

FN32 Appeal Book, Vol. 1, p. 94a, Monitor's Second Report, s. 8.1.2.3.

FN33 *Ibid.*, p. 95a, s. 8.2.

FN34 *Ibid.*, pp. 99a and 100a, s. 13.0.

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2007 CarswellOnt 661, 29 C.B.R. (5th) 1

Ravelston Corp., Re

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

IN THE MATTER OF a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc.

IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and the Courts of Justice Act, R.S.O. 1990 c. C.-43, as amended

Ontario Superior Court of Justice [Commercial List]

Cumming J.

Heard: January 15, 18, 25, 26, 30, 2007
Judgment: February 7, 2007[FN*]
Docket: 05-CL-5863

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Proceedings: affirmed *Ravelston Corp., Re* (2007), 2007 CarswellOnt 1115 (Ont. C.A.) [Ontario]

Counsel: Alex MacFarlane, Max Mendelson for Moving Party Receiver

Peter F.C. Howard, Danielle K. Royal for Conrad Black Capital Corporation

Earl A. Cherniak, Q.C., Edward L. Greenspan, Q.C., George S. Glezos, Lisa Munro for Conrad Black

Robyn Ryan Bell, Derek J. Bell for Sun-Times Media Group (formerly Hollinger International Inc.)

M.P. Gottlieb, W. Brock for Hollinger Inc.

David R. Wingfield, Paul D. Guy for Peter G. White, Peter G. White Management Limited

David Moore for Catalyst Fund General Partner I Inc.

Clifton Prophet for Argus Corporation Limited

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

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

Receiver was appointed for company and company was granted protection under Companies' Creditors Arrangement Act — Company was charged in United States with five counts of mail fraud, two counts of wire fraud, and two counts relating to non-compete payments — President and other officers and directors of company were also charged — President of company entered into plea agreement in which he agreed to plead guilty to one count — Receiver negotiated plea agreement for company in which company would plead guilty to one count — Receiver brought motion for approval of its activities and for order directing receiver to enter into plea agreement and enter guilty plea — Shareholder in company brought motion for directions challenging process followed by receiver in preparing its report — Motion for directions dismissed — Cross-examination of receiver was not appropriate as there was no evidence that receiver had not been acting in objective and neutral manner — Legal advice received by receiver was subject to solicitor-client privilege — Receiver was not required to disclose full contents of its communications with United States Attorney's Office — Receiver needed to be able to conduct meaningful and candid negotiations in confidence in order to discharge its duties in administration of estate — Negotiation of plea agreement was properly dealt with in confidence between receiver and United States Attorney's Office.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Receiver was appointed for company and company was granted protection under Companies' Creditors Arrangements Act — Company was charged in United States with five counts of mail fraud, two counts of wire fraud, and two counts relating to non-compete payments — President and other officers and directors of company were also charged — President of company entered into plea agreement in which he agreed to plead guilty to one count — Receiver negotiated plea agreement for company in which company would plead guilty to one count — Receiver brought motion for approval of its activities and for order directing receiver to enter into plea agreement and enter guilty plea — Motion granted — Receiver had made reasonable and sufficient effort to determine best course of action, had considered interests of all parties, and had followed fair and proper process in arriving at plea agreement — Plea agreement was prudent and commercially reasonable — Estate had limited assets and significant cost of defending at trial would have adverse impact on limited resources available in estate — Plea agreement significantly reduced fine that would be otherwise imposed upon conviction at trial — Risk of collateral or issue estoppel was modest and would be significantly greater in event of conviction at trial on all nine counts.

Cases considered by *Cumming J.*:

Anvil Range Mining Corp., Re (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. S.C.J. [Commercial List]) — referred to

Appley v. West (1987), 832 F.2d 1021 (U.S. C.A. 7th Cir.) — considered

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — considered

Betthel v. Black (2006), 2006 SKQB 92, 2006 CarswellSask 255 (Sask. Q.B.) — referred to

Black v. Hollinger International Inc. (2005), 872 A.2d 559 (U.S. Del. S.C.) — referred to

CC &L Dedicated Enterprise Fund (Trustee of) v. Fisherman (2001), 6 C.P.C. (5th) 281, 2001 CarswellOnt 514 (Ont. S.C.J.) — considered

Confectionately Yours Inc., Re (2001), 25 C.B.R. (4th) 24, 2001 CarswellOnt 1784 (Ont. S.C.J. [Commercial List]) — referred to

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Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 312 N.R. 195 (note), 41 C.B.R. (4th) 28, 181 O.A.C. 197 (note) (S.C.C.) — referred to

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — considered

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 CarswellAlta 557, 2004 ABQB 337 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 423, 2004 CarswellAlta 810 (Alta. Q.B.) — referred to

F. (K.) v. White (2001), 3 C.P.C. (5th) 189, 198 D.L.R. (4th) 541, 53 O.R. (3d) 391, 2001 CarswellOnt 634, 142 O.A.C. 116 (Ont. C.A.) — considered

Hollinger Inc. v. Ravelston Corp. (2006), 2006 CarswellOnt 7269 (Ont. S.C.J.) — referred to

Hollinger International Inc. v. Black (2004), 844 A.2d 1022 (U.S. Del. Ch.) — considered

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — referred to

Nathan v. Tenna Corp. (1977), 560 F.2d 761 (U.S. C.A. 7th Cir.) — considered

National Trust Co. v. Massey Combines Corp. (1988), 39 B.L.R. 245, 69 C.B.R. (N.S.) 171, 1988 CarswellOnt 157 (Ont. H.C.) — considered

Ostrander v. Niagara Helicopters Ltd. (1973), 1973 CarswellOnt 89, 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (Ont. H.C.) — considered

Ravelston Corp., Re (2005), 2005 CarswellOnt 1619 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2005), 2005 CarswellOnt 4907 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 45 B.C.L.R. 218, 1983 CarswellBC 147, [1983] 4 W.W.R. 762, 35 C.P.C. 146 (B.C. S.C.) — considered

Solosky v. Canada (1979), 1979 CarswellNat 4, (sub nom. *Solosky v. R.)* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 1979 CarswellNat 630 (S.C.C.) — considered

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Sovereign Bank v. Parsons (1912), 1912 CarswellOnt 770, [1913] A.C. 160, C.R. [1913] A.C. 259 at 293, 9 D.L.R. 476 (Ontario P.C.) — considered

Teacher's Retirement System of Louisiana v. Black (June 3, 2004), Doc. No. 04 C 834 (U.S. Dist. Ct. S.D. Ill.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — followed

Toronto Dominion Bank v. Fortin (1978), [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111, 1978 CarswellBC 273 (B.C. S.C.) — considered

U.S. v. Alburay (2005), 415 F.2d 782 (U.S. C.A. 7th Cir.) — referred to

U.S. v. Belk (2006), 435 F.3d 817 (U.S. C.A. 7th Cir.) — referred to

U.S. v. Stitman (2007), 472 F.3d 983 (U.S. C.A. 7th Cir.) — referred to

YBM Magnex International Inc., Re (April 14, 1999), Doc. Calgary 9801-16691 (Alta. Q.B.) — considered

YBM Magnex International Inc., Re (2000), 2000 CarswellAlta 1068, 9 B.L.R. (3d) 296, (sub nom. *YBM Magnex International Inc. (Receivership), Re)* 275 A.R. 352 (Alta. Q.B.) — considered

Statutes considered:

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

Generally — referred to

s. 47(1) — referred to

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

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 101 — referred to

Crimes and Criminal Procedure Code, 18 U.S.C.

Chapter 227, s. 3572(b) — referred to

Chapter 232, s. 3663A — referred to

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Chapter 232, s. 3664(h) — referred to

Evidence Act, R.S.O. 1990, c. E.23

s. 22.1 [en. 1995, c. 6, s. 6(3)] — referred to

Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.)

s. 9(1) — considered

s. 17(2) — referred to

Rules considered:

Federal Rules of Criminal Procedure, Fed. R. Crim. P.

R. 16(a)(1)(C) — referred to

MOTION by receiver for approval of plea agreement; CROSS-MOTION by shareholder for directions regarding procedure followed by receiver.

***Cumming J.*:**

The Plea Agreement Motion

1 The Receiver of The Ravelston Corporation Limited ("RCL"), RSM Richter Inc. ("Richter"), brings a motion for an order approving its Eighteenth Report dated January 5, 2007, approving the activities of the Receiver, and in particular, for an order directing the Receiver to:

(1) enter into a Plea Agreement (as attached to the Eighteenth Report) with the United States Attorney's Office (Northern District of Illinois) ("USAO"), and

(2) subject to the acceptance by the U.S. District Court of the guilty plea by RCL, as represented by the Receiver, voluntarily enter a plea of guilty to Count Two of the Third Superceding Indictment dated August 17, 2006 on behalf of RCL.

2 The Receiver asserts that the Plea Agreement is fair and reasonable and entry into the Plea Agreement accomplishes the primary objective of the Receiver, being "to extricate RCL on a timely basis from the morass of litigation to which it is a defendant." The motion raises several novel issues. (This motion is referred to as the "Plea Agreement Motion" or simply as the "Motion".)

3 Conrad Black Capital Corporation ("CBCC"), the majority shareholder of RCL, Conrad M. Black, Peter G. White, and Peter G. White Management Corporation ("PWMC") (a shareholder of RCL), oppose the Motion. (The opposing parties are collectively referred to as the "Black group".)

4 CBCC brought what in effect was a cross-motion for directions on January 15, 2007, challenging the process followed by the Receiver in making its Eighteenth Report and the adequacy of such Report. (This cross-motion is

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referred to as the "CBCC Cross-Motion for Directions".)

Background to the Receivership

5 RCL is a privately held corporation, with 98.5% of its equity owned by officers and directors of Hollinger Inc. ("Hollinger") and Hollinger International Inc. ("International") at the relevant times and 1.5% owned by the estate of a former Hollinger director. Approximately 65.1% of RCL is owned by CBCC, which in turn is controlled by Conrad M. Black, who became a member of the House of Lords of the United Kingdom in 2000, becoming Lord Black of Crossharbour. Lord Black was the Chief Executive Officer and Chairman of the Board of Directors of RCL, Hollinger and International at the material times. Lord Black resigned as an officer of RCL on April 19, 2005.

6 Mr. F. David Radler was the President of RCL until the Receiver was appointed April 20, 2005. Between 1998 and 2003 Mr. Radler was the President and Chief Operating Officer of Hollinger and International. Mr. Radler holds a 14.2% ownership interest in RCL through his holding company, F.C. Radler Ltd.

7 Mr. Peter G. White, then a director and Executive Vice-President of RCL, swore an affidavit dated April 19, 2005 in support of the application of RCL and its subsidiary, Ravelston Management Inc. ("RMI") for an order staying all proceedings in respect of RCL pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and appointing Richter as Receiver pursuant to s. 101 of the *Courts of Justice Act* R.S.O. 1990, c C.43 ("*CJA*") and s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), for the purpose of maintaining and maximizing value for all stakeholders. (These ongoing proceedings can be referred to as the "Canadian Insolvency Proceedings.")

8 Pursuant to an Order of Farley J. of this Court, dated April 20, 2005, Richter was appointed as receiver and manager and interim manager with respect to the property, assets and undertaking of RCL, and RMI. RCL and RMI were granted protection under the *CCAA*. See *Ravelston Corp., Re*, [2005] O.J. No. 1643 (Ont. S.C.J. [Commercial List]).

9 The primary business purpose of RCL is an investment holding company, with its principal asset being its direct or indirect interest in Hollinger, a Canadian corporation and reporting issuer with retractable common shares and exchangeable non-voting preference shares Series II listed on the Toronto Stock Exchange. As of March 5, 2005 RCL and RMI owned directly or indirectly some 78.3% of the common shares of Hollinger.

10 The most significant asset of Hollinger is its interest in International, a Delaware and public corporation traded on the New York Stock Exchange, which through its operating subsidiaries has owned and published newspapers around the world, including the Chicago Sun-Times in the United States, The Daily Telegraph in the United Kingdom and the National Post in Canada. (International has since been re-named "Sun-Times Media Group, Inc." in 2006 and is referred to herein as either "International" or "Sun-Times.")

11 As of April 1, 2005 Hollinger owned directly or indirectly some 17.4% of the equity and 66.8% of the voting interest in International. As of May 18, 2004, there were cease trade orders made in respect of both Hollinger and International. As such, RCL, deemed an insider, cannot trade its shares in Hollinger.

12 RCL and its subsidiary RMI provided management and advisory services for compensation to each of Hollinger and International and other related entities pursuant to agreements until about late 2003. The termination of these agreements is the subject of litigation.

13 There is extensive litigation involving all the entities referred to and the principal individuals behind the entities, as set forth in Mr. White's affidavit of April 19, 2005.

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14 Mr. White states in his April 19, 2005 affidavit that given the underlying value of Hollinger and International he believed the value of RCL exceeded the liabilities of the corporation. However, given the lawsuits faced by RCL, the absence of distributions from Hollinger, the non-payment of management fees and the inability of RCL to dispose of any shares of Hollinger, RCL and RMI were unable to pay amounts then owing to creditors as they became due. Hence, RCL and RMI were "facing severe financial difficulty" with its financial condition "eroding quickly." There was a need for the Receiver to be appointed to provide stability and to preserve the assets.

15 The receivership ultimately embraced RCL, RMI, and other subsidiary entities, those being Argus Corporation Limited ("Argus") and 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., and 509647 N.B. Inc. (collectively, the "N.B.Subs"). (All collectively being the "Companies").

16 As stated above, RCL, directly or indirectly through the Companies, owns about 78.3% of Hollinger, or some 27.4 million common shares. Hollinger has about 17.4% of the equity of International.

17 The United States Securities and Exchange Commission ("S.E.C.") commenced proceedings against Lord Black, Mr. Radler and Hollinger on November 15, 2004. Lord Black commenced a proceeding in Ontario (Court file 06-CL-6259) for contribution and indemnity in respect of certain ongoing proceedings (not including the S.E.C. action).

18 An Agreement was later made on November 13, 2006 to toll the limitation period in respect of Lord Black's claim for contribution and indemnity from RCL, RMI and Argus in respect of the S.E.C. action until the completion of the S.E.C. action.

Background to the Criminal Proceedings in the United States

19 On August 18, 2005 an indictment was returned in Chicago against RCL, Mr. Radler and Mark S. Kipnis (an officer of International) with each defendant charged with five counts of mail fraud and two counts of wire fraud.

20 Mr. Radler entered into a Plea Agreement on September 20, 2005 whereby he would plead guilty to Count One.

21 Mr. Radler has stated in his plea agreement that:

(i) He personally and on behalf of RCL participated in a scheme to divert non-compete payments from International to Hollinger, RCL and other individual defendants;

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors; and

(iii) It was not in International's interest to have monies diverted to Hollinger or RCL from International in respect of non-compete payments.

22 The defendants allegedly benefited from having non-compete payments diverted to Hollinger from International because RCL had a greater direct interest in Hollinger than in International.

23 The Receiver engaged U.S. counsel to represent and defend RCL. The Ninth Report of the Receiver dated September 15, 2005, reviews and reports upon these events.

24 The Receiver in its Tenth Report dated September 15, 2005, stated that the Receiver would make a thorough

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analysis after its U.S. criminal counsel obtained discovery of the evidence accumulated by the USAO. The Receiver expressed the view RCL should voluntarily accept service of the indictment and "that it is appropriate for RCL to enter a plea of not guilty...." An Order by Farley J. of this Court dated October 4, 2005, directed the Receiver to accept service of the Indictment and enter a plea of "not guilty". See *Ravelston Corp., Re*, [2005] O.J. No. 4266 (Ont. S.C.J. [Commercial List]). On November 10, 2005, the Order of Justice Farley directing the Receiver to attorn was upheld by the Court of Appeal: *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.). The plea of not guilty was entered on November 22, 2005.

25 On November 17, 2005, a First Superceding Indictment added Lord Black, John A. Boultbee and Peter Y. Atkinson as defendants. A Second Superceding Indictment was returned December 15, 2005. Messrs. Black, Boultbee, Atkinson and Kipnis have entered pleas of not guilty to the charges.

26 An 80 page Third Superceding Indictment was returned by the Grand Jury on August 17, 2006, pursuant to which RCL was added as a named defendant to Counts 8 and 9 in respect of the alleged diversion from International of non-compete payments paid by CanWest Global Communications Corp. ("CanWest") as part of the purchase of a 50% interest in the *National Post* and certain other newspaper related assets. (There are now seventeen Counts in the Third Superceding Indictment.)

27 The Receiver and its counsel entered into discussions with the USAO in April, 2006, in an attempt to negotiate a settlement of the criminal charges against RCL. On January 4, 2007, the USAO delivered a final version of a Plea Agreement relating to certain criminal charges to the Receiver's counsel.

28 The Plea Agreement is based upon a guilty plea by RCL to Count Two of the Third Superceding Indictment, dealing with a non-compete payment in the Forum Communications Inc. ("Forum") transaction.

29 On January 5, 2007, the Receiver served its notice of this Motion for an order approving RCL entering into the Plea Agreement and to change its plea from not guilty to guilty. The Receiver's Eighteenth Report sets forth the Receiver's position in support of the Motion.

30 On January 3, 2007, CBCC and Peter White Management Limited ("PWML") had served a notice of motion seeking directions with respect to the Receiver's obligation to prepare for the trial, given its not guilty plea. The Receiver had advance notice of this motion as of December 22, 2006. CBCC and PWML assert that the Receiver was obliged to not finalize the content of the Plea Agreement in the face of their outstanding motion.

31 On August 7, 2006, RCL had given notice to its co-defendants it would be withdrawing from the joint defence agreement (which the defendants had orally agreed to) for 60 days. RCL did not participate in the joint defence agreement thereafter.

32 Given this course of events, it would be apparent to the co-defendants that there was a real possibility that RCL might enter into a Plea Agreement. In my view, this is why CBCC and PWML gave notice to the U.S. District Court and to RCL on December 22, 2006 of the intent to bring a motion for directions in this Court. This motion became moot given the Receiver's Plea Agreement Motion, served January 5, 2007.

33 The trial of the defendants is scheduled to commence March 14, 2007, before Judge Amy J. St. Eve in the United States District Court, Northern District of Illinois, Eastern Division.

The CBCC Cross-Motion for Directions, Heard January 15, 2007

34 On January 9, 2007, in response to the Plea Agreement Motion at hand, CBCC provided the Receiver with an initial set of questions with respect to the Eighteenth Report. The Receiver provided written responses ("Receiver's

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Answers") on January 10, 2007. On January 11, 2007, CBCC provided the Receiver with an additional set of questions. The Receiver provided answers ("Additional Answers") the same day. CBCC asserted that the Receiver had not properly considered the interests of all stakeholders in the Ravelston estate.

35 As mentioned above, on January 15, 2007 CBCC brought what was in effect a cross-motion for directions in respect of the Receiver's pending Motion. This Cross-Motion for Directions was dismissed orally at the conclusion of the hearing. I undertook to give written reasons for my decision in respect of the Cross-Motion for Directions. My reasons follow.

Issues Arising from the CBCC Cross-Motion for Directions

36 There were three issues arising from the CBCC Cross-Motion for Directions.

(1) Was CBCC entitled to examine the Receiver on the information contained in the Eighteenth Report relating to the proposed Plea Agreement?

(2) Had the Receiver waived its right to claim solicitor-client privilege over communications regarding the Plea Agreement and issues related thereto by allegedly disclosing portions of such communications in the Eighteenth Report? and

(3) Should the Receiver be required to disclose the full contents of its communications with the USAO regarding the Plea Agreement including all relevant documentation?

Issue #1 Is an examination of the Receiver appropriate in the circumstances?

37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours Inc., Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), at para. 2, var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, (2003), [2002] S.C.C.A. No. 460 (S.C.C.); *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List])) at para. 5 ; *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) at para. 4; *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 (Alta. Q.B.)at para. 18; and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 (Alta. Q.B.)at paras. 17-22

38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List])) at para 8, Farley J. of this Court stated:

> [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* [*Re Confectionately Yours*] 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 ex-

amination.

[emphasis added.]

39 CBCC submits that the Receiver is not acting in an objective and neutral manner in dealing with CBCC's questions or the interests of its stakeholders.

40 In my view, the evidentiary record did not support the allegation that the Receiver was not acting in an objective and neutral manner. There was no good reason to depart from the norm that a court-appointed receiver is not subject to cross-examination on its reports.

Issue #2: Has there been a waiver of solicitor-client privilege on the part of the Receiver?

41 CBCC cites the reference by the Receiver in s. 4.1 of the Eighteenth Report that the Receiver worked closely with its counsel during May and June, 2006 "to formulate a position" relating to a proposed *nolo contendere* plea, taking into account certain factors. The USAO rejected RCL's offer to plead *nolo contendere*. Negotiations in respect of the Plea Agreement under present consideration were ultimately concluded January 5, 2007.

42 The Receiver has refused to provide access to CBCC to legal opinions underlying the Receiver's determining that the Plea Agreement should be executed. The Receiver claims that such information is subject to solicitor-client privilege.

43 Anyone considering a plea agreement in respect of a criminal charge is entitled to the confidential advice of the person's counsel, and solicitor-client privilege attaches to the communications between counsel and client. The principle that communications between a solicitor and his/her client are privileged is recognized as fundamental to the administration of justice. *Solosky v. Canada*, [1980] 1 S.C.R. 821 (S.C.C.).

44 There can be a waiver of privilege where it is shown the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive such privilege. There is no evidence in the situation at hand that the Receiver voluntarily intended to waive privilege.

45 There can also be a waiver of privilege even in the absence of an intention to waive, "where fairness and consistency so require". *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C. S.C.)) at paras. 6-10.

46 CBCC asserts in its factum that the legal advice received by the Receiver "is critical" to this Court's assessment of the Plea Agreement

> and understanding of whether the Receiver independently and fairly assessed the risks associated with attempting to defend the U.S. Criminal Proceeding, the likelihood of conviction, the enforceability of a monetary penalty and its ranking in the estate, the impact of any restitution orders on distribution, the costs of maintaining a defence and the impact of the Plea Agreement on all of Ravelston's stakeholders.

47 Legal advice received in respect of a proposed plea agreement is by reason of its subject matter "critical" advice. The evidentiary record does not establish any arguable unfairness such that it can be asserted that privilege should fall away. In my view, there is not any aspect of "fairness" in the situation at hand that comes into play such that the normative sanctity to solicitor-client privilege is to be overridden.

Issue #3 Must the Receiver Disclose the Full Contents of Its Communications with the USAO Regarding the

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Plea Agreement Including All Relevant Documents?

48 CBCC requested an order that the Receiver provide copies of all documents, analyses and reports, including legal opinions and advice, with respect to the negotiation with the USAO in respect of the Plea Agreement.

49 To discharge its duties in the administration of an estate, a receiver necessarily enters into confidential discussions to resolve issues or disputes with specific stakeholders. A receiver must have the ability to conduct meaningful and candid negotiations in confidence with a view to achieving a resolution in the best interests of the estate. RCL itself could conduct such negotiations in confidence prior to the appointment of the Receiver. The Receiver steps into the shoes of RCL for administrative purposes of the RCL estate.

50 To require a receiver to disclose all the details of its discussions with a stakeholder, regardless of whether those details are relevant to the outcome of the discussions, would severely impede a receiver's ability to embark upon any negotiations. The USAO provided the Receiver and its counsel with witness statements. The confidentiality in respect of these statements is protected pursuant to a Protective Order granted by Judge St. Eve in the U.S. District Court. The record establishes the USAO entered into discussions April 10, 2006 with the Receiver on a confidential basis.

51 The USAO and Receiver understood the Receiver would be obliged, if the negotiations were successful, to provide to this Court the information necessary to enable the Court to reach an informed conclusion as to whether to approve the Plea Agreement. The implicit agreement as to confidentiality of the negotiations limits the disclosure needed to meet that standard.

52 In my view, the negotiation of the Plea Agreement was properly a matter dealt with in confidence between the Receiver and the USAO. Notice to the Receiver on December 22, 2006, of the intended CBCC/PWMC motion (served January 3, 2007), referred to above, was irrelevant to these negotiations.

The Motion for a "Payments Report"

53 The Receiver brought a motion (which can be referred to as the "Payments Report Motion") on January 12, 2007 seeking approval of its Nineteenth Report dated January 9, 2007 and, in particular, an order authorizing the Receiver to complete a report and analysis to be filed with this Court setting out the payments made by RCL and its subsidiaries between January, 1998 and January, 2004 to Messrs. Black, Radler, Boultbee and Atkinson.

54 At the return of the motion, the Receiver advised it has been engaged in this analysis as a necessary requirement in the ordinary administration of the estate. The Receiver advised it expected the analysis to be completed in some three or four weeks.

55 The Black group appeared at the return of the motion and gave notice that they were opposed to public dissemination of the analysis and report.

56 The so-called "Payments Report Motion" has been adjourned to February 12, 2007.

The Plea Agreement Motion

57 In formulating its position relating to a proposed *nolo contendere* plea, the Receiver states in its Eighteenth Report it took into account the following factors:

(a) The Receiver had no first-hand knowledge of RCL's activities which predated its appointment in April 2005;

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(b) The Receiver's knowledge about the events underlying the criminal and civil claims was limited to what it was able to learn by reviewing the documents it had received to date;

(c) RCL's liabilities likely greatly exceeded the realizable value of its assets. The Receiver sought to extricate RCL from the U.S. Criminal Proceedings on a cost-effective basis provided that in doing so, the interests of RCL's estate were well served;

(d) As an indicted corporation, the Receiver understood that RCL's guilt at trial would be based, in large part, on the actions of its officers and other agents;

(e) The directors and officers of Hollinger, Sun-Times and RCL were overlapping, and the relationship amongst these entities was complicated (i.e. the same individuals alleged in the Second Superseding Indictment as "RCL's Agents" were also agents of Sun-Times and of Hollinger);

(f) The Receiver determined that notwithstanding that RCL had not yet been charged in respect of the CanWest non-compete payments, it would likely be charged with those counts if it did not pursue a plea arrangement. Furthermore, the Receiver was concerned that proceeding to trial would increase the quantum of the fine sought by the USAO if RCL was ultimately unsuccessful at trial;

(g) The Receiver was mindful that the manner in which it resolved the U.S. Criminal Proceedings should not adversely impact on its ability to defend the civil proceedings to which RCL was named as a defendant; and

(h) The uncertain status of any U.S. fine or restitution order in the Canadian Insolvency Proceedings (as defined below). It was important the Receiver establish that any fine or restitution order have no greater status (if any) in the Canadian Insolvency Proceedings than that of ordinary unsecured claims.

58 The Receiver in its Eighteenth Report then lists factors taken into account in deciding to propose entering a guilty plea to Count Two of the Third Superceding Indictment, being:

(a) In accordance with general corporate law, a corporation acts only through its officers, directors, employees or agents;

(b) A corporation is generally responsible for the acts or omissions of its officers, directors, employees or agents;

(c) Radler, the former president of and significant shareholder of RCL, president of Sun-Times and a director of Hollinger, has stated in his plea agreement and is likely to testify at trial that:

(i) He personally and on behalf of RCL, participated in a scheme to divert non-compete payments from Sun-Times to Hollinger, RCL and other individual defendants;

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors;

(iii) It was not in Sun-Times' interest to have monies diverted to Hollinger or RCL from Sun-Times in respect of non-compete payments; and

(iv) The defendants benefited from having non-compete payments diverted to Hollinger from Sun-Times because RCL had a greater direct interest in Hollinger than in Sun-Times, and Radler's company, F.D. Radler Ltd., held a 14.2% ownership interest in RCL;

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(d) Radler's testimony, as the former president of RCL, is likely to bind RCL at trial;

(e) Hollinger, in its Cooperation Agreement (the "Hollinger Cooperation Agreement") with the USAO has acknowledged (i) the U.S. Government has developed evidence during its investigation that Hollinger is criminally liable because one or more of Hollinger's former officers, directors or employees violated U.S. Federal criminal law with the intent, in part, to benefit Hollinger with the fraudulent diversion from Sun-Times to Hollinger of approximately US$16.55 million; (ii) that one or more of Hollinger's former officers, directors or employees acted illegally with respect to Hollinger's receipt of the said US$16.55 million in non-compete payments; and (iii) that it was inappropriate for Hollinger to receive those monies. The individuals whose acts are impugned were also officers or directors of RCL; and

(f) The USAO has a very high success rate in securing convictions.

59 The Receiver then states in its Eighteenth Report that it concludes there is "a strong rationale" to enter into the Plea Agreement, for the following reasons:

(a) The guilty plea of RCL's president, Radler, in conjunction with the factors set forth above;

(b) Prior to it's appointment in April, 2005, the Receiver had no first-hand knowledge of RCL's prior activities. Many of the events underlying the criminal and civil claims against RCL occurred as much as ten years ago. The Receiver is only able to discern what it knows about the events underlying the criminal and civil claims by reviewing documentation and witness statements made available to it.

(c) The RCL estate lacks liquidity — it is likely that the value of the valid claims against the RCL estate will significantly exceed the net realizable value of its assets. The Receiver is of the view that it should attempt to extricate RCL from any litigation on an economic basis provided that by doing so, RCL's interests are well served;

(d) The criminal litigation is complex; it will be costly to litigate. The Receiver estimates that the cost of preparing for and attending at trial could exceed US$3 million. As noted above, RCL's estate has limited financial resources;

(e) The implications to RCL of a guilty plea are strictly monetary. A guilty plea will only result in a fine and restitution order in favour of the U.S. government being levied against RCL. Pursuant to the Plea Agreement, the status of any such fine or restitution order in the Canadian Insolvency Proceedings will be determined in those proceedings and will have no higher priority (if any) than a general unsecured claim. The Plea Agreement eliminates the risk that the U.S. government may attempt to assert a property or similar claim ranking in priority to all other claims asserted against RCL;

(f) In practice, a receiver does not attest to matters that pre-date its appointment. The Receiver therefore considered the factors/evidence available to it that may put RCL at risk at trial. In this regard, the Receiver understood that RCL's guilt at trial would be based, in part, on the actions of its officers and other agents with the ability to bind RCL. Radler, RCL's president, pled guilty to one count of the Indictment. Hollinger also acknowledged the wrongdoings of certain of its former officers and directors (some of whom were also officers and directors of RCL) in the Hollinger Cooperation Agreement;

(g) Should RCL be found guilty of one or more counts as charged under the Third Superseding Indictment, there is a significant likelihood that a higher fine would be levied. The Fine is significantly less than stipulated by the *Guidelines* if RCL were to be found guilty. (Furthermore, the Receiver is of the view that the amount that is likely to be distributed by RCL in respect of the Fine (if a provable claim) will be considerably less than the agreed amount of the Fine);

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(h) The Plea Agreement preserves the Receiver's right to challenge the validity of the Fine and/or any restitution order in the Canadian Insolvency Proceedings;

(i) Even if the restitution order results in a valid claim against the RCL estate, any monies paid to Sun-Times from the RCL estate in respect of the litigation detailed in Section 5.1(e)(v) of the Plea Agreement will be offset dollar-for-dollar against the amounts payable under the restitution order;

(j) The Plea Agreement preserves the Receiver's right to advance arguments at sentencing as to RCL's responsibility for any damages, including the argument that in determining the amount attributable to RCL, the damage caused by other parties and individuals must be considered, as well as the amount paid by those parties and individuals (i.e. at the present time it appears that the total amount paid in respect of criminal restitution cannot exceed US$83,950,000, of which US$32.8 million has already been paid);

(k) The Receiver is of the view that the civil proceedings in both the U.S. and Canada are the preferred forum in which to resolve the competing claims made against RCL, its affiliates and subsidiary companies, rather than the U.S. Criminal Proceedings. The Receiver determined that participating in the U.S. Criminal Proceedings would not be helpful, but might be detrimental, to the position of RCL in its civil proceedings. An unfavourable outcome in the U.S. Criminal Proceedings would adversely affect RCL's ability to defend itself in the civil proceedings; a favourable outcome would still require RCL to litigate the civil proceedings;

(l) By pleading guilty to the Forum transaction, which involved the least of the non-compete payments received by Hollinger, the Receiver structured the Plea Agreement in such a manner as to minimize any adverse ramifications that a guilty plea may have to the interests of RCL, including its interests as a defendant to the civil proceedings; and

(m) In the Receiver's view, the Plea Agreement incorporates many of the provisions and concepts of the *nolo* [*contendere*] plea (including the requirement to have the status of any fine and restitution order determined in the Canadian Insolvency Proceedings).

The role of the court-appointed Receiver

60 A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Sovereign Bank v. Parsons*, [1913] A.C. 160 (Ontario P.C.) at 167.

61 When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *Toronto Dominion Bank v. Fortin* (1978), 85 D.L.R. (3d) 111 (B.C. S.C.) at 113. The essence of a receiver's power is to settle liabilities and liquidate assets.

62 It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (Ont. H.C.) [*Ostrander*].

63 A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander v. Niagara Helicopters Ltd.*, *supra* at 286.

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64 It is appropriate for a receiver to consider negative economic factors such as cost, time and risk. See generally *National Trust Co. v. Massey Combines Corp.* (1988), 69 C.B.R. (N.S.) 171 (Ont. H.C.) at 179 dealing with the test to be employed in considering whether to approve a sale of assets.

65 There apparently has only been one previous analogous situation in Canada to the one at hand, where a receiver sought court approval to plead guilty to a criminal charge in the U.S.

66 In *YBM Magnex International Inc., Re* (April 14, 1999), Doc. Calgary 9801-16691 (Alta. Q.B.) [*YBM*], Paperny J. of the Alberta Court of Queen's bench (as she then was) dealt with an unopposed motion by a receiver seeking court approval of a guilty plea agreement with the U.S. Attorney in respect of a one-count information for criminal conduct related to money-laundering and falsification of public financial statements. She stated at p.17:

> This court must determine whether the plea agreement being entered into is fair and reasonable, considering the interests of all the stakeholders to the estate.
>
> I am satisfied that the receiver independently and fairly assessed the risks associated with attempting to defend these charges, the likelihood of conviction, the likelihood of pre-trial forfeiture, the size of the fine, the ranking in the estate, the impact of competing restitution orders on distribution and the costs of maintaining a defence, successful or not. I accept his risk assessment.
>
> In my view, this agreement is prudent and commercial reasonable in the circumstances, as well as being abundantly fair to all stakeholders. [emphasis added]

67 A court-appointed receiver under the *BIA* or *CJA*, as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. *YBM Magnex International Inc., Re*, [2000] A.J. No. 1118 (Alta. Q.B.) at paras. 34, 87; and *Confederation Treasury Services Ltd., Re*, [1995] O.J. No. 3993 (Ont. Bktcy.), at para. 8, (citing Morawetz, *Bankruptcy and Insolvency Law of Canada*, (3rd ed. 1995) at 1-61/2).

68 In *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.) at para. 40 Doherty, J.A. stated:

> Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision in within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

69 In *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 5-6 Galligan J.A. made general observations as to how a receiver is to make business decisions in the administration and management of an estate. He emphasized that the court should be reluctant to second-guess the considered business decisions made by a receiver. As well, the conduct of the receiver is to be reviewed in the light of the specific mandate given to the receiver by the

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court. The duties of a receiver are to consider the interests of all parties or stakeholders. The court is to consider whether there was unfairness in the process leading to the receiver's recommendation to the court and whether the receiver acted reasonably and prudently in all the circumstances.

The risks in a guilty plea vs. the risks in pleading not guilty and proceeding to trial

70 There are two options for the Receiver in respect of the criminal charges facing RCL: plead guilty or continue a plea of not guilty and defend at trial.

71 The Receiver is faced with an imminent criminal trial. The Receiver must decide what is in the best interests of the estate of RCL in these unfortunate circumstances. This decision must be made, and be seen to be made, within the bounds of reasonableness. The Receiver must balance the interests of all the stakeholders in exercising its business judgment and in making its recommendation.

72 In his Endorsement dated October 4, 2005 (reported as *Ravelston Corp., Re*, [2005] O.J. No. 4266 (Ont. S.C.J. [Commercial List])) dealing with the Receiver's request for approval to voluntarily appear and enter a plea of not guilty on behalf of RCL to the Indictment returned August 18, 2005, Farley J. stated at para. 5:

> However, the Receiver also has to be mindful that a fundamental reason for its appointment was to extricate Ravelston from the morass of litigation in which it was involved (including litigation with International and [Hollinger] on the other side). The US Criminal Proceedings are not something as to which the Receiver was instrumental; as I understand it, the complaints involved there predate the Receiver's involvement. Acting responsibly, the Receiver must zealously safeguard the interests of legitimate stakeholders (including the DOJ and those for whom the DOJ is responsible for protecting); the Receiver thus has an umbrella responsibility and it would be helpful for the DOJ to recognize that responsibility of the Receiver. If the Receiver concludes that it would be wasteful for Ravelston's estate to engage in protracted, costly litigation, then it would be undesirable to adopt a "scorched earth" policy or anything approaching same. That approach would as well be unlikely to be fruitful in seeing if a resolution of the US Criminal Proceedings (including any further potential exposure) vis-à-vis Ravelston could be advantageously discussed with the DOJ.

73 Counsel for CBCC submits that the question that must be answered by the Receiver is — What are the comparative prejudices to the competing stakeholders in RCL by a changed plea and what is the appropriate balance in weighing such comparative prejudices? The Black group asserts that the Receiver has made erroneous assumptions in calculating possible prejudice, has followed an imperfect process lacking in due diligence, and that the Receiver ultimately brings its Motion to change the plea upon a false rationale.

74 The Receiver emphasizes that it seeks as much avoidance of risk and uncertainty as possible. The Receiver says that there is an issue of significant cost in RCL defending at trial. The Receiver argues that the liabilities of RCL exceed the realizable value of its assets. There are also three possible adverse consequences to RCL being convicted in the criminal proceedings: a fine, a restitution order, and collateral estoppel in respect of the civil proceedings. (I leave aside the possibility of forfeiture of assets as forfeiture does not seem to be sought by the USAO against RCL. RCL apparently has only some jewelry worth about US $100,000 situated in the United States and the USAO has reportedly advised the Receiver it is not interested in asserting any claim against the jewelry. There are Forfeiture Allegations against the individual defendants included within the Indictment.)

75 The three possible adverse consequences must be weighed in the plea consideration. These consequences are relevant to the determination by the Receiver of the balancing of interests as between the stakeholders in RCL and in the Receiver adopting a position in respect of the plea of RCL.

76 The Receiver's position is that after consultation with its counsel and after careful review of all the available

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evidence against RCL that there is sufficient evidence to justify a plea of guilty on behalf of RCL. The Receiver says that given such evidence, in conjunction with the economics and terms of the Plea Agreement, coupled with the precarious financial position of RCL, the Plea Agreement is in the best interests of RCL's stakeholders.

77 All defendants other than Mr. Radler have entered pleas of not guilty. None of the allegations have yet been proven in court.

78 With respect to a former director or officer innocent of any criminal wrongdoing, the stigma or association with the criminal proceedings exists at present and in all events. The stigma may be worsened by a corporate plea of guilty by RCL but, if so, it is only incremental and not such as to displace the greater interest of the estate. In any event, the failure of this Court to approve the plea would, of course, not mean the U. S. criminal proceedings would disappear.

79 Assuming the U.S. District Court is prepared to accept a guilty plea from RCL, based upon evidence that establishes the constituent elements of the offence, and certain former directors and officers are also criminal defendants, the plea of the co-accused has no juridical impact upon the position of another defendant. Any one defendant has no say (*qua* a defendant) on whether a co-defendant can plead guilty. There is no prejudice of legal interest in the criminal proceedings potentially affected.

80 Lord Black and Mr. White as shareholders of RCL, and as unsecured creditor claimants of RCL, have an economic interest in the estate of RCL. It is their economic interests as stakeholders in RCL that must be considered by the Receiver in determining whether to enter into the Plea Agreement.

81 As stated above, Mr. Radler entered into a Plea Agreement with the USAO on September 20, 2005, wherein he agreed to enter a voluntary plea of guilty to Count One of the Indictment. Mr. Radler indirectly has an equity interest in both Hollinger and International through a 14.2% ownership in RCL through a holding company, FDR Ltd. Mr. Radler was President of RCL and President and Chief Operating Officer of Hollinger and International at the material times.

82 It is alleged in the Indictment that RCL and its agents fraudulently inserted themselves and Hollinger as recipients of non-compete fees from the sale of newspaper businesses by International that should have been paid exclusively to International.

83 The issue of guilt of RCL at trial is dependent in large part upon the actions of its officers and other agents. There is an overlapping of the directors and officers of RCL, Hollinger and International. The individuals alleged to be wrongdoers in the Indictment were agents of all three entities (other than Mr. Kipnis who was an officer of International and not of RCL).

84 A corporation can have criminal liability even though it is an artificial, juristic person. RCL is responsible for an act committed by an agent of RCL within the scope of his employment. Even if a jury finds that an act of an agent was not committed within the scope of his employment, RCL may be responsible because RCL later approved of the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act. A corporation is legally responsible for any act or omission approved by its agents.

85 Ravelston is a named defendant in Counts One through Nine. The Plea Agreement provides that RCL would plead guilty to Count Two, dealing with a single transaction, being the Forum transaction.

86 RCL acknowledges in the Plea Agreement that to its knowledge Forum had not requested that Hollinger be included as a non-compete covenanter in the sale to Forum of community newspaper assets by International for some

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U.S.$14 million. Hollinger received US $100,000 as the result of the insertion of it as a non-compete covenanter entitled to 25% of the total amount payable (US $400,000) for the non-compete covenants. The Plea Agreement states that RCL breached its fiduciary duty to International to refrain from acting to benefit itself or anyone else at International's expense and that it participated in a scheme to defraud International of money to which International was entitled under the Forum transaction. The Receiver is of the opinion, having examined the witness statements and documentation that Mr. Radler's testimony at trial, as the former President of RCL, is likely to bind RCL at trial.

87 The Black group claims the Receiver has not done due diligence before entering into the Plea Agreement. The Receiver says in fact that it has had significant pre-criminal trial disclosure, being that to which all defendants are entitled. The Receiver says it and its counsel have reviewed the sworn witness statement of Mr. Radler dated August 18, 2005 as provided to the Grand Jury. The Receiver says it has reviewed statements Mr. Radler has made to the Federal Bureau of Investigation and other US law enforcement agencies, and has reviewed the witness statements of each of the co-defendants, or agents of RCL, provided to the Special Committee of International and to the USAO.

88 Indeed, as a corporate defendant the Receiver says it has been entitled to even greater disclosure than that afforded to the individual defendants, by reason of s. 16 (a) (i) (C) of the U.S. Federal Rules of Criminal Procedure which has resulted in disclosure of the witness statements of the directors, officers, employees or agents of RCL. This disclosure was made under a Protective Order made by Judge St. Eve on January 6, 2006.

89 The Receiver says that it did not approach the other defendants because the Receiver was of the view that it had a duty to make certain public disclosures such that the individual defendants would have declined any attempt to be interviewed. However, as the Black group points out, a Receiver may be able to exert a protective "common interest privilege" in certain situations in respect of disclosures. *CC & Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 637 (Ont. S.C.J.).

90 In my view, although common interest privilege may perhaps have been available to meet the Receiver's concerns in talking to the defendants in the context of the Receiver's intent to possibly change RCL's plea, this is not fatal to the Receiver's Motion. The Receiver says it had ample disclosure as to the USAO's case against RCL such that the Receiver formed the view that there was a significant risk of conviction of RCL.

91 The Receiver has determined, with the advice of its U.S. criminal counsel, based upon the facts known to them, that there is a "substantial risk" that RCL would be found guilty at trial of one or more of the counts charged under the Third Superceding Indictment, based in part upon the guilty plea of Mr. Radler, the President of RCL over the relevant time period.

92 It is noted that in *Hollinger International Inc. v. Black*, 844 A.2d 1022 (U.S. Del. Ch. 2004) at 11-12, 15-16, and 46-47, Vice Chancellor Strine of the Court of Chancery of Delaware considered a November, 2003 written agreement, signed by Lord Black, which constituted a "Restructuring Proposal" for International. The agreement included a statement that the non-compete payments "were not properly authorized on behalf" of International. Vice Chancellor Strine examined the findings of International's Special Committee in respect of the non-compete payments received by Messrs. Black, Radler, Atkinson and Boultbee. He concluded that the evidence did not support Lord Black's claim in the case before him that the non-compete payments were properly approved by International's independent directors. The Vice Chancellor found that the best evidence in the record suggested that the Restructuring Proposal was accurate in saying that there was not proper authorization for the non-compete payments.

The factor of a fine

93 RCL agrees to a fine of US $7 million through paragraph 12 of the Plea Agreement. The contemplated fine takes into account the United States *Sentencing Guidelines ("Guidelines")* which considers the relevant conduct of a defendant in respect of all related offences or possible charges beyond the count to which the defendant has been

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convicted. As such, the amount of pecuniary gain which RCL is alleged to have derived looks to all the non-compete payments (admitted to be US$83,950.000) in which RCL allegedly participated and not simply the relatively small non-compete payment received in respect of the Forum transaction.

94 The USAO gives the Receiver a two level reduction in the offence level because of the cooperation of the Receiver (Paragraph 6(d) of the Plea Agreement). Applying the sentencing minimum and maximum multipliers, the fine range would be US $67,160,000 to US $134,320,000 if RCL was convicted at trial, given that US $83,950,000 is the total pecuniary amount involved in all transactions underlying the offences.

95 The Receiver says that the US $7 million fine is some 90% less than the low end of the range for fines seen under the *Guidelines* for a total pecuniary loss of US $83,950,000. While advisory rather than directory, the *Guidelines* are to be consulted and considered together with the relevant statutory sentencing factors set forth in 18 U.S.C. s. 3553(a), when sentencing in Illinois. *U.S. v. Stitman*[472 F.3d 983 (U.S. C.A. 7th Cir. 2007)] 2007 WL 60421; *United States v. Alburay*, 415 F.2d 782 (U.S. C.A. 7th Cir. 2005). The *Guidelines* fine range is expressly referred to in paragraph 6(f) of the Plea Agreement.

96 In my view, the Receiver is reasonable in contemplating the possibility of a fine, in the event of conviction, that is significantly higher than the US $7 million agreed upon in the Plea Agreement.

97 The *Mutual Legal Assistance in Criminal Matters Act*, S.C. 1988, c. 37 ("*MLACMA*") provides in s. 9(1) that when the Minister of Justice approves the enforcement of the payment of a fine imposed in respect of an offence by a court of criminal jurisdiction in the United States, the fine can be enforced in Canada.

98 The fine and any restitution order must ultimately be dealt with in the Canadian insolvency proceedings. The USAO may amend the claim already filed with the Receiver to reflect the fine and any restitution order. This Court would ultimately have to determine whether a claim for either or both the fine and restitution order constitute valid claims in the Canadian insolvency proceedings. The Receiver retains the right to argue that they do not give rise to a valid claim.

The Assets and Liabilities of RCL

99 The Receiver in its Eighteenth Report makes the somewhat cryptic statement that in 2006 "RCL's liabilities likely greatly exceeded the realizable value of its assets." The Receiver seeks to extricate RCL from the U.S. criminal proceeding on a cost-effective basis. At the conclusion of the hearing on the Cross-Motion for Directions on January 15, 2007, this Court suggested that a more detailed financial analysis of RCL would be appropriate for the return of the Plea Agreement Motion.

100 This resulted in a Supplement to the Eighteenth Report. In the Supplement's Appendix "A", the "Analysis of Estimated Funds Available for Distribution", the estimated range is from a negative of $27 million to a positive of $10 million after priority payments for ongoing restructuring proceedings costs (some $6-10 million), payments to the Argus preference shareholders (some $23-$24 million), payment of priority claims of the tax authorities (some $4.256 million) and payment of secured claims of Hollinger/Domgroup and payment of the Pension Administrator Claim (some $29 million-$66 million), before addressing the estimated unsecured and filed contingent claims of some $1.037 billion.

101 This Analysis suggests it is extremely unlikely that there will be any surplus available for shareholders in any and all events. However, the Black group submits that the Receiver's estimate of the present value of RCL lacks meaningful analysis.

102 The major asset of RCL is the value of its shares in Hollinger (and indirectly the value of Hollinger's shares in

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International). Taking the January 16, 2006 market value of Hollinger's thinly traded shares, the Receiver gives an estimated value to Hollinger's holding in International as being only $31 million. CBCC submits that with an acquittal of the defendants in the criminal proceedings the value of the shares would rise significantly. CBCC refers to the 2005 purchase by Catalyst Fund General Partner I ("Catalyst") of a sizeable bloc of some 883,000 common shares for over $7.00 per share (well above the listed value of $1.15 per share on January 16, 2007).

103 In Appendix "A" to its Third Supplemental Record the Receiver calculates the required realization per Hollinger share to fund claims *prior* to a consideration of contingent claims to be $7.12 per share. After a discounted estimate for the contingent claims, the Receiver estimates a realization of $8.95 to $12.60 per share in Hollinger would be required to settle all claims before any surplus would be available for shareholders.

104 Thus, the Receiver's view is that there cannot realistically be a recovery of share value such as to result in equity for RCL's shareholders. However, the Black group says that if the Receiver changes its plea to a guilty plea to Count Two, that the shareholders of RCL will lose any chance at all for a recovery of their equity notwithstanding an acquittal in the criminal proceedings.

105 If there is a conviction of all defendants in the criminal proceedings then it seems certain that with fines and restitution orders, coupled with possible civil action awards, that the individual defendants would lose their equity in RCL and RCL would lose its equity in Hollinger.

106 However, if there is an acquittal then the Black group says there is a realistic chance of regaining equity on their part through a rise in value of the shares and restructuring under their leadership. They say that a change in plea by the Receiver dooms this possibility while in reality gaining nothing or relatively little for the Receiver. Hence, they argue, in balancing the economic interests of the various stakeholders, the balance should favour the Black group in not approving the change in plea.

The factor of costs in going to trial

107 The Receiver submits that there would be an estimated outlay of $3 million in legal fees to defend the criminal proceeding. As well, the Receiver points out that the legal fees would be a priority charge against the assets of the estate. The liquid and near-liquid assets of the estate are less than $7 million.

108 The estimate of legal fees for RCL to retain counsel and mount a proper defence in the criminal proceedings seems modest at $3 million, given the anticipated length (reportedly at least three months) and complexity of the trial.

109 The Black group says that RCL could have a relatively cost-free defence through an inactive, "coat-tail" defence following that of the other defendants. The Black group says that there are not truly diverging interests as between the defendants. The Black group says that there is an identical interest to the defence of all defendants in their central position that Mr. Radler is being untruthful in his expected evidence and that, accordingly, all defendants are to be acquitted.

110 The Receiver says that there is some divergency in the defendants' defences evidenced by Atkinson, Boultbee and Kipnis having filed severance motions. However, these motions were dismissed by Judge St. Eve on January 22, 2007 on the basis that the defendants had failed to demonstrate that their claimed mutually antagonistic defences would prejudice them in a joint trial.

111 In my view, the Receiver is reasonable in being of the opinion that a so-called coat-tail defence would be inappropriate and inadequate and hence, inadvisable. RCL's interests and fate are not necessarily tied to that of any one or more of the other defendants and their positions. RCL should properly have separate counsel prepared and present in all events to independently advise the Receiver and to ensure that RCL's interests are protected at all times at trial.

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This is particularly necessary as a divergency of interests as between defendants is seen to be a distinct possibility by the Receiver and RCL's counsel.

The factor of restitution

112 RCL agrees by paragraph 6(f) of the Plea Agreement that the total pecuniary loss involved in the transactions underlying all the offences set forth in the Third Superceding Indictment pertaining to the alleged diverted non-compete payments is US$83,950,000. Paragraph 9 states that RCL understands that the offence to which it pleads guilty carries "any restitution order ordered by the Court." U.S. Code s. 3663A requires that restitution for the loss is required in respect of an offence against property. Paragraph 20 of the Plea Agreement sets forth the agreement as to the determination of restitution.

113 Paragraph 20 (a) of the Plea Agreement provides that the restitution order is to provide for restitution for the pecuniary loss attributable to the offense of conviction *and* the transactions underlying the offences charged in the Third Superceding Indictment. Thus, RCL is potentially liable for restitution of pecuniary loss up to about US $51,150,000 (ie. US$83,950,000 less US $32.8 million already repaid relating to non-compete payments). However, an apportionment of liability would be done to fairly determine RCL's actual contribution to the loss. If more than one convicted defendant contributed to the pecuniary loss, apportionment of liability is required pursuant to U.S. Code s. 3664(h). RCL reserves the right to make representations as to allocation. RCL's "economic circumstances" can also be taken into account in determining restitution.

114 Article XVII.2 of the *MLACMA* states that the two Governments shall assist each other, *inter alia*, in proceedings related to restitution to the victims of crime and the collection of fines.

115 United States Code s. 3572(b) provides that the imposition of a fine in sentencing is not to impair the ability to make restitution to a victim such as International. Section 8C.3 (a) of the *Guidelines* is to the same effect, saying that the court shall reduce the fine to the extent the imposition of the fine would impair the ability to make restitution. Sections 5E1.1 and 5E1.2 say that if a defendant is ordered to make restitution and to pay a fine, any money paid is first to be applied to satisfy the order of restitution. Thus, the Black group argues, if there is a conviction of the defendants, the quantum of the restitution order, even with an allocation, would overwhelm the possibility of a large fine being payable by RCL.

116 As stated above, in the event of the conviction of the individual defendants, the apportionment of liability and allocation of restitution would be made by the court as between the defendants. Indeed, with a conviction of all defendants, assuming enforceability in Canada of the restitution order, the defendants' indirectly held shares in RCL would be subject to seizure to satisfy the restitution requirement.

117 However, in the event of an acquittal of all defendants other than Mr. Radler, there is uncertainty as to how much of the US$ 83,950,000 RCL might be required to pay in restitution.

118 The Black group argues that the present Plea Agreement leaves the possibility that a large amount would be ordered payable by RCL as restitution upon the guilty plea, and potentially most of the restitution would be payable by RCL if the other defendants are acquitted.

119 The impact of paragraph 20(a) of the Plea Agreement upon RCL's liability to pay restitution is uncertain in the event of an acquittal of the individual defendants (other than Mr. Radler). The Receiver was apparently unable to obtain greater clarity, and hence greater certainty, in further discussions with the USAO during the course of the hearing of the Motion at hand. However, paragraph 20(a) states that restitution is for the pecuniary loss attributable to "the transactions underlying the offences charged in the Third Superceding Indictment *which* are *attributable to the defendant* [ie. RCL]" [emphasis added]. Thus, it would be arguable that in respect of non-compete payments made

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directly to an acquitted defendant, such loss could not be attributed to RCL.

120 There has already been restitution made by Hollinger and individual defendants (a total of US$32.8 million) in respect of non-compete payments relating to the sale of the U.S. community newspapers. Thus, RCL's potential exposure to a restitution requirement appears to be limited to the US$26.4 million allegedly paid directly to RCL by Can West as a non-compete payment (some US$26.4 million was also allegedly paid directly to the individual defendants) in connection with the purchase of a 50% interest in the *National Post* and several hundred Canadian newspapers for about US $2.1 billion.

121 However, any such restitution order following upon a guilty plea would probably have only limited impact upon RCL from a practical standpoint.

122 First, the Receiver reserves the right (by paragraph 20(c)(vi) of the Plea Agreement) to argue that any restitution order does not give rise to a valid claim by the U.S. Government in the Canadian insolvency proceedings.

123 Second, whether or not there are acquittals of the individual defendants in the criminal proceedings, there remains a significant risk of civil liability on the part of RCL in respect of the Illinois civil claims advanced by International for recovery of this $26.4 million received by RCL.

124 Paragraphs 20(e)(iii) and (iv) of the Plea Agreement provides that any amount to which International may become entitled to through its Illinois civil action is subject to an agreement of May 13, 2005 between the Receiver and International whereby such amount is to be accepted as a claim for distribution purposes in the Canadian Claims Procedure in the *CCAA* proceeding. If the US Government's claim based upon any restitution order is recognized by the Ontario Court as a valid claim in the Canadian insolvency proceedings, such restitution to International will then be off-set and reduced dollar-for-dollar by the amount of the claims finally proven through a resolution of the civil actions by International. This removes the possibility of double recovery by International.

125 Third, it is agreed (by paragraph 20(e)(vi) of the Plea Agreement) that any U.S. Government claim based upon a restitution order, if accepted as a valid claim in the Canadian insolvency proceedings, is simply an unsecured claim without any priority. The unfortunate reality is that there is a probable significant excess of liabilities to assets in the winding-up of RCL. If so, the *pro rata* claim of the U.S. Government would impact adversely upon other unsecured creditors in respect of any monies available for the unsecured creditors, but have no practical impact upon RCL itself.

The risks of collateral or issue estoppel in the civil proceedings

126 In the United States, the doctrine of collateral estoppel or issue preclusion may be applied in civil proceedings in respect of issues which have been previously determined on a criminal conviction through a guilty plea. *Appley v. West*, 832 F.2d 1021 (U.S. C.A. 7th Cir. 1987), at 1025 -6 (7th Cir.) [*Appley*]. A criminal conviction based upon a guilty plea within Illinois and the ambit of the 7th Circuit seems to conclusively establish for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he or she was convicted. *Nathan v. Tenna Corp.*, 560 F.2d 761 (U.S. C.A. 7th Cir. 1977).

127 In Canada, criminal convictions are admissible in subsequent civil proceedings. A criminal conviction ordinarily constitutes *prima facie* proof, "but in some cases, the person convicted may be precluded by the doctrine of abuse of process from contesting the underlying facts." *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.)) at para. 19 per Sharpe J.A.

128 The Plea Agreement proposes that RCL plead guilty to Count Two, which involved an alleged non-compete payment of $400,000 in the Forum transaction. It is alleged that $100,000 was wrongly diverted to Hollinger. The

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Receiver submits that collateral estoppel at most would apply only to the $100,000 in the Forum transaction.

129 The Receiver is faced with RCL being a defendant in the criminal proceedings. The Receiver is also faced with RCL being one defendant in a number of civil actions both in the U.S. and Canada, including: a class action, *Betthel v. Black* [2006 CarswellSask 255 (Sask. Q.B.)] in the Court of Queen's Bench Judicial Centre of Saskatoon, No. 1492 of 2004; a class action in Ontario, being *Steve Drover et al. v. Argus Corporation et al.* file no. 04-CV-028649; an Ontario action, *Hollinger Inc. v. Ravelston Corp.*[2006 CarswellOnt 7269 (Ont. S.C.J.)], file no. 06-CL-6261; an action in the U.S. District Court for the Northern District of Illinois, Eastern Division, *Hollinger International Inc. Hollinger Inc. et al*, No. 04C-0834; and a class action in the U.S. District Court for the Northern District of Illinois, *Teacher's Retirement System of Louisiana v. Black* (June 3, 2004), Doc. No. 04 C 834 (U.S. Dist. Ct. S.D. Ill. 2004), No. 0C-0834 (collectively, referred to as the "civil proceedings"). These civil proceedings raise several alleged causes of action beyond allegations simply related to the non-compete payments. However, they include in part alleged wrongdoing because of the non-compete payments, including those referred to in Counts One and Two.

130 The Black group says that the Receiver failed to properly evaluate the risk that a guilty plea to Count Two of the Third Superceding Indictment will prejudice RCL's position in subsequent civil proceedings. The Black group submits that there is a real risk that plaintiffs in the civil proceedings would seek to use a guilty plea to prevent RCL from relitigating the facts and issues underlying Count Two, pursuant to the U.S. doctrine of collateral estoppel and the Canadian doctrine of abuse of process.

131 The Black group also asserts that Hollinger and International support the Receiver's Plea Agreement Motion at hand because collateral estoppel would likely result in their civil actions being successful.

132 The Black group submits that a plea of guilty to Count Two, given its wording, is an admission as to facts beyond simply those relating to the Forum transaction. In Count Two the Grand Jury charges RCL as follows:

> The Grand Jury realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

133 Count Two then charges RCL with mail fraud "for the purpose of executing and attempting to execute the above — described scheme". The proof of the "scheme" is a precondition to a finding of guilt in respect of mail fraud. The "scheme" is that described in paras. 1 to 33 of Count One, set forth in the first 22 pages of the Third Superceding Indictment.

134 I turn then to a consideration of paras. 1-33 in Count One of the Third Superceding Indictment. Paragraph 1 sets forth as background the interests and inter-relationships of the defendants in respect of RCL, Hollinger and International. The accusation is made in paragraph 2 that from about January, 1999 to about May, 2001 at Chicago the defendants "intended to devise, and participated in a scheme to defraud International and International's public shareholders..." The alleged general "scheme" as to the diversion of non-compete payments is then described at length and in detail in paras. 3 to 33, dealing with a number of sales of community newspapers and other publications by International, totaling about US $678 million in sale proceeds to International.

135 The Black group argues that by pleading guilty to Count Two, RCL would admit to the facts constituting alleged fraud in respect of all the transactions set forth in Count One. The particular non-compete payments referred to in Count One allegedly diverted to the defendants include US$2 million (American Trucker), US$12 million (CNHI 1), US$1.2 million (Horizon), and US $100,000 (Forum).

136 The U.S. doctrine of collateral estoppel is similar to issue estoppel in Canada. It may preclude the relitigation of issues in a subsequent proceeding when: (1) the party against whom the doctrine is asserted was a party to the earlier

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proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical. Unlike issue estoppel in Canada, collateral estoppel does not require mutuality (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.) at 99 (*C.U.P.E., Local 79*)). Collateral estoppel may be applied in civil trials to issues decided in a prior criminal conviction: *Appley*, *supra* at 1025-6.

137 The Canadian doctrine of abuse of process provides courts with the discretion to prevent relitigation of issues decided in a previous proceeding. A previous criminal conviction is *prima facie* admissible in a civil proceeding under s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23. When determining whether or not the criminal conviction has preclusive effect in the civil proceeding, the Supreme Court in *C.U.P.E., Local 79* advises the courts to, "turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process". In that same case, the Supreme Court identified a non-exhaustive list of situations where relitigation enhances, rather than impeaches, the integrity of the judicial system: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; and (3) when fairness dictates that the original result should not be binding in the new context (e.g. where there was an inadequate incentive to defend a criminal prosecution): *C.U.P.E., Local 79*, *supra* at 106, 110.

138 As I have already outlined above, the Black group points out that Count Two incorporates by reference paras. 1-33 of Count One, which describe in detail the alleged scheme to defraud International of non-compete payments received from the sale of its U.S. community newspapers to various entities, including Forum. The Black group referred the Court to the decision in *U.S. v. Belk*, 435 F.3d 817 (U.S. C.A. 7th Cir. 2006), at 819 [*Belk*]. They submit that the *Belk* decision indicates that the crime to which the Receiver proposes to plead guilty is not limited to mail fraud in relation to the Forum transaction, but also includes the entire "scheme" to defraud International as set out in paras. 1-33 of Count One. In other words, by pleading guilty to Count Two, RCL would be admitting that it participated in a scheme to defraud International of non-compete payments for every transaction involving the sale of International's U.S. community newspapers. As mentioned above, according to the Black group, there is a real risk that plaintiffs would rely on the doctrines of collateral estoppel and abuse of process to prevent RCL from attempting to rebut these admissions in the pending civil proceedings in both the U.S. and Canada.

139 The Receiver asserts that the Plea Agreement reduces RCL's exposure to civil liability because the guilty plea to Count Two is restricted to mail fraud only in relation to the Forum Transaction.

140 By paragraph 5 of the Plea Agreement, RCL agrees to plead guilty "to the charge contained in Count Two". As stated above, Count Two necessarily incorporates by reference an admission to the facts of the alleged "scheme" set forth in Count One. However, paragraph 5 of the Plea Agreement goes on to say that "[I]n pleading guilty [RCL], by its Receiver, admits the following facts...." Paragraph 5 then goes on to provide some background but refers only to a "scheme" to defraud International of money to which its was entitled under the Forum transaction. Paragraph 5 goes on to describe how RCL used interstate mail to execute that scheme. The Plea Agreement does not mention any other sale of U.S. community newspapers to any other entity. Paragraph 5 concludes with the statement that "[t]he factual summary contained in this paragraph is provided for the sole purpose of establishing a factual basis for [RCL's] plea of guilty."

141 In addition, both the Receiver and Hollinger submit that even if the Black Group is correct in its analysis of the consequences of a guilty plea to Count Two, the risk of actual prejudice to RCL in the civil proceedings is minimal, for two reasons. First, RCL faces a number of civil suits regarding the U.S. $2.1 billion CanWest transaction (the alleged scheme to defraud International of non-compete payments from this transaction is described in Counts Eight and Nine of the Third Superceding Indictment). According to paragraph 25 of the Plea Agreement, all other Counts against RCL (ie. other than Count Two) will be dismissed, which preserves RCL's ability to defend the CanWest aspect of the civil proceedings without raising concerns of collateral estoppel and abuse of process.

142 Second, restitution has already been paid for the approximate U.S. $32.8 million in non-compete payments

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allegedly improperly taken from International in relation to the sale of the U.S. community newspapers (*Hollinger International Inc. v. Black*, 844 A.2d 1022 (U.S. Del. Ch. 2004). C.A. No. 183-N (May 19, 2004) (Transcript), aff'd 872 A.2d 559 (U.S. Del. S.C. 2005). (Reportedly, Hollinger has made restitution of US$16.5 million, Lord Black US$7.1 million. Mr. Radler, U.S.$7.1 million and Mr. Atkinson, US$2.2 million.) Thus, the only outstanding issues in this aspect of the civil proceedings relating to these non-compete payments are compensatory and punitive damages.

143 I note that neither party put forward evidence from a U.S. attorney regarding the likely impact of the proposed Plea Agreement on RCL's position in the U.S. civil proceedings. There is no way for this Court, as a Canadian court of law, to objectively evaluate the risk that the U.S. doctrine of collateral estoppel will prejudice RCL in the U.S. civil proceedings if it pleads guilty to Count Two. In addition, it is not obvious whether it would be an abuse of process for RCL to rebut the facts set out in Count Two in a Canadian civil proceeding, given the significant discretion afforded the trial judge to assess whether relitigation would be detrimental to the adjudicative process. Suffice it to say that collateral estoppel and abuse of process are live issues.

144 Nevertheless, I am satisfied that the Receiver acted reasonably. The Receiver has retained experienced civil counsel in both Canada and the U.S. In consultation with its counsel over a number of months, the Receiver has concluded that the risk of prejudicing its position in the civil proceedings by pleading guilty to Count Two is lower than the risk of prejudice RCL faces in the civil proceedings if it is convicted on all Counts it faces.

145 In my view, it was reasonable for the Receiver to evaluate and compare the risks associated with the "worst case scenarios" — i.e. the risk of prejudice to RCL's position in the civil proceedings by (i) entering the Plea Agreement or (ii) being convicted on all of Counts One to Nine.

146 If there were to be an acquittal then, of course, there is no risk of prejudice through a continuing plea of not guilty. However, the prospect of acquittal is not relevant to evaluating the risk to RCL's position in the civil proceedings. This is because the Receiver has reasonably concluded that there is a significant risk of RCL being convicted of all Counts against RCL in the Third Superceding Indictment.

147 Given the conclusion RCL faces a significant risk of conviction, the Receiver is left with an evaluation of the risks resulting from a guilty plea to Count Two under the Plea Agreement as compared with the risks arising from a continuing not guilty plea with an eventual conviction on all nine Counts it faces.

148 Were RCL convicted on all Counts, it would face the risk that collateral estoppel and abuse of process would preclude relitigation of the issues surrounding the sale of all the U.S. community newspapers *and the CanWest Transaction*. But if RCL enters into the Plea Agreement, there would be greater certainty for the estate because it would only face the much lesser risk that collateral estoppel and abuse of process would preclude, at most, relitigation of the issues surrounding the sale of the U.S. community newspapers.

Disposition

149 The major underlying premise to the Receiver's Motion to change its plea from not guilty and plead guilty to Count Two of the Third Superceding Indictment, is that the Receiver considers there is a significant risk of the conviction of RCL on all nine Counts it faces if it proceeds to a trial.

150 Having made that assessment, the Receiver entered into negotiations with the USAO with a view to determining whether the alternative of a change of plea was feasible and desirable. In doing so, the Receiver has acted with the realization that the RCL estate has limited assets and that the significant cost of defending at trial will have a very adverse impact upon the limited resources remaining available in the estate.

151 The Receiver submits that the Plea Agreement brings some greater certainty, inasmuch as the fine is fixed at

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US$7 million, the concern as to collateral estoppel arguably relates only to Count Two and a possible civil claim of US$100,000, and that an order of restitution would likely be less than that seen upon a conviction on all nine Counts.

152 The Plea Agreement achieved has reduced significantly the probable fine that would be otherwise imposed upon a conviction at trial. While there is certainly a risk of a significant restitution order upon sentencing through the Plea Agreement, the impact is lessened by other protective provisions. There is a risk as to a greater quantum of restitution being ordered if there is a conviction following upon a trial.

153 There is a concern of collateral or issue estoppel that may arise upon a plea of guilty to Count Two. However, this risk is modest in all the circumstances, and in any event, this risk would be significantly greater in the event of a conviction at trial upon all nine Counts faced by RCL.

154 In my view, the Receiver has made a reasonable and sufficient effort to determine the best course of action in all the circumstances, has considered the interests of all parties and has followed a fair and proper process in arriving at the Plea Agreement. The Receiver has assessed the risks of (1) the likelihood of conviction; (2) the size of the potential fine and ranking in the estate; (3) the impact of a competing restitution order on a receivership distribution and (4) the cost to the estate of maintaining a defence. I accept the Receiver's risk assessment. The Receiver has concluded that there is a greater probability of each of the risks coming to pass in the event the Receiver did not enter a guilty plea pursuant to the Plea Agreement. The Receiver's decision to enter into the Plea Agreement is well within the bounds of reasonableness. In my view, the Plea Agreement is prudent and commercially reasonable taking into account all the circumstances, as well as being fair to all stakeholders.

155 The Receiver has taken such reasonable steps as are possible in the circumstances to minimize any impact of a guilty plea by RCL upon former directors and officers. It has not named any former director or officer other than Mr. Radler and the fact of his Plea Agreement. Each of the individual defendants maintains all the defences and rights that he may have at present.

156 The Receiver has followed a fair and proper process in arriving at the Plea Agreement, determining upon a change of plea and in bringing forward the Motion at hand for approval. The interests of all stakeholders have been given due consideration. The Receiver has weighed carefully and fairly the pros and cons of entering into the Plea Agreement and in trying to balance responsibly the divergent interests of the various stakeholders. The Receiver, facing an extremely serious criminal trial, has fairly, objectively and responsibly negotiated the Plea Agreement and brought forward same for approval by this Court, all with a view to acting in the best interests of the estate.

157 For the reasons given, the Motion is granted. An Order will issue in accordance with these Reasons for Decision.

Motion granted; cross-motion dismissed.

FN* Affirmed *Ravelston Corp., Re* (2007), 2007 CarswellOnt 1115, 29 C.B.R. (5th) 45 (Ont. C.A.). A corrigendum issued by the court on February 12, 2007 has been incorporated herein.

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2007 CarswellOnt 1115, 29 C.B.R. (5th) 45, 85 O.R. (3d) 175

Ravelston Corp., Re

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

And In the Matter of a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc.

And In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Ontario Court of Appeal

D.H. Doherty, R.J. Sharpe, R.A. Blair JJ.A.

Heard: February 26, 2007
Judgment: March 1, 2007[FN*]
Docket: CA C46649, C46680, M34773

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Proceedings: affirming *Ravelston Corp., Re* (2007), 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]); additional reasons at *Ravelston Corp., Re* (2007), 2007 CarswellOnt 2126, 2007 ONCA 272 (Ont. C.A.)

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David Moore for Respondent, Catalyst Fund

No one for Respondent, Argus Corporation

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

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Respondent company was court-appointed receiver of R Ltd. — Receiver recommended that R Ltd. enter plea of guilty on charge of mail fraud in United States District Court — Receiver brought motion for approval — Motion judge gave detailed and well-considered reasons for finding that receiver's recommendation to enter plea agreement was "well within the bounds of reasonableness" and granted receiver's approval motion — Order permitting R Ltd. to plead guilty was appealed — Respondents brought motion to quash appeal on ground that leave was required pursuant to Bankruptcy and Insolvency Act or Companies Creditors Arrangement Act, and appellants brought cross-motion for leave to appeal if necessary — Appeal dismissed — Appellate court owes substantial deference to discretion of commercial court judge charged with responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere — There was no reason to interfere with decision of motion judge — Receiver and motion judge did not err by basing decision on assessment of risk of conviction — Risk of conviction was first factor to consider — Motion judge did not err by rejecting appellants' submission that cost of defence in criminal proceedings could have been avoided without pleading guilty by adopting "coat-tail" defence with other defendants — This suggestion ignored separate identity and interests of R Ltd. that both receiver and motion judge were required to consider — It was open to motion judge to conclude that plea agreement benefited R Ltd. by reducing its monetary exposure — Receiver's assessment that plea agreement significantly reduced R Ltd.'s risk of exposure to civil liability did not exceed bounds of reasonableness — Motion judge was open to accept receiver's assessment that guilty plea to one count and acquittal on all other counts under this plea agreement carried less risk of exposure to civil liability than conviction on all counts.

Cases considered:

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Statutes considered:

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

s. 193(e) — considered

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

s. 13 — referred to

APPEAL from judgment reported at *Ravelston Corp., Re* (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]), granting receiver's approval motion.

***Per curiam*:**

1 This appeal concerns the recommendation of the respondent, RSM Richter Inc., ("Richter") the court-appointed receiver of The Ravelston Corporation Limited ("Ravelston"), that, pursuant to a plea agreement it negotiated with the United States Attorney's Office, Ravelston enter a plea of guilty on a charge of mail fraud in a United States District Court. The motion judge gave detailed and well-considered reasons finding, at para. 154, that the receiver's recommendation to enter the plea agreement was "well within the bounds of reasonableness" and granted the receiver's approval motion. The appellants, Conrad Black and his holding company that formerly controlled Ravelston, Conrad Black Capital Corporation, and Peter G. White Management Ltd. And Peter White, a former director of Ravelston, seek to appeal the order permitting Ravelston to plead guilty.

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Motion to Quash

2 The respondents move to quash this appeal on the ground that leave is required pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 193(e), or the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13. The appellants brought a cross motion for leave to appeal if necessary. In the circumstances, without deciding the motion to quash, we heard argument on the question of leave and the merits and these reasons should not be read as deciding the question of whether the appellants are entitled to an appeal as of right.

Standard of Review

3 The motion judge applied the appropriate standard when considering Richter's recommendation: see *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)at para. 40: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision." It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere.

Merits

4 The appellants submit that the motion judge clearly erred by considering the risk of conviction and by failing to consider the possibility of the "acquittal contingency" in which all individual defendants are exonerated. The appellants further submit that the terms of the plea agreement fail to provide Ravelston with sufficient benefit to justify surrendering the possibility of an acquittal on all counts. For the following reasons we reject these submissions.

(a) Risk of conviction and possibility of acquittal

5 The submission that the receiver and the motion judge erred by basing their decision on an assessment of the risk of conviction is entirely without merit. As a matter of logic, professional responsibility and judgment, the risk of conviction was the first factor to consider. Nor do we agree with the suggestion that the receiver failed to take adequate steps to obtain the necessary information to assess the risk of conviction. The receiver was entitled to enter plea negotiations with the prosecutor and this almost inevitably interfered with the commonality of interest Ravelston had shared with the other defendants. As for the "acquittal contingency", the appellants put forth nothing but conjecture and their faith in their ability to destroy Radler's credibility on cross-examination to challenge the receiver's assessment that Ravelston faces a substantial risk of conviction. Without knowing the theory of the defence of the individual defendants, we cannot accept the submission that acquittal of the individual defendants would make Ravelston's acquittal "inevitable" in the face of the guilty plea and the evidence of Radler, its President and Chief Operating Officer.

(b) Benefit of the plea agreement

(i) Cost of defence

6 One of the principal benefits of the plea agreement is that Ravelston would avoid the costs of a defence in the criminal proceedings. We see no merit in the submission that the motion judge erred by rejecting the appellants' submission that the cost of a defence in the criminal proceedings could have been avoided without pleading guilty by adopting a "coat-tail" defence with the other defendants. This suggestion essentially ignores the separate identity and interests of Ravelston that both the receiver and the motion judge were required to consider.

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(ii) Fine and restitution order

7 It was clearly open to the motion judge to conclude that the plea agreement benefited Ravelston by essentially capping the fine and reducing its risk of exposure to a large restitution order, particularly in relation to the $26 million in potential liability arising out of the Can-West transaction. By pleading guilty to one count only and agreeing to the fine to be imposed, Ravelston substantially reduced its monetary exposure. With respect to the restitution order, while Ravelston remains legally exposed to a significant order, a guilty plea would potentially assist Ravelston when the sentencing judge exercises his or her discretion in fixing the quantum of the restitution order. The terms of the plea agreement explicitly preserve Ravelston's rights to argue that any fine and restitution order are not enforceable in Ontario.

(iii) Impact on civil proceedings

8 While there may be some ambiguity in the terms of the plea agreement as to what facts Ravelston admits, we cannot say that the receiver's assessment that it significantly reduced Ravelston's risk of exposure to civil liability exceeded the bounds of reasonableness. This argument must be considered in the light of the receiver's assessment that Ravelston faced a substantial risk of conviction on all counts. In that scenario, Ravelston's position in the outstanding civil proceedings would be severely prejudiced. Even on the least favourable interpretation of the plea agreement, the guilty plea could not provide the basis for issue estoppel with respect to the Can-West transaction. Moreover, the appellants provided no evidence as to foreign law to support their contention that, for the purposes of issue estoppel, the plea agreement would be read more broadly than suggested by the receiver. In our view, it was clearly open to the motion judge to accept the receiver's assessment that a guilty plea to one count and an acquittal on all other counts under this plea agreement carried less risk of exposure to civil liability that a conviction on all counts.

9 Assuming without deciding that the Richter was bound to consider White's personal exposure to liability as a director, the degree of his exposure is at most no more than that of Ravelston. We agree with the submission that the issue for the motion judge was whether it was better to plead guilty under *this* plea agreement or proceed to trial, not whether some better plea agreement could be imagined.

Conclusion

10 We see no reason to interfere with the thorough and balanced decision of the motion judge. Accordingly, assuming that leave to appeal is required, we would grant leave to appeal but dismiss the appeal. The parties are at liberty to make brief written submissions as to the costs of the appeal, the respondents to file their submissions within ten days of the release of these reasons, and the appellants to file theirs within ten days thereafter.

Appeal dismissed.

FN* A corrigendum issued by the court on March 5, 2007 has been incorporated herein.

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2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

Canadian Airlines Corp., Re

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

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

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

Alberta Court of Queen's Bench

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000[FN*]
Docket: Calgary 0001-05071

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

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2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

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Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Cases considered by *Paperny J.*:

Alabama, New Orleans, Texas & Pacific Junction Railway, Re (1890), [1891] 1 Ch. 213, 60 L.J. Ch. 221, [1886-90] All E.R. Rep. Ext. 1143, 64 L.T. 127, 7 T.L.R. 171, 2 Meg. 377 (Eng. C.A.) — referred to

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — referred to

Algoma Steel Corp. v. Royal Bank (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.) — referred to

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 22 O.T.C. 247 (Ont. Gen. Div.) — referred to

Cadillac Fairview Inc., Re (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]) — considered

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — referred to

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Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — referred to

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

Crabtree (Succession de) c. Barrette, 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, (sub nom. *Barrette v. Crabtree (Succession de))* 53 Q.A.C. 279, (sub nom. *Barrette v. Crabtree (Succession de))* 150 N.R. 272, (sub nom. *Barrette v. Crabtree Estate)* 101 D.L.R. (4th) 66, (sub nom. *Barrette v. Crabtree Estate)* [1993] 1 S.C.R. 1027 (S.C.C.) — referred to

Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 (B.C. S.C.) — referred to

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.) — referred to

Hochberger v. Rittenberg (1916), 54 S.C.R. 480, 36 D.L.R. 450 (S.C.C.) — referred to

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

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

Pente Investment Management Ltd. v. Schneider Corp. (1998), 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — referred to

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — referred to

Repap British Columbia Inc., Re (1998), 1 C.B.R. (4th) 49, 50 B.C.L.R. (3d) 133 (B.C. S.C.) — considered

Royal Oak Mines Inc., Re (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) — considered

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

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

Savage v. Amoco Acquisition Co. (1988), 60 Alta. L.R. (2d) lv, 89 A.R. 80n, 70 C.B.R. (N.S.) xxxii, 89 N.R. 398n, 40 B.L.R. xxxii (S.C.C.) — considered

SkyDome Corp., Re (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List]) — referred to

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

T. Eaton Co., Re (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — considered

Wandlyn Inns Ltd., Re (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) — referred to

Statutes considered:

Aeronautics Act, R.S.C. 1985, c. A-2

Generally — referred to

Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.)

Generally — referred to

Business Corporations Act, S.A. 1981, c. B-15

Generally — referred to

s. 167 [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1) [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1)(e) — considered

s. 167(1)(f) — considered

s. 167(1)(g.1) [en. 1996, c. 32, s. 1(4)] — considered

s. 183 — considered

s. 185 — considered

s. 185(2) — considered

s. 185(7) — considered

s. 234 — considered

Canada Transportation Act, S.C. 1996, c. 10

Generally — referred to

s. 47 — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

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

s. 5.1(1) [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 6 [am. 1992, c. 27, s. 90(1)(f); am. 1996, c. 6, s. 167(1)(d)] — considered

s. 12 — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

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

***Paperny J.*:**

I. Introduction

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

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

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

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the proposed plan.

II. Background

Canadian Airlines and its Subsidiaries

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

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

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

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

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

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

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

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number

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

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

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

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

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

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

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

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *oneworldTM* Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation

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of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

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

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

Initial Discussions with Air Canada

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

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

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

Offer by Onex

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

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

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

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

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

Offer by 853350

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

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

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

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

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

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

a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;

b) sales for future air travel were down by approximately 10% compared to 1998;

c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would

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

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

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

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

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

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

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

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

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

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being

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the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

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

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

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

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

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

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;

(b) allow for the return of aircraft not required by Canadian; and

(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

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

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

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

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

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

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

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
>
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

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

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

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

The Affected Unsecured Creditors fall into the following categories:

> a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
>
> b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
>
> c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
>
> d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;

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e. Claims of tax authorities against Canadian; and

f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

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

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

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

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

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

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

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the *Alberta Business Corporations Act* ("ABCA"). They characterize the transaction as a cancellation of issued shares

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unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. Analysis

59 Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> >
> > (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

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

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

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

1. Statutory Requirements

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

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
>
> (b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
>
> (c) the notice calling the meeting was sent in accordance with the order of the court;
>
> (d) the creditors were properly classified;
>
> (e) the meetings of creditors were properly constituted;

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(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

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

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

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

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

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

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

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

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

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

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

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

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

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

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

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

Section 167 of the ABCA

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

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

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

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

71 The relevant portions of section 167 provide as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 183 of the ABCA

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

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

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

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

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

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

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

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

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

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

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

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

3. Fair and Reasonable

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

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

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

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

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

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a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position 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.

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

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

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

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

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

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

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence

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

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

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

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

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

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2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

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

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

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

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;

2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;

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

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

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

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

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

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

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

CRAL

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

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

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

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

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

International Routes

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

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

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

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

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

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rights which ought to have been assigned value.

Tax Pools

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

Capital Loss Pools

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

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their

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response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

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

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

d. Oppression

Oppression and the CCAA

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

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

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

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

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

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a

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true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd., supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company, supra.*

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

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

Oppression allegations by Resurgence

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any

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compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

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

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

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

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

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

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

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily

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insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

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

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

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

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

e. The Public Interest

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

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

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

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2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

Application granted; counter-applications dismissed.

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

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