Court File No. CV-09-8241-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO **FRASER PAPERS INC.**, FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H. LLC

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS
(Motion Returnable on February 10, 2011)

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CCAA Section 36".

11. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7169 (S.C.J.).

12. *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 4087 (S.C.J. [Commercial List]).

13. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 2265 (S.C.J. [Commercial List]).

14. *Re Nortel Networks Corp.*, [2010] O.J. No. 1232 (S.C.J. [Commercial List]), leave to appeal refused [2010] O.J. No. 2361 (C.A.).

15. *Re Grace Canada Inc.*, 2008 CarswellOnt 6284 (S.C.J.).

16. *Amoco Canada Petroleum Co.* v. *Propak Systems Ltd.*, 2001 CarswellAlta 575 (C.A.).

17. *Noonan* v. *Alpha-Vico*, 2010 CarswellOnt 4813 (S.C.J.).

18. *M.(J.)* v. *Bradley*, 2004 CarswellOnt 2243 (C.A.).

TAB 1

Re NORTHLAND PROPERTIES LIMITED et al.

[Indexed as: **Northland Properties Ltd., Re**]

British Columbia Supreme Court,
Trainor J.

Judgment – December 12, 1988.

Corporations – Arrangements and compromises – Companies' Creditors Arrangement Act – Order approving reorganization plan – Plan approved by majority of creditors as required under s. 11 – Court enumerating principles to be considered when approving a plan – Principles favouring approval of plan – Plan not affecting rights of dissenting minority priority mortgagees seriously enough to find plan unfair and unreasonable.

The debtors were a number of companies engaged in the business of real estate investment and development. By the spring of 1988 the debtors owed about $200,000,000 and had assets of approximately $100,000,000. At this time their bank, which was owed about $117,000,000, commenced a receivership action. Before a decision was given in those proceedings, the debtors petitioned under the Companies' Creditors Arrangement Act for permission to make a proposal to their creditors. The debtors were authorized to file a reorganization plan and all proceedings against them were stayed until further order of the court. The debtors reached a settlement agreement with their bank and a copy of this settlement agreement along with the reorganization plan, an information circular and other documents were provided to the creditors. The class meetings and a general meeting of creditors were held. At that time additional information was disclosed which had arisen between the time the plan was mailed to the creditors and the date of the meetings.

Under the plan, the priority mortgagees would all be treated in a similar manner. The mortgages were to remain in full force on their existing terms, except that the terms were all to be varied to five years, with interest rates at 12 per cent or less, and the amount of each mortgage was to be varied to the amount the priority mortgagee would get on a receivership with no loss for costs.

All classes of creditors, except the class of priority mortgagees, voted unanimously in favour of the plan . Of the priority mortgagees, 11 of the 15, representing 73.33 per cent of the number of mortgagees voting and 78.35 per cent of the value of the mortgages, voted in favour of the plan.

The debtors applied to the court for an order sanctioning the reorganization plan. The application was opposed by the dissenting priority mortgagees.

Held – Application granted.

The legislation is intended to protect creditors and allow the orderly administration of the assets and affairs of debtors. Section 6 of the Companies' Creditors Arrangement Act says that where a majority in number representing three-fourths in value of the creditors, or class of creditors, voting at the meeting agrees to a proposed compromise or arrangement, the compromise or arrangement may be sanctioned by the court and will be binding on all the creditors.

In this case the plan was approved by a majority in number of each class representing at least 75 per cent of the value in that class. Therefore, the sole issue was whether the court should approve and sanction the plan.

In the exercise of this discretion the court should consider three criteria: whether there has been strict compliance with all statutory requirements; whether anything has been done which was not authorized by the Act; and whether the plan is fair and reasonable.

With respect to the first criteria, the court was satisfied that there had been strict compliance with all statutory requirements.

With respect to the second criteria, the principal concern was whether the classes of creditors were properly established. The general considerations for constituting a class are: whether or not there is security; the nature of any security; the nature of the claim; and what contractual rights exist.

The priority mortgagees should properly all be in the same class. The nature of the debts were the same: moneys advanced as a loan. Each was a corporate loan by a sophisticated lender; the security in each case was a first mortgage and the remedies would have been the same: foreclosure proceedings and receivership. No possible reorganization plan would give the lender more than the value of the property less carrying costs and legal costs (unless the creditor were given the property to hold for a possible appreciation in value). All the creditors were to be treated the same under the reorganization plan. The only dissimilarities were that the mortgages involved separate properties and there were differences in the values of the securities for the loans. The vast majority of the creditors accepted the concept of a consolidated plan.

With respect to the final criteria, the plan was fair and reasonable. There were no secret agreements and all negotiations with various creditors were reported to both the class and the general meetings. The agreement with priority mortgagee R. to reduce its mortgage in return for a cash sum at a later date was only a negotiation as to agreed price and not an attempt to buy R.'s vote to ensure the necessary majority in the class.

The denial of the right of a priority mortgagee to hold the property after an order absolute was not significant enough that it should affect the proceedings. In view of the speculative nature of holding the property, this right should be subsumed to the benefit of the majority. The objecting priority mortgagees would be no worse off under the proposed plan than if there were no plan and they could possibly be put in a position to save carrying and legal costs. Denying them the option of holding the properties after order absolute was not serious enough to find that the plan was unfair and unreasonable.

Cases considered

Alabama, New Orleans, Texas & Pac. Junction Ry. Co., Re, [1891] 1 Ch. 213 (C.A.) – considered.

Associated Investors of Can. Ltd., Re, 67 C.B.R. (N.S.) 237, [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.*) (Q.B.) [reversed 71 C.B.R. (N.S.) 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.)] – considered.

Avery Const. Co., Re, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) – referred to.

Br. Amer. Nickel Corp. Ltd. v. O'Brien, [1927] A.C. 369 (P.C.) – considered.

Companies' Creditors Arrangement Act, Re; A.G. Can. v. A.G. Que., [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 – considered.

Dairy Corp. of Can. Ltd., Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) – considered.

English, Scottish & Australian Chartered Bank, Re, [1893] 3 Ch. 385, [1891-94] All E.R. Rep. 775 (C.A.) – considered.

Hochberger v. Rittenberg (1916), 54 S.C.R. 480, 36 D.L.R. 450 [Que.] – distinguished.

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) – considered.

Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.) – considered.

Snider Bros., Re, 18 B.R. 230 (Mass. Bankruptcy Court, 1987) – considered.

Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B. 573 (C.A.) – considered.

Wellington Bldg. Corp. Ltd., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (S.C.) – referred to.

Statutes considered

Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36]
s. 6
s. 7
s. 11

Authorities considered

Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 590, pp. 595, 602.

Canadian Abridgment (2d) Classification

Corporations
XVII. 1.

APPLICATION for an order approving plan of reorganization over objections of minority of creditors.

H.C. Clark, R.D. McRae and *R. Ellis*, for petitioners.
G.W. Ghikas and *C.S. Bird*, for Bank of Montreal.
F.H. Herbert, Q.C., and *N. Kambas*, for Excelsior Life Insurance Company of Canada and National Life Assurance Company of Canada.
S. Strukoff and *R. Argue*, for Metropolitan Trust Company.
A. Czepil, for Guardian Trust Company.
L.A. Jensen, for Royal Trust Corporation of Canada.
A. Bensler, for Canada Trustco Mortgage Company and Guaranty Trust.
D.W. Donohoe, for Thorne Riddell.

(Vancouver A880966)

December 12, 1988. TRAINOR J. (orally):– This is an application for an order under the Companies' Creditors Arrangement Act, approving and sanctioning a reorganization plan submitted to the petitioners' creditors. It was unanimously approved by all classes of creditors except the priority mortgagees. That class, however, did approve the plan by the majority provided in the Act. The particular order sought is lengthy and is set out in the minutes attached to the motion by which this application is brought.

In the course of considering the plan, the various steps taken to obtain creditors' approval, all of the evidence and the submissions on behalf of the minority of the priority mortgagees who voted against approval of the plan, I will deal with the elements of the order sought.

The petitioners are a number of companies engaged in the business of real estate investment and development in western Canada and the western United States. They collectively own and operate a number of office buildings and a chain of 20 hotels and motels in western Canada known as the Sandman Inns. The hotels, inns and office buildings, with a couple of exceptions, were constructed by the companies as new facilities.

Financial problems started in 1981, with declining revenues and rising interest rates. By the spring of 1988 the companies owed about $200,000,000 and had assets of about $100,000,000. The Bank of Montreal was owed about $117,000,000 by the companies, and it authorized the commencement of a receivership action.

Before a decision was given in those proceedings, the companies petitioned under the Companies' Creditors Arrangement Act for an order directing meetings of the secured and unsecured creditors of the companies to consider a proposed compromise or arrangement between the creditors and the companies.

I heard that petition on 7th April 1988 and ordered, as an initial step, that the companies were authorized to file a reorganization plan with the court, and that in the meantime the companies would remain in possession of their undertaking, property and assets, and could continue to carry on their businesses. I further ordered, pursuant to s. 11 of the Act, that all proceedings against the companies be stayed until further order of this court.

The thrust of this legislation is the protection of creditors and the orderly administration of the assets and affairs of debtors.

Duff C.J.C., who gave the judgment of the court in *Re Companies' Creditors Arrangement Act*; *A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659 at 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75, said:

> . . . the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

Mr. Justice Wachowich, in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109 at 114, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.), said:

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

Earlier, I indicated, and I now reassert, my adoption of those judicial statements indicating the purpose of this legislation and the underlying purpose behind the order which I made on 7th April last.

In reasons which I gave in this matter on 5th July 1988 [reported 69 C.B.R. (N.S.) 266 at 273, 29 B.C.L.R. (2d) 257 (S.C.)], I said:

> At the time I made that order I was satisfied on the basis of the material filed in support of the petition that the companies should have an opportunity to lay before their creditors a proposal as to how their liabilities could be met and the companies continue in operation. The purpose of this legislation is to keep companies in business if possible. That is the sense in which this legislation is to be distinguished from winding-up or bankruptcy proceedings: *Re Avery Const. Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.).

A number of motions to this court sought changes or definition of rights and procedures. The companies filed a plan in August, but that was amended, particularly with respect to classification of creditors. I will deal later with the question of classes of creditors, but for now I merely wish to say that, in the first instance, it is the responsibility of the debtor companies to define the classes and make the proposal to them.

One of the interim applications which I heard in this matter on the motions of the companies and the bank dealt with the composition of classes. My ruling that two classes of bondholders should be recognized, namely, the "A bondholders" and the "put debt claimants and C bondholders" was upheld by the Court of Appeal. Throughout that application and decisions it was of paramount importance that it only related to the question of the classes into which the securities held by the bank should be divided.

I did, however, rule that in addition to the individual meetings of classes of creditors and at the conclusion of those meetings a general meeting of all creditors should be convened to consider the plan. That in fact was done.

The plan proposed by the companies was based on the following classes of creditors:

Class Name	*Definition*
shareholder creditors	a creditor who is a shareholder (except the bank)
A bondholders	the holder of a series A bond issued by the petitioners, except B & W, under the trust deed
put debt claimants and C bondholders	the bank in respect of the put debt and as holder of a series C bond issued by Northland pursuant to the trust deed
priority mortgagees	a creditor other than the bank, a bondholder or the trustee having a mortgage against a property
government creditors	a creditor with a claim that arises pursuant to a municipal by-law or a provincial, state or federal taxing statute, who is not a property tax creditor
property tax creditors	a creditor having a claim for unpaid municipal property taxes
general creditors	a creditor not falling within any other class, but does not include a contingency claimant

Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rate and directions for the calling of meetings.

The companies and the Bank of Montreal reached an agreement on 20th October 1988 by which they settled all outstanding claims against each other. It deals with the amounts owing to the bank by the companies, claims by the companies and others against the bank in relation to a lender liability lawsuit and the terms of a compromise between the bank and the companies. This agreement is referred to in the material as the "settlement agreement". It recites that it is the entire agreement between the parties, and a copy of it was provided to creditors, along with such other documents as notice of the meetings, the reorganization plan and an information circular.

The class meetings and the general meeting of creditors were held in Vancouver on 31st October and 1st November 1988. W.J. Little, a vice-president of Dunwoody Limited, acted as chairman of all meetings. He supervised the conduct of scrutineers who recorded the votes cast for and against the plan at each of the meetings. At each of the meetings additional information which had arisen between the time the plan was mailed to the creditors and the date of the meeting was disclosed to the creditors.

Particulars of the disclosures are set out in the affidavit of Terrence King, sworn 14th November 1988 and filed herein. Most deal with variations to the plan with respect to priority mortgagees.

The report of Mr. Little, as chairman of the meetings, is contained in his affidavit sworn 9th November 1988. All classes of creditors voted unanimously in favour of the plan, except the class of priority mortgagees. The result of the vote in that class is:

– Priority mortgagees meeting of petitioners held on 31st October 1988. The priority mortgagees present in person or by proxy, to the value of $77,087,531.69. The number of mortgagees total 15.

– Voting for in person or by proxy, $60,397,607.50. The percentage of value is 78.35 per cent. The number of mortgagees voting for is 11, which amounts to a percentage of 73.33 per cent.

– Voting against in person or by proxy, $16,689,924.19, which is a percentage of 21.65 per cent. Four mortgagees voted against, and that percentage is 26.67 per cent.

The two main opponents of the plan were Guardian Trust Company and the holders of a joint mortgage, Excelsior Life Assurance and National Life Assurance. Guardian and Excelsior have participated in this application and I have received and considered their submissions.

It will be seen that 11 of 15, that is, 73.33 per cent of the priority mortgagees voted in favour of the plan, and that those who favoured the plan represented 78.35 per cent of the value of the mortgages in this class. Based on that result, the companies now apply for an order approving and sanctioning the reorganization plan. The Companies' Creditors Arrangement Act provides (and I want to set out both ss. 6 and 7):

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of such sections, agree to any compromise or arrangement either as proposed or as altered or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and is also binding on the company, and in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in course of being wound up under the *Winding-up Act*, is also binding on the trustee in bankruptcy or liquidator and contributories of the company.
>
> 7. Where an alteration or modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, such meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and such directions may be given as well after as before adjournment of any meeting or meetings, and the court may in its discretion direct that it shall not be necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and a compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

In summary, the two conditions which must be met are approval of the plan by the creditors, and approval and sanction by the court. Here each class of creditor voted in favour of the plan by a majority in number who represented at least 75 per cent of the value of the creditors in that class. Consequently, the sole issue is whether the court should approve and sanction the plan.

In the exercise of its discretion, the court should consider three criteria, which are:

1. There must be strict compliance with all statutory requirements.

2. All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Companies' Creditors Arrangement Act.

3. The plan must be fair and reasonable.

As I indicated, I have had the benefit of full submissions by counsel. I will refer to a number of the cases cited by them.

I refer to a decision of the Alberta Court of Queen's Bench, Berger J., in *Re Associated Investors of Can. Ltd.*, 67 C.B.R. (N.S.) 237, [1988] 2 W.W.R. 211 at 218, 56 Alta. L.R. (2d) 259, 38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.*), where he said:

> Assistance in interpreting s. 6 may thus be obtained from other company and corporation Acts which have their genesis in the British statute and are akin in wording to the Companies' Creditors Arrangement Act.

And then he went on to set out elements which are similar to the ones to which I have referred.

In *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.*, [1891] 1 Ch. 213 at 238-39, a decision of the English Court of Appeal, Lindley L.J. said:

> . . . what the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting *bona fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

In the Ontario Court of Appeal in *Re Dairy Corp. of Can. Ltd.*, [1934] O.R. 436 at 439, [1934] 3 D.L.R. 347, Middleton J.A. said:

> Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements which are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this Statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.

And the English Court of Appeal again, in *Re English, Scottish & Australian Chartered Bank*, [1893] 3 Ch. 385, [1891-94] All E.R. Rep.

775, referred to in the judgment, again by Lindley L.J., to what he had said in the decision to which I have referred earlier, *Re Alabama*. He confirmed that, and he also quoted what Fry L.J. said in that earlier decision [pp. 778-79]:

> It is quite obvious from the language of the Act and from the mode in which it has been interpreted that the court does not simply register the resolution come to by the creditors, or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed unobserved and which might be pointed out later. But giving them the opportunity of observation, I repeat that I think they are much better judges of a commercial matter than any court, however constituted, can be. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view – that is, with a view to the interests of the class to which they belong, and that which they are empowered to bind – the court ought to be slow to differ from them. It should do so unhesitatingly if there is anything wrong about it. But it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some great oversight or miscarriage.

And again, in the Ontario Court of Appeal in *Re Langley's Ltd.*, [1938] O.R. 123 at 141-42, [1938] 3 D.L.R. 230, Masten J.A. said:

> I desire to make my view clear with regard to the function of the Court upon an application of this kind, so far as it relates to the fairness and reasonableness of the compromise or arrangement itself. It is in the nature of such a proceeding that it will alter and affect the respective rights of shareholders and different classes of shareholders, and it appears to me that, granted the compromise or arrangement proposed is placed fairly and squarely before the shareholders, the meeting or meetings is or are called and conducted in accordance with the provisions of the statute, and that 75 per cent of the shares of each class represented agree to the compromise or arrangement, the Court is entitled to sanction it. In such a case the Court is not, in my opinion, to substitute its view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the shareholders themselves.

And in *Re Wellington Bldg. Corp. Ltd.*, [1934] O.R. 653, 16 C.B.R. 48 at 53, [1934] 4 D.L.R. 626 (S.C.), Kingstone J. [quoting Bowen L.J.] said:

> "The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such."

I want to refer as well to an article by Stanley Edwards ["Reorganizations Under the Companies' Creditors Arrangement Act"] which ap-

pears in vol. 25 of the Canadian Bar Review. I refer specifically to p. 595, where he said:

> In addition to being feasible, a reorganization plan should be fair and equitable as between the parties. In order to make the Act workable it has been necessary to permit a majority of each class, with court approval, to bind the minority to the terms of an arrangement. This provision is justified as a precaution that minorities should not be permitted to block or unduly delay the reorganization for reasons that are not common to other members of the same class of creditors or shareholders, or are contrary to the public interest.

And on p. 602 he spoke of the classification of creditors, and said:

> Classification of the creditors is the next problem which the court will face. Creditors should be classified according to their contract rights, – that is according to their respective interests in the company.

He said at p. 612 that votes must be made in good faith and referred to a decision of the judicial counsel in *Br. Amer. Nickel Corp. Ltd. v. O'Brien*, [1927] A.C. 369 at 373-74 (P.C.), where Viscount Haldane, in giving the opinion, said:

> . . . their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

The reorganization plan, as I indicated, was distributed and considered. In putting forward the plan, there are a number of recitals which indicate the hope of the companies for their future. For example, recital "H" is:

> Management is of the opinion that the Companies can return substantially more to their Creditors from the continued operation of the Properties than could reasonably be expected to be realized from their sale on a liquidation.

And recital "I":

> Management is also of the opinion that the Companies will be able to return more to the Creditors following the anticipated refinancing, since the Companies' debt structure will have been significantly improved and management's time and efforts will once again be concentrated on the business and operations of the Companies.

The reorganization plan contains as art. 1.01:

Purpose of Plan

The purpose of this Plan is to permit the Companies to remain in possession of their undertaking, property and assets, and to continue to carry on their businesses, as reorganized, with the intent that the Companies will be able to pay each Creditor as much or more on account of its Claim, calculated on a Net Present Value basis, than it would on a liquidation of the Companies' assets via alternate proceedings available to wind up the affairs or liquidate the assets of insolvent debtors or other proceedings which might be initiated by Creditors to recover their Claims or enforce security granted to them by the Companies.

1.02 Effect of Plan

This Plan involves the amalgamation and refinancing of the Companies and, generally, the amendment of certain terms of and the extension of time for satisfaction of debts of the Companies. Management believes that this Plan will allow the Companies to fulfill their obligations hereunder from the Trustco financing and income from their operations.

1.03 Principles of Plan

This plan has been formulated on the basis of the following principles:

(a) The acceptance of this Plan will allow the Companies to utilize their large tax loss position to assist in raising capital to repay the Creditors on the basis of their Claims, as restructured. Those tax losses are not available to the Companies or the Creditors in a bankruptcy of the Companies.

(b) The Companies' financial position permits them to take advantage of tax-assisted methods of financing under the Tax Act which will effectively reduce the cost of refinancing below the cost of any conventional method of refinancing. The First Distress Preferred Share issue will result in Net Proceeds sufficient to satisfy all cash payment obligations of the Companies to the Bank pursuant to the Settlement Agreement.

The plan goes on in a number of other paragraphs under the topic of "Principles of Plan" to discuss the details of that.

One of the relevant definitions is that of "Agreed Price", which is defined to mean:

. . . the amount agreed to among the Companies and a Creditor as the value of a Property for the purposes of a Sale of that Property under this Plan or, in the absence of agreement within the time limited for such agreement by this Plan [the amount determined as a result of a specific system of appraisals or by arbitration].

Article III deals with the plan summary:

3.01 Amalgamation

The Companies will amalgamate to form the Amalgamated Company. The Amalgamated Company may, for tax purposes, incorporate a wholly-

owned subsidiary to issue Distress Preferred Shares and loan the Net Proceeds to the Amalgamated Company. The Net Proceeds will be used by the Amalgamated Company to fulfill its obligations to Creditors in accordance with this Plan.

3.02 Financing of Debt Restructuring

The Companies have entered into the Settlement Agreement for the purpose of resolving all matters among the Companies, the Principals and the Bank. The Companies have received a firm commitment from Trustco to provide them with sufficient financing to permit $33,550,000 to be paid to the Bank under the Settlement Agreement. In addition, the Companies are currently negotiating with a bank to act as Guarantor to assist the Companies in raising sufficient funds to satisfy all their indebtedness to Priority Mortgagees and Property Tax Creditors. As a result, the Companies are now in a position to propose to their Creditors the following arrangements:

(a) The Bank

By the Settlement Agreement the Companies have agreed, inter alia, that on or before January 17, 1989 or such later date, not later than February 6, 1989, as may be agreed by the Bank, the Companies will, at their option, either pay the Bank the sum of $41,650,000 or pay the Bank the sum of $33,550,000 and deliver to the Bank title to all Non-Core Properties and the Mortgage Receivables, in consideration of which the Bank will acknowledge reduction of the Bank Debt by the sum of $41,650,000 and transfer and assign to Holdco or its nominee the remaining Bank Debt and the security therefor.

All actions commenced by the Companies against the Bank have been or have been agreed to be discontinued or dismissed by consent at the earliest practicable time after the execution of the Settlement Agreement. All actions commenced by the Bank in respect of past dealings between them have been or are to be discontinued or dismissed by consent and the relationship between the Companies and the Bank will, upon performance of all conditions and obligations to be performed by the parties to the Settlement Agreement, be at an end. In the event of a default on the part of the Companies, including non-approval of this Plan by the requisite majority of Creditors of each Class or the Court within the time limits prescribed in the Settlement Agreement, the Bank may immediately become or cause its nominee to become the sole owner of all outstanding shares in the Companies and/or take title to such of the assets of the Companies, as the Bank shall require in its discretion.

(b) First Distress Preferred Share Issue

It is the intention of the Companies to cause Finco [a wholly-owned subsidiary of the Amalgamated Company] to issue sufficient Distress Preferred Shares to Trustco to realize Net Proceeds therefrom sufficient to pay $33,550,000 to the Bank. It is the intention of the Companies to satisfy their remaining obligations to the Bank under the Settlement Agreement either by raising monies on the Non-Core Properties and Mortgage Receivables as may be necessary to pay an additional $8,100,000 to the Bank or by transferring the Non-Core Properties and Mortgage Receivables to the Bank. The Companies have applied to Revenue Canada, Taxation for an advance tax ruling to authorize the issuance by a subsidiary of the Amalgamated Company of

Distress Preferred Shares. The Companies have been advised by their tax advisors that such a ruling should be available to them in their current situation.

(c) Priority Mortgagees

After the Effective Date [i.e. the date upon which a final order is accepted for filing by the Registrar of Companies], a mortgage held by a Priority Mortgagee against a Property:

(i) will remain in full force and effect on its Existing Terms except as modified hereby;

(ii) will have its term extended to the earlier of the fifth anniversary of the Effective Date and March 31, 1994;

(iii) will have the interest payable thereunder adjusted to the applicable Five Year Rate or such lower rate as may be agreed between the Priority Mortgagee and the Companies.

This Plan contains provisions that govern the amount to be received by a Priority Mortgagee on the Sale of a Property and special provisions relating to interest rates and early redemption during the first six months of the extended term.

Article IX deals with priority mortgagees. Two particularly relevant sections are:

9.02 (d)

If a Property has been determined by the Companies, or is determined by the Companies as at the Effective Date, to be worth less than the amount due to all Priority Mortgagees holding mortgages against the Property and the Companies then determine and notify the appropriate Priority Mortgagee in writing not later than March 31, 1989:

(i) that the Property is integral to this Plan, then the Priority Mortgagee that would not receive the full amount of its Claim from the Sale Proceeds of the Property will reduce the amount of its mortgage to the Agreed Price and will sell and assign the balance of its Claim to Holdco or its nominee for $1.00; or

(ii) that it is in the best interests of the Companies, necessary under this Plan or required by the provisions of this plan to dispose of that Property, then the Priority Mortgagee that would not receive the full amount of its Claim from the Sale Proceeds of that Property will:

(A) cause a nominee of the Priority Mortgagee to purchase that Property at the Agreed Price by assumption of that portion of that Priority Mortgagee's Claim which is equal to the Agreed Price for that Property, and

(B) sell and assign the balance of its Claim to Holdco or its nominee for $1.00.

9.04 Agreement with Companies

Notwithstanding anything contained in this Article IX, if the Companies, before the Meetings:

(a) agree with any Priority Mortgagee as to specific provisions of its mortgage which may differ materially from those set out in this Plan; and

(b) those provisions are fully disclosed to the Creditors and the Bank before or at the Meetings;

the terms of that agreement will override the specific provisions of this Plan as they relate to that Priority Mortgagee and its mortgage.

The information circular which was distributed to creditors contains a complete list of the priority mortgagees. It deals with the subject of classes of creditors and talks about community of interest. Recited at p. 45 of the information circular is what the companies say happened with respect to changes in class designations.

> The five Classes of Priority Mortgagees originally contemplated by the Proof of claim have been consolidated, following the Order of The Honourable Mr. Justice Trainor of July 5, 1988 permitting the Companies to file a consolidated Plan and the Companies' considerations in the development of the Plan, into one Class, Priority Mortgagees. Insofar as the treatment of Priority Mortgagees under the Plan is not dependent on or related to ownership of the various Properties and the mortgages will be serviced out of the continued Revenue generated by the Amalgamated Company, it was determined that Classes should not be constituted on the basis of the Company owning the Property. Instead, Priority Mortgagees are classified on the basis of the treatment of their Claims envisaged by the Plan and on the further premise that their Claims and priorities are not so dissimilar so as to make it impossible for them to consult together with a view to their common interest. Although the Priority Mortgagees are for the most part secured by charges against different Properties, their relative security positions are essentially the same. It is the Companies' position that differing terms of payment (i.e. maturity date and rate of interest) and differing security (i.e. Properties) do not sufficiently differentiate the Priority Mortgagees so as to require separate Classes. The Amended Petition filed with the Court by the Companies on August 25, 1988 contemplated two distinct classes of Priority Mortgagees, however, that distinction was made solely on the basis of how the Plan, at that time, affected the rights of various Priority Mortgagees. As a result of the Settlement Agreement and the consequent amendments to the Plan, that distinction is no longer relevant.

As I indicated earlier, the settlement agreement with the bank was distributed and there was disclosure of all the negotiations which occurred after documents were sent to the creditors.

Referring back to the three criteria which I mentioned and with respect to the first, which is strict compliance with all statutory require-

ments, I am satisfied that the companies have complied. There has been disclosure and full and adequate explanation of the proposal and how, in the opinion of the companies, it will function. The meetings were properly conducted in circumstances of disclosure and open response.

The second criteria is that 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 Act. With respect to this criteria I have read and considered all of the material which has been filed throughout the course of many proceedings and applications which I have heard in this matter, and I have, of course, considered the submissions which have been made to me by counsel.

The principal concern under this criteria is whether the classes of creditors were properly established. The only class to which objection has been taken is the priority mortgagee class. There was a dispute earlier about the bondholder classes, but as I indicated earlier in these reasons, that was resolved by an application to the court.

I want to refer again to the decision of Mr. Justice Kingstone in *Re Wellington*, supra, where [at p. 53] he refers with approval to the *Re Alabama* case, and then he refers to the case of *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573 (C.A.), and the judgment of Lord Esher M.R. who said:

> "The Act says that the persons to be summoned to the meeting . . . are persons who can be divided into different classes – classes which the Act of Parliament recognizes, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes . . .
>
> "It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

Classes of creditors should be established, having in mind the principles found in the cases to which I have referred. Generally, one should consider, first, whether the debt is secured or not. That distinction is recognized in the Act. If there is security, what is the nature of it, what is the nature of the claim and what contractual rights exist? In these proceedings the companies first proposed to establish separate classes based on the fact that each mortgage was on a separate property.

If the companies' proposal for a consolidated approach to the plan is accepted, then, in my view, there can be no basis for separate classes on the ground that each mortgage is on a separate piece of property.

In the reasons for judgment which I gave in this matter on 5th July last, at p. 21 [C.B.R., p. 280] I referred to a decision of the United States Bankruptcy Court in *Re Snider Bros.*, 18 B.R. 230 (Mass. Bankruptcy Court, 1987), and I said:

> I accept the analysis contained in the *Snider* case. It would be improper for the court to interfere with or appear to interfere with the rights of the creditors. In my view, that appearance would be created by making an order that the reorganizations be merged and consolidated for all purposes. The order sought in this part of the motion is refused. Of course that does not mean that the companies are barred from seeking from the creditors their approval of a consolidated plan. I say that consolidation is not appropriate at this time. The creditors may decide to accept a consolidated plan when they have had a full opportunity to consider the reorganization plans submitted to them.

That consolidated plan was put to the creditors, and it would seem that the vast majority of the creditors have accepted that concept.

An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:

1. The nature of the debt is the same, that is, money advanced as a loan.

2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.

3. The nature of the security is that it is a first mortgage.

4. The remedies are the same – foreclosure proceedings, receivership.

5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped for appreciation in value.

6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be

somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.

The points of dissimilarity are that they are separate properties and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.

Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

I turn then to the last of the criteria, that is, that the plan must be fair and reasonable. There can be no doubt that a secret, clandestine agreement giving an advantage as the price for voting support would defeat the proceedings.

The Supreme Court of Canada in *Hochberger v. Rittenberg* (1916), 54 S.C.R. 480, 36 D.L.R. 450 at 452 [Que.], dealt with this question. Fitzpatrick C.J.C. said:

> Here there was a previous secret understanding that the appellants should receive security for their debt and a direct advantage over all the others who were contracting on the assumption that all were being treated alike. The notes sued on were given in pursuance of an agreement, which was void, as made in fraud of the other creditors . . .

At p. 455 Duff J. said:

> Any advantage, therefore, obtained by them as the price of their participation, which was not made known to the other parties, must be an advantage which they could not retain without departing from the line of conduct marked out in such circumstances by the dictates of good faith.

The material before me does not indicate any agreement of that kind. The plan permitted negotiation, and in fact there was negotiation with both Guardian and Excelsior before the meetings. All the results from negotiations which took place with other priority mortgagees were reported to both the class and the general meetings.

Guardian and Excelsior submit that by the special agreement reached with Relax its vote was bought in order to ensure the necessary majority in the class. They say it violates the principle of equality and that the vote cannot be considered bona fide for the purpose of benefitting the class as a whole.

The particulars with respect to the Relax mortgage and the negotiations which took place are set out in the material which has been filed. The basic and fundamental difference between the facts as presented by the companies on the one hand and Guardian and Excelsior on the other relates to the value of the property. There is an appraisal which indicates value in the amount of $3,700,000 and there is other material before me which indicates a value of something between $4,500,000 and $4,600,000.

The negotiations which took place and the arrangement which was made and which was presented to the meeting of the priority mortgagees involved a payment of a cash sum to Relax at some future date, not later than 18 months from the effective date, in return for a reduction of the Relax mortgage from something over $6,000,000 down to about $4,000,000.

The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.

If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and re-read a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

The question, of course, is whether or not there is some preference which is given to one mortgagee over the other mortgagees, or the other creditors. This has been canvassed thoroughly in the submissions under the headings of interclass preferences and intraclass preferences.

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

that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

There is in the submissions considerable discussion of the personal guarantee given by Robert Gaglardi of the amount owing under the mortgages to the priority mortgagees who complain of the plan. That guarantee is there. The guarantee does not form part of the reorganization plan, in my view. It is not mentioned in the plan, that I remember, insofar as a negotiating factor is concerned, in any event, and it is something which should not form part of the negotiations.

The fact of the matter is that if the reorganization plan is not approved, then, no doubt, the bankruptcy proceedings would go ahead, and under those proceedings the second position with respect to real property interests would go to the Bank of Montreal who are in a position of having something like $120,000,000 owing to them at this time, so any claim for a shortfall by a first mortgagee, having in mind the possibility of collecting on a guarantee of Mr. Gaglardi's, would rank second to the Bank of Montreal's claim of $121,000,000. In those circumstances I just do not think it has any value.

What is the effect of the plan and those two priority mortgagees? In my view, neither is worse off than the "no plan condition", and they could stand to gain the amount otherwise thrown away in carrying costs and in legal costs.

In the circumstances and on the basis of the material before me, I would not think giving them the option of holding the properties after order absolute would be a viable choice weighty enough to find the companies' course to be unfair and unreasonable.

In conclusion, I am satisfied that the companies have complied with all statutory requirements regarding service, notice, convening and conduct of meetings and so on, and other matters of that kind. The plan which has been prepared is in conformity with the object of the Act and, in particular, the companies have properly classified the creditors of the companies.

The plan was approved by each class of creditors under the plan. The approval was unanimous in all cases except the priority mortgagees, and in that instance the required statutory majority in number and three-quarters in value of the creditors voted in favour of it.

I do not find that the plan is unjust, unfair or is in the nature of a confiscation of the rights of creditors. So I am satisfied that the order should go in the form in which it is set out in the minutes attached to the motion.

I specifically would like to confirm that I would ask that the order contain a request to the United States Bankruptcy Court which had earlier indicated that it would await the outcome of these proceedings before taking any further steps in matters pending before it, and that request would be that they would consider the plan and approve and sanction it as they see fit, having in mind the proceedings which have taken place here and the reasons which I have given for my approval and sanction of the plan.

Application granted.

NORTHLAND PROPERTIES LIMITED et al. v. EXCELSIOR LIFE INSURANCE COMPANY OF CANADA, NATIONAL LIFE ASSURANCE COMPANY OF CANADA and GUARDIAN INSURANCE CO. OF CANADA

[Indexed as: **Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.**]

British Columbia Court of Appeal,
McEachern C.J.B.C., Esson and Wallace JJ.A.

Judgment – January 5, 1989.

Corporations – Arrangements and compromises – Reorganization plan under Companies' Creditors Arrangement Act providing for consolidation of petitioner companies and grouping all priority mortgagees into one voting class – Two priority mortgagees, not being fully secured creditors, voting against and appealing court order approving plan – Appeal dismissed – Consolidation being appropriate where economic prejudice less than prejudice arising from continued debtor separateness – Composition of priority creditors not being unfair since plan formulated for benefit of all creditors, who had indicated approval – Plan being fair and reasonable since priority mortgagees assured value of security without liquidation expenses and this result being unavailable in absence of plan.

After the petitioners' bank commenced receivership proceedings against the petitioners, the court approved a reorganization plan filed under the Companies' Creditors Arrangement Act. The plan incorporated a settlement agreement that had been reached

between the bank and the petitioners. In addition, the plan proposed consolidation of all the petitioners and provided that all priority mortgagees would be grouped into one class for voting purposes. Of the 15 priority mortgagees, 11 were fully secured while the remaining four, including the respondents, faced deficiencies. All classes of creditors had voted unanimously in favour of the plan, except the priority mortgagee class, which had none the less approved the plan by the requisite majority under the Act. Prior to the settlement with the bank, R. Ltd., a priority mortgagee facing a deficiency, had struck an agreement with the petitioners on the value of its security amounting to approximately $900,000 over a disputed appraisal value. R. Ltd. agreed in the settlement to vote in favour of the plan. Had it voted against, the petitioners would not have obtained the requisite majority from the priority mortgagee class. The respondents appealed the order approving the plan on a number of grounds.

Held – Appeal dismissed.

There was some merit in the respondents' argument that the Act does not authorize the creditors of one company to vote on the disposition of a creditor's security in another company. However, the plan contemplated the consolidation of the petitioners and the chambers judge correctly concluded that consolidation was appropriate if its economic prejudice was less than the prejudice arising from continued debtor separateness.

Furthermore, the composition of the class of priority creditors was not unfair. The plan was not only for the benefit of the undersecured priority mortgagees, but also for the benefit of the companies and other creditors who, by their votes, had indicated that they thought the plan was in their best interest. Nor was the plan tainted by the agreement between R. Ltd. and the respondents. The agreement was not made for the purpose of ensuring a favourable vote because at the time it was made the petitioners had not yet reached a settlement with the bank. Furthermore, the agreement with R. Ltd. was fully disclosed in the plan and it was the bank, not the respondents, which stood to lose by that agreement.

Finally, the plan was neither unfair nor unreasonable. Only the appellants had voted against it and the court should not be astute in finding technical arguments to overcome the majority's decision. Moreover, the plan assured all priority mortgagees the full value of their security without liquidation expenses, which was more than they could have expected in the absence of the plan. Although they lost the right to pursue the petitioners for any deficiency, this right was wholly illusory given the petitioners' overwhelming debt to the bank.

Cases considered

Alabama, New Orleans, Texas & Pac. Junction Ry. Co., Re, [1891] 1 Ch. 231 (C.A.) – referred to.

Associated Investors of Can. Ltd., Re, [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 67 C.B.R. (N.S.) 237, 38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.*) (Q.B.) – referred to.

Baker & Getty Fin. Services Inc., Re, 78 B.R. 139 (U.S. Bankruptcy Ct., N.D. Ohio, 1987) – referred to.

Br. Amer. Nickel Corp. v. O'Brien Ltd., [1927] A.C. 369 (P.C.) – followed.

Companies' Creditors Arrangement Act, Re; A.G. Can. v. A.G. Que., [1934] S.C.R. 659, [1934] 4 D.L.R. 75 – referred to.

Dairy Corp. of Can. Ltd., Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 – referred to.

Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd., [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 53 A.R. 39 (Q.B.) – referred to.

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) – followed.

Snider Bros., Re, 18 B.R. 320 (U.S. Bankruptcy Ct., D. Mass., 1982) – followed.

Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B.D. 573 (C.A.) – referred to.

Wellington Bldg. Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 – referred to.

Statutes considered

Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36]
s. 20

Company Act, R.S.B.C. 1979, c. 59
ss. 276-278

Canadian Abridgment (2d) Classification

Corporations
XVII. 1.

APPEAL from order of Trainor J. approving reorganization plan filed under Companies' Creditors Arrangement Act.

F.H. Herbert and *N. Kambas*, for appellant Excelsior Life Insurance Company of Canada and appellant National Life Assurance Company of Canada.

A.P. Czepil, for appellant Guardian.

H.C.R. Clark and *R.D. Ellis*, for respondent companies.

G.W. Ghikas and *C.S. Bird*, for respondent Bank of Montreal.

(Vancouver Nos. CA010238; CA010198; CA010271)

January 5, 1989. Excerpt from the transcript.

MCEACHERN C.J.B.C.: We are giving an oral judgment this morning because of the commercial urgency of these appeals and because counsel's helpful arguments have narrowed the issues substantially. We are indebted to counsel for their useful submissions.

The petitioners (respondents on these appeals) are a number of companies (which I shall call "the companies") who have outstanding issues of secured bonds and are all engaged in real estate investment and development in Western North America and who collectively own and operate a number of office buildings and the Sandman Inn chain of hotels and motels. The appellants, Excelsior Life and National Life and Guardian Trust, are creditors of the petitioners who hold mortgages over specific properties owned by certain of the companies. They, along with eleven other lenders, are called "priority mortgagees".

The companies ran into financial problems starting in 1981 and by spring of 1988, the companies owed approximately $200 million against assets of $100 million. The major creditor, the Bank of Montreal (which I shall sometimes call "the bank"), was owed approximately $117 million by the companies and the bank authorized the commencement of a receivership action. The bank holds security in all of the assets of the companies by way of trust deeds and bonds ranking second in priority to the security held by the priority mortgagees. Before decision in the receivership proceedings, the companies petitioned under the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36] (which I shall sometimes refer to as "C.C.A.A.") for an order directing meetings of the secured and unsecured creditors to consider a proposed compromise or arrangement plan.

Mr. Justice Trainor, on 7th April 1988, granted the petition authorizing the companies to file a reorganization plan with the court, and that in the meantime, the companies would continue to carry on business and remain in possession of their undertaking, property and assets. Further, all proceedings against the companies were stayed. The original reorganization plan was filed on 25th August 1988. It provided that each priority mortgagee holding security over the property of the individual petitioners would constitute a separate class.

The petitioners obtained an order to hold a creditors' meeting on 31st October 1988 and 1st November 1988. The order provided that in addition to meetings of individual classes of creditors, there should be a later general meeting of all creditors to consider the plan. In addition, the petitioners obtained an order to file and serve the amended plan seven days before the creditors' meeting along with their information circular. Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rates and directions for the calling of meetings.

The amended plan was based on the following classes of creditors (descriptions of which are contained in the reasons for judgment of Trainor J. at pp. 6-7) namely:

– shareholder creditors

– A bondholders

– PUT debt claimants and C bondholders

– priority mortgagees

– government creditors

– property tax creditors

– general creditors

The amended plan also proposed consolidation of all the petitioner companies. The amended plan provided that all priority mortgagees would be grouped into one class for voting purposes. There were fifteen priority mortgagees in total, eleven of which were fully secured while the remaining four (including the appellants) faced deficiencies. The amended plan also authorized the companies to negotiate with creditors in order, if possible, to reach as much agreement as possible so that the plan would have a better chance of gaining the requisite majorities.

The companies and the Bank of Montreal reached a settlement agreement on 20th October 1988, dealing with (a) the amounts owing to the bank by the companies; (b) claims by the companies and others against the bank in relation to a lender liability lawsuit; and (c) the terms of a compromise between the bank and the companies. The Bank of Montreal, according to the information circular, would only realize $32,859,005 upon liquidation. The settlement agreement between the Bank of Montreal and the companies, which is incorporated as part of the plan, provides that as of 17th January 1989, the bank is to receive the sum of $41,650,000 in either cash or in cash plus properties. A copy of this agreement was provided to creditors, along with such other documents including a notice of the meetings, the reorganization plan, and an extensive information circular.

The class meetings and the general meetings of creditors were held in Vancouver on 31st October and 1st November 1988. All classes of creditors voted unanimously in favour of the plan except the priority mortgagee class. This class approved the plan by the requisite majority pursuant to the provisions of the C.C.A.A., that is, a simple majority of creditors in the class holding at least 75 per cent of the debt voting in favour of the plan. 73.3 per cent of the priority mortgagees holding 78.35 per cent of the debt voted in favour of the plan.

Relax Development Corporation Ltd., a priority mortgagee facing a deficiency, voted in favour of the plan. If Relax had not voted in favour of the plan, the companies would not have obtained the requisite majority from the priority mortgagee class. Prior to the settlement with the bank, Relax struck an agreement with the companies on the value of its security amounting to about $900,000 over an appraisal value which was in dispute. Relax agreed in the settlement to vote in favour of the plan. More about that later.

The appellants on these appeals voted against the plan, and raised objections that the plan improperly put all priority mortgagees into one class, and also that the plan preferred some creditors over others. They allege that the net effect of the plan on the fully secured priority mortgagees is different than that on the mortgagees facing deficiencies, in that the plan reduces the amount of debt owed to the mortgagees facing deficiencies to the market value of the subject property of their respective security, and required assignment of the deficiency for $1. They lose the right to obtain an order absolute of foreclosure pursuant to their security. On the other hand, the fully secured priority mortgagees recover the entire amount of their indebtedness.

The appellants Excelsior and National are secured creditors of the petitioner, Northland Properties Ltd., one of the companies. They hold a first mortgage jointly over an office tower in Calgary adjacent to the Calgary Sandman Inn. Both buildings share common facilities. The principle amount of the debt owing to Excelsior and National as of 26th October 1988, is $15,874,533 plus interest of $311,901. The market value of the office tower as of 13th May 1988 was stated to be $11,675,000. They, therefore, face a potential deficiency of $4,512,434.

Guardian Trust is a secured creditor of the petitioner, Unity Investment Company Limited, and holds a first mortgage over a small office building in Nelson, British Columbia. The amount owing to Guardian is $409,198.46 and the estimated deficiency is approximately $150,000 exclusive of transaction costs.

Mr. Justice Trainor, on 12th December 1988, found that the companies had complied with the provisions of the C.C.A.A., and, therefore, the court could exercise its discretion and sanction the reorganization plan. Excelsior and National and Guardian appeal against that decision.

Mr. Justice Trainor had the carriage of this matter almost from the beginning and he heard several preliminary applications. In a careful and thorough judgment, he set out the facts distinctly, reviewed the authorities and approved the plan. I do not propose to review the authorities again because they are extensively quoted in nearly every judgment on this subject. It will be sufficient to say that they include *Re Companies' Creditors Arrangement Act; A.G. of Can. v. A.G. Que.*, [1934] S.C.R. 659, [1934] 4 D.L.R. 75; *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 53 A.R. 39 (Q.B.); *Re Associated Investors of Can. Ltd.*, [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 67 C.B.R. (N.S.) 237,

38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.*) (Q.B.); *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.*, [1891] 1 Ch. 231 (C.A.); *Re Dairy Corp. of Can. Ltd.*, [1934] O.R. 436, [1934] 3 D.L.R. 347; *Re Wellington Bldg. Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626; *Br. Amer. Nickel Corp. v. O'Brien Ltd.*, [1927] A.C. 369 (P.C.); *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B.D. 573 (C.A.), and others.

The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

(2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

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

There were really four issues argued on this appeal but, as is so often the case, there is some overlapping. I shall attempt to deal with them individually.

First it was alleged, principally by Mr. Czepil, that the Act does not authorize a plan whereby the creditors of other companies can vote on the question of whether the creditors of another company may compromise his claim. He called this the cross-company issue.

This argument arises out of the particular facts that Mr. Czepil's client found itself in where it had a first mortgage, that is, Guardian had a first mortgage on a building owned by Unity which was the only asset of Unity, and he says the C.C.A.A. does not permit creditors of other companies to vote on the disposition of Guardian's security. I think there

would be considerable merit in this submission except for the fact that the plan contemplates the consolidation of all the petitioner companies and the applications are made in this case not just under the C.C.A.A., but also under ss. 276-78 of the British Columbia Company Act, R.S.B.C. 1979, c. 59. In this respect, it is necessary to mention s. 20 of the C.C.A.A. which provides:

> 20. The provisions of this Act may be applied conjointly with the provisions of any Act of Canada or of any province, authorizing or making provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

During the argument of these appeals, we were treated to a review of the history of this matter in the court below. In reasons for judgment dated 5th July 1988 [now reported *Re Northland Properties Ltd.* (1988), 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266], Mr. Justice Trainor recited that he had been asked by some of the parties to approve a consolidation plan, but he declined to do so as the plan was not then before him in final form. It is implicit that Trainor J. thought he had authority to approve a consolidation plan and he referred to American authorities particularly, *Re Baker & Getty Fin. Services Inc.*, 78 B.R. 139 (U.S. Bankruptcy Ct., N.D. Ohio, 1987), and in *Re Snider Bros.*, 18 B.R. 320 (U.S. Bankruptcy Ct., D. Mass., 1982), and he said that he accepted the analysis of *Snider*, which proposes the test between economic prejudice of continued debtor separateness versus the economic prejudice of consolidation, and holds that consolidation is preferable if its economic prejudice is less than separateness prejudice.

I think Mr. Justice Trainor was right for the reasons described in the American authorities and because to hold otherwise would be to deny much meaning to s. 20 of the C.C.A.A. and would mean that when a group of companies operated conjointly, as these companies did (all were liable on the Bank of Montreal bonds), it would be necessary to propose separate plans for each company and those plans might become fragmented seriously.

I am satisfied there is jurisdiction to entertain a consolidation proposal.

Secondly, it was agreed that the composition of the class of priority creditors was unfair by reason of including all priority mortgagees without regard to the fact that some of them faced a deficiency and some did not. The appellants were each in the latter difficulty and they argue that they should have been placed in a different class because the other 11

priority mortgagees were going to get paid in full whether the plan was approved or not. This argument would have more merit if the plan were only for the benefit of the undersecured priority mortgagee. But the plan was also for the benefit of the company and the other creditors who, by their votes, indicted that they thought the plan was in their best interest. The learned chambers judge considered this question carefully. At p. 25 of his reasons he said this:

> An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:
>
> 1. The nature of the debt is the same, that is, money advanced as a loan.
>
> 2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.
>
> 3. The nature of the security is that it is a first mortgage.
>
> 4. The remedies are the same – foreclosure proceedings, receivership.
>
> 5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped-for appreciation in value.
>
> 6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.
>
> The points of dissimilarity are that they are separate priorities and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.
>
> Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

I agree with that, but I wish to add that in any complicated plan under this Act, there will often be some secured creditors who appear to be oversecured, some who do not know if they are fully secured or not, and some who appear not to be fully secured. This is a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both.

I adopt, with respect, the reasoning of Forsyth J. of the Court of Queen's Bench of Alberta, in a recent unreported decision in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, No. 8801-14453, 17th November 1988 [now reported 63 Alta. L.R. (2d) 361, 92 A.R. 81], particularly at pp. 13 and 14 [pp. 369-70]. I am unable to accede to this ground of appeal.

Thirdly, I pause to mention that it was not suggested that the arrangement with the Bank of Montreal constituted a preference. It was argued, however, that the entire plan was tainted by the agreement made by the companies with Relax. Apparently, there was an appraisal showing a value of its security at $3.7 million while other evidence suggests a value of between $4.5 million to $4.6 million. The amount owing to Relax on its mortgage was $6 million.

Early in the history of this matter before the plan was finalized, and before the companies struck their crucial arrangement with the Bank of Montreal, the companies and Relax agreed to a future cash payment of $500,000 and a valuation of $4 million for the Relax property which could, in total, amount to a preference of up to $900,000 to Relax and that company, in consideration of that compromise, agreed to vote for the plan.

It should be mentioned that the plan, from its inception, ensured to the priority mortgagees the full market value of their security to be determined either by agreement, appraisal, or, if necessary, arbitration. Thus, the appellants do not stand to lose anything by the agreement made with Relax. It is the bank which carried the burden of that expense.

There is no doubt that side deals are a dangerous game and any arrangement made with just one creditor endangers the appearance of the bona fides of a plan of this kind and any debtor who undertakes such a burden does so at considerable risk. In this case, however, it is apparent that this agreement was not made for the purpose of ensuring a favourable vote because at the time the deal was struck the companies had not reached an accommodation arrangement with the bank. I think the companies were negotiating, as businessmen do, on values for the purpose of putting a plan together.

Further the arrangement with Relax was fully disclosed in the plan. This does not ensure its full absolution if it was improper, but at least it removes any coloration of an underhanded or secret deal. In fact, there were also negotiations between the companies and the appellants but nothing came of those discussions.

After referring to the fact that the plan anticipated and permitted negotiations about values and other matters, the learned chambers judge said this at pp. 28 and 29 of his reasons:

> The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.
>
> If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and reread a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

In the circumstances of this case, I would not disagree with the learned chambers judge in that connection.

Lastly, it remains to be considered whether the plan is fair and reasonable. I wish to refer to three matters.

First, the authorities warn us against second-guessing businessmen (see *Re Alabama*, supra, at p. 244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, voted for the plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

Secondly, I wish to mention Mr. Czepil's argument that the plan was unfair, perhaps not conceptually, but operationally by authorizing negotiations. He says this put the parties in a difficult position when it came to vote because they risked retribution if they failed to reach agreement and then voted against the plan. He complains that some benefits offered in negotiations are no longer available to his clients.

With respect, negotiations between businessmen are much to be desired and I would not wish to say anything that would impede that salutory process. If negotiations lead to unfairness, then other considerations, of course, arise. But that, in my view, is not this case.

Thirdly, the plan assures all the priority mortgagees the full market value of their security without liquidation expenses. That is more than they could expect to receive if there had been no plan.

What they gave up is the right to take the property by order absolute or to seek a judicial sale and pursue the borrower for the deficiency. Guardian was actually offered its security but declined to accept it. The difficulty about this whole matter is the uncollectability of the deficiency having regard to the overwhelming debt owed to the bank which would practically eliminate any real chance of recovery of the deficiency.

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

> I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
>
> Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

I agree with that.

I also agree with the learned chambers judge that the plan should have been approved and I would dismiss these appeals accordingly.

ESSON J.A.: I agree.

WALLACE J.A.: I agree.

MCEACHERN J.A.: The appeals are dismissed with costs.

Appeal dismissed.

TAB 2

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

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

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

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

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

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

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

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

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

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

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

M. Hollins, for Pacific Costal Airlines.

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

J. Thom, for Royal Bank of Canada.

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

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

Subject: Corporate and Commercial; Insolvency

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

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

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

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 the proposed plan.

II. Background

Canadian Airlines and its Subsidiaries

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

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

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

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

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

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

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

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

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

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

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

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

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

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

and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *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 of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

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

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

Initial Discussions with Air Canada

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

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

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

Offer by Onex

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

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

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

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

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

Offer by 853350

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

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

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

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

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

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

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

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

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

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

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

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

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

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, sub-

ject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

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

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

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

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

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

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

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

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

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

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

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

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

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

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

51 The proposed treatment of stakeholders is as follows:

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

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

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

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

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

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

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the fly-

ing public are left unaffected.

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

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

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

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

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");

b. Claims in respect of certain outstanding or threatened litigation involving Canadian;

c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;

d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;

e. Claims of tax authorities against Canadian; and

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

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

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

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of

disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

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

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

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

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

III. Analysis

59 Section 6 of the CCAA provides that:

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

made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

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

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

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

(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [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;

(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 Af-

fected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

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

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

2. Matters Unauthorized

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

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

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

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

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

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

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

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

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

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

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

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

Section 167 of the ABCA

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

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

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

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

71 The relevant portions of section 167 provide as follows:

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

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

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

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

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

Proposed Amendment in Schedule "D"	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.

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

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

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a

cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

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

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

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

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision

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

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

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

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

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

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

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

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

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

92 While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are ad-

dressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

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

3. Fair and Reasonable

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

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

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

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

a. The composition of the unsecured vote;

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

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. Composition of the unsecured vote

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

cept 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.

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 liquida-

tion basis or on a going concern basis.

Pension Plan Surplus

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

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

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

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

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

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

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

CRAL

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

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

123 Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the wind-dup 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 rights which ought to have been assigned value.

Tax Pools

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

Capital Loss Pools

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

Undepreciated capital cost ("UCC")

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

Operating Losses

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any

operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

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

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

c. Alternatives to the Plan

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

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

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

d. Oppression

Oppression and the CCAA

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

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation,

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

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

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

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

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

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

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

Oppression allegations by Resurgence

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

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

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

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

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

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

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

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the opera-

tions of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

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

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

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

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

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

e. Unfairness to Shareholders

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

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing)

have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

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

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

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

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

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

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

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

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

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

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

e. The Public Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

able 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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2000 CarswellAlta 919, 2000 ABCA 238, [2000] A.W.L.D. 655, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131

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Canadian Airlines Corp., Re

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

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

And In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.; Resurgence Asset Management LLC (Applicant) and Canadian Airlines Corporation and Canadian Airlines International Ltd. (Respondents)

Alberta Court of Appeal [In Chambers]

Wittmann J.A.

Heard: August 3, 2000
Judgment: August 29, 2000
Docket: Calgary Appeal 00-08901

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.); affirmed (2000), 2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 3 W.W.R. 1 (Alta. C.A.)

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H.M. Kay, Q.C., A.L. Friend, Q.C., and *L.A. Goldbach*, for Respondents.

S.F. Dunphy, for Air Canada.

F.R. Foran, Q.C., for Monitor, Pricewaterhouse Coopers.

Subject: Corporate and Commercial; Civil Practice and Procedure; 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 was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation brought application for leave to appeal — Leave to appeal refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppresive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public — 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.

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

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 was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation brought application for leave to appeal — Leave to appeal refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Plan was already partially implemented and certain steps could not be reversed, including issuance of articles of reorganization, changes in share structure and management, and implementation of restructuring plan — Appeal court could not rewrite plan, but only uphold it or set it aside — Since it was no longer possible to set plan aside, court could not grant any effective remedy — Appeal court could not grant declaration that investment corporation was unaffected unsecured creditor, nor could appeal on basis of oppression proceed for same reason — No special circumstances existed to warrant expenditure of judicial resources on appeal despite its mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppresive to minority shareholders, did not violate s. 167 of Business Corporations Act of Alberta and represented best option for all parties concerned, including Canadian public — 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 *Wittmann J.A.*:

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

Borowski v. Canada (Attorney General), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232 (S.C.C.) — applied

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

Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2d) 142, 31 B.C.A.C. 161, 50 W.A.C. 161 (B.C. C.A.) — considered

Gibbex Mines Ltd. v. International Video Cassettes Ltd., [1975] 2 W.W.R. 10, 49 D.L.R. (3d) 731 (B.C. S.C.) — considered

Harris v. Universal Explorations Ltd. (1982), 16 B.L.R. 186, (sub nom. *Universal Explorations Ltd., Re)* 18 Alta. L.R. (2d) 119, 35 A.R. 71 (Alta. T.D.) — considered

Norcan Oils Ltd. v. Fogler (1964), [1965] S.C.R. 36, 49 W.W.R. 321, 46 D.L.R. (2d) 630 (S.C.C.) — considered

Schmidt v. Air Products of Canada Ltd., 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, (sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, C.E.B. & P.G.R. 8173 (S.C.C.) — referred to

Sparling v. Northwest Digital Ltd. (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) — applied

Statutes considered:

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

s. 185 — considered

s. 234 — considered

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

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 13 — considered

APPLICATION by investment corporation for leave to appeal from judgment reported at 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, [2000] 10 W.W.R. 269, 2000 ABQB 442, 20 C.B.R. (4th) 1 (Alta. Q.B.), approving airline's plan of arrangement under *Companies' Creditors Arrangement Act.*

***Wittmann J.A.* [In Chambers]:**

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, [reported 84 Alta. L.R. (3d) 9, [2000] 10 W.W.R. 269 (Alta. Q.B.)] pursuant to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, ("*CCAA*"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the *CCAA* on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

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

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

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

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;

(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as un-

secured creditors for the remainder;

(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;

(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the *CCAA*.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the *CCAA* and an order for reorganization pursuant to s. 185 of the *Business Corporations Act* (Alberta), S.A. 1981, c. B-15 as amended ("*ABCA*"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought 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 provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the *ABCA*.

15 The fairness hearing lasted two weeks during which *viva voce* evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the *ABCA* to reorganize the corporation.

LEAVE TO APPEAL UNDER THE *CCAA*

18 The *CCAA* provides for appeals to this Court as follows:

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

19 As set out in *Re Canadian Airlines Corp.*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point 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.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:
>
> (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
>
> (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the

Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;

(c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s.80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;

(d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and

(e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following *Norcan Oils Ltd.* have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: *Harris v. Universal Explorations Ltd.* (1982), 35 A.R. 71 (Alta. T.D.) and *Gibbex Mines Ltd. v. International Video Cassettes Ltd.*, [1975] 2 W.W.R. 10 (B.C. S.C.).

26 *Norcan* applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the *ABCA*, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ***ABCA*** for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.), to argue that leave to appeal can be granted after a *CCAA* plan has been implemented. In that case, as noted by Fruman, J.A.

at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the *CCAA* supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in *Norcan Oils Ltd.*, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the *ABCA*, cannot be allowed since that remedy must be granted within the context of the *CCAA* proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the *ABCA* requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of *CCAA* insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski, supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) and *Galcor*, *supra*.

39 In *Sparling*, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering *Borowski*, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In *Galcor*, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in *Borowski* were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting

of leave.

42 In particular, the applicant has not established *prima facie* meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in *Resurgence No. 1*, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the *CCAA*? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a *prima facie* meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a *prima facie* meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation

analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a *prima facie* meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had

evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is *prima facie* meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the *CCAA* proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any *prima facie* error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

Application dismissed.

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2000 CarswellAlta 1556, 2001 ABCA 9, [2001] A.W.L.D. 132, [2001] 3 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179, 88 Alta. L.R. (3d) 8, [2001] 4 W.W.R. 1, [2000] A.J. No. 1028

Canadian Airlines Corp., Re

Resurgence Asset Management LLC (Appellant)and Canadian Airlines Corporation and Canadian Airlines International Ltd. (Respondents)

Alberta Court of Appeal

Conrad, McFadyen, O'Leary JJ.A.

Judgment: December 15, 2000
Docket: Calgary Appeal 18901

Proceedings: affirming [2000] 10 W.W.R. 269 (Alta. Q.B.); refused leave to appeal [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers])

Counsel: *D.R. haigh, Q.C., D.S. Nishimura* and *A. Campbell*, for Appellant.

A.L. Friend, Q.C., S. Dunphy (Air Canada) and *L.A. Goldbach*, for Respondents.

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

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 was granted and counter-application dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation's application for leave to appeal was refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and made no error in her exercise of discretion in approving plan — Trial judge correctly determined that plan was not oppressive to minority shareholders, did not violate s. 167 of Business Corporations Act and represented best option for all parties concerned, including Canadian public — Investment corporation appealed dismissal of application for leave to appeal on grounds that R. 516 of Alberta Rules of Court allowed variation of orders made by single judges on matters incidental to appeal — Appeal dis-

missed — Application for leave to appeal is not matter incidental to appeal — Alberta Rules of Court, Alta. Reg. 390/68, R. 516 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Practice --- Practice on appeal — Leave to appeal — Appeal from refusal or granting of leave

Application by airline for approval of plan of arrangement was granted and counter-application by investment corporation was dismissed on basis that all statutory conditions were fulfilled and plan was fair and reasonable — Investment corporation's application for leave to appeal was refused — Appeal concerning fairness and reasonableness of plan could not proceed on grounds of mootness — Even if appeal were not moot, leave would be refused on basis that chambers judge made no palpable error in findings of fact, and made no error in her exercise of discretion in approving plan — Investment corporation appealed dismissal of application for leave to appeal on grounds that R. 516 of Alberta Rules of Court allowed variation of orders made by single judges on matters incidental to appeal — Appeal dismissed — Application for leave to appeal is not matter incidental to appeal — Alberta Rules of Court, Alta. Reg. 390/68, R. 516.

Statutes considered:

Court of Appeal Act, S.B.C. 1982, c. 7

Generally — referred to

s. 9(7) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 516 — considered

APPEAL by investment corporation from order reported at [2000] 10 W.W.R. 314, 84 Alta. L.R. (3d) 52, 20 C.B.R. (4th) 46, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131, 2000 ABCA 238 (Alta. C.A. [In Chambers]), dismissing application for leave to appeal judgment reported at [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, 2000 ABQB 442 (Alta. Q.B.), approving plan of arrangement of airline.

***Conrad J.A.* (orally):**

1 We have reached a decision in this matter. The decision is unanimous and will be delivered by Madam Justice McFadyen.

***McFadyen J.A.* (orally):**

2 In our view, the *Weststar* decision of the Supreme Court of Canada adopted the reasoning of Chief Justice McEachern. In turn, his decision was based on the provisions of the British Columbia *Court of Appeal Act* as they existed at the time. Section 9(7) permitted the Court to vary or discharge any order made by a single judge of the Court. In other words, the British Columbia legislation gave jurisdiction to the British Columbia Court of Appeal to review *all* decisions of the single judge, including leave orders.

3 In Alberta, Rule 516 provides that the Court may vary orders made by single judges on matters which are incidental to an appeal. Without commenting on the meaning of that phrase, we are of the view that matters incidental to an appeal do not include leave and our Court has consistently held that to be the case.

4 In our view, there is no jurisdiction in Alberta to review the decision of a single judge refusing leave to appeal.

***Conrad J.A.* (orally):**

5 In keeping with the practice that has developed with these parties, the Court orders that there will be no costs of this appeal.

Appeal dismissed.

END OF DOCUMENT

2001 CarswellAlta 888, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note), 2001 CarswellAlta 889, [2001] S.C.C.A. No. 60

Canadian Airlines Corp., Re

Resurgence Asset Management LLC v. Canadian Airlines Corporation and Canadian Airlines International Ltd.

Supreme Court of Canada

Bastarache J., Iacobucci J., McLachlin C.J.C.

Judgment: July 13, 2001
Docket: 28388

Proceedings: Leave to appeal refused (2000), 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 3 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.); Affirmed 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]); Leave to appeal refused 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.)

Counsel: None given.

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

Corporations.

Practice.

Bastarache J., Iacobucci J., McLachlin C.J.C.:

1 The application for leave to appeal is dismissed with costs.

END OF DOCUMENT

TAB 3

2002 CarswellOnt 1261, 33 C.B.R. (4th) 284, 113 A.C.W.S. (3d) 760

C

2002 CarswellOnt 1261, 33 C.B.R. (4th) 284, 113 A.C.W.S. (3d) 760

PSINet Ltd., 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 PSINet Limited, PSINet Realty Canada Limited, PSINetworks Canada Limited and Toronto Hosting Centre Limited, Applicants

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: March 14, 2002
Judgment: March 14, 2002
Docket: 01-CL-4155

Counsel: *Lyndon A.J. Barnes*, *Monica Creery*, for Applicants

Geoffrey B. Morawetz, for the Monitor, PricewaterhouseCoopers Inc.

Peter H. Griffin, for PSINet Inc.

Edmond F.B. Lamek, for 360Networks Services Ltd.

Subject: Corporate and Commercial; Insolvency

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

Corporations proposed consolidated plan of arrangement or compromise — Consolidated plan was approved by creditors at meeting — Unsecured creditors strongly supported consolidated plan — Since meeting of creditors negotiations with respect to some aspects of plan had been ongoing — Corporations brought motion to sanction consolidated plan of arrangement or compromise — As result of negotiations, sanction was unopposed — Motion granted — Consolidated plan avoided complex and potentially litigious issues arising from allocation of proceeds from sale of corporations' assets — Consolidated plan was in strict compliance with statutory requirements and adhered to previous orders of court — Determination was made that all done or purported to be done was authorized by Companies' Creditors Arrangement Act — Creditors had sufficient time to make reasoned decision — As to fairness and reasonableness of plan, perfection was not required — In circumstances, given in-

tertwined nature of business, consolidated plan was appropriate — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Farley J.*:

Associated Freezers of Canada Inc., Re, 36 C.B.R. (3d) 227, 1995 CarswellOnt 944 (Ont. Bktcy.) — considered

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

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

Central Guaranty Trustco Ltd., Re, 21 C.B.R. (3d) 139, 1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List]) — referred to

J.P. Capital Corp., Re, 31 C.B.R. (3d) 102, 1995 CarswellOnt 53 (Ont. Bktcy.) — referred to

Lehndorff General Partner Ltd., Re, 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Northland Properties Ltd., Re, 73 C.B.R. (N.S.) 175, 1988 CarswellBC 558 (B.C. S.C.) — considered

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

Northland Properties Ltd., Re, 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — referred to

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

Statutes considered:

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

Generally — referred to

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

Generally — referred to

MOTION by corporations to sanction consolidated plan of arrangement or compromise.

***Farley J.*:**

1 This motion was for the sanctioning of the consolidated plan of arrangement or compromise of the four Canadian applicants under the *Companies' Creditors Arrangement Act* ("CCAA"). The consolidated plan was approved by the creditors of the applicants at meetings held February 28, 2002. Since that time and as permitted by the consolidated plan there have been ongoing negotiations concerning various aspects of the plan. It is a tribute to the expertise and experience of the parties involved and their counsel that they have been able to negotiate resolutions of the various points in issue with the result that this sanction motion is unopposed. I also think it commendable that the Monitor so amply demonstrated the objectivity and neutrality which is the hallmark of a court-appointed officer.

2 I am advised that while the applicants initially considered an unconsolidated plan which had the support of PSINet Inc. ("Inc."), their parent and major creditor, it was considered that the consolidated route was the way to go. The consolidated plan avoids the complex and likely litigious issues surrounding the allocation of the proceeds from the sale of substantially all of the assets of the applicants to Telus Corporation. The consolidated plan also reflected the intertwined nature of the applicants and their business operations, which businesses in essence operated as a single business and with only one of the applicants having employees. I have previously alluded to the incomplete and deficient record keeping of the applicants. While shooting oneself in the foot should not be endorsed, this is another factor favouring consolidation and the elimination of expensive allocation (amongst the four Canadian applicants) litigation.

3 I note that the consolidated plan also provides that Inc. valued its charge against the assets of PSINet Limited ("Ltd.") one of the applicants to $55 million. The Monitor, PricewaterhouseCoopers Inc. found this to be a reasonable amount and within the range of values which might reasonably be anticipated. Again however I would repeat my observation about incomplete and deficient record keeping.

4 At the February 28th meeting of creditors, a single class of creditors, namely the unsecured creditors, voted on the consolidated plan as it then existed. Secured creditors were not affected by the plan, but were of course characterized as unsecured creditors to the extent that their claim exceeded the expected deficiency in the deemed realization of their security. 92.7% of the creditors voting, representing 98.8% in value of the claims, voted in favour of the plan. Had the votes of Inc. and other creditors affiliated with the applicants been ignored, then 92.5% of the class, representing 87.2% in value voted in favour of the plan.

5 Since the vote, 360Network Services Ltd. (and other affiliates) ("360Networks") have reached agreement with the applicants and Inc. to resolve a motion brought by 360Networks in respect of its concerns regarding the consolidation of the estates of the applicants in the plan of arrangement.

6 Similarly Inc. has made certain concessions as to the plan with an eye to making good on the condition imposed on it to make a material (albeit modest) adjustment so as to compensate the other creditors for the "frustration cost" associated with Inc.'s late blooming discovery of its security vis-à-vis Ltd. and its motion to reperfect this security.

7 The three part test for sanctioning a plan is laid out in *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Sammi Atlas Inc., Re*, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]):

> (a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

(b) All material filed and procedures carried out are to be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA or other orders of the court; and

(c) The plan must be fair and reasonable.

8 It appears to me that parts (a) and (b) have been accomplished, now that Inc. has made the further concessions. The creditors have had sufficient time and information to make a reasoned decision. They have voted in favour of the consolidated plan by a significant margin over the statutory requirement, even where one eliminates the related vote of Inc. and its affiliates. In reviewing the fairness and reasonableness of a plan, the court does not require perfection. As discussed in *Sammi* at p. 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... One must look to the creditors as a whole (i.e. generally) and to the objecting creditors (specifically), and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights...

9 There is a heavy onus on parties seeking to upset a plan that the required majority have supported: See *Sammi* at p. 174 citing *Central Guaranty Trustco Ltd., Re*, 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List])

10 The fairness and reasonableness of a plan are shaped by the unique circumstances of each case, within the context of the CCAA. In *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.), leave to appeal refused [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers]) Paperny J. at p. 294 considered factors such as the composition of the unsecured vote, what creditors would receive on liquidation or bankruptcy as opposed to the plan, alternatives available (to the plan and bankruptcy) and the public interest. I have already discussed the first element; the third and fourth do not appear germane here. As to the second, it is clear that the creditors generally are receiving more than in a bankruptcy and to the extent that Inc. is impacted, it has consented to such impact.

11 In the circumstances of this case, the filing of a consolidated plan is appropriate given the intertwining elements discussed above. See *Northland Properties Ltd., Re*, 69 C.B.R. (N.S.) 266 (B.C. S.C.), affirmed (B.C.C.A.), *supra*, at p. 202; *Lehndorff General Partner Ltd., Re*, 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 31. While consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect. Here as well the concessions of Inc. have ameliorated that prejudice. Further I am of the view if consolidation is appropriate (and not proceeded with by any applicant for tactical reasons of minimizing valid objections), then it could be inappropriate to segregate the creditors into classes by corporation which would not naturally flow with the result that one or more is given a veto, absent very unusual circumstances (and not present here). I would also note that *Associated Freezers of Canada Inc., Re*, 36 C.B.R. (3d) 227 (Ont. Bktcy.) and *J.P. Capital Corp., Re*, 31 C.B.R. (3d) 102 (Ont. Bktcy.) which referred to prejudice to one creditor were not CCAA cases, but rather *Bankruptcy and Insolvency Act* cases; secondly *Associated Freezers* merely kept the door open for the objecting party to reconsider its position given the short notice and provided that if on reflection it wished to come back to make its submissions, it was entitled to do so for a period of time.

12 In the end result (and with no creditors objecting), I approve and sanction the consolidated plan as amended. Order to issue accordingly as per my fiat.

Motion granted.

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TAB 4

1993 CarswellOnt 182, 17 C.B.R. (**3d**) 1, (sub nom. Olympia & York Developments Ltd., Re) **12 O.R.** (**3d**) **500**

Olympia & York Developments Ltd. v. Royal Trust Co.

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re plan of arrangement of OLYMPIA & YORK DEVELOPMENTS LIMITED and all other companies set out in Schedule "A" attached hereto

Ontario Court of Justice (General Division)

R.A. Blair J.

Heard: February 1 and 5, 1993
Oral reasons: February 5, 1993
Written reasons: February 24, 1993
Judgment: February 24, 1993
Docket: Doc. B125/92

Counsel: [List of counsel attached as Schedule "A" hereto.]

Subject: Corporate and Commercial; Insolvency

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

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Sanctioning of plan — Unanimous approval of plan by all classes of creditors not being necessary where plan being fair and reasonable.

Under the protection of the *Companies' Creditors Arrangement Act* ("CCAA"), O & Y negotiated a plan of arrangement. The final plan of arrangement was voted on by the numerous classes of creditors: 27 of the 35 classes voted in favour of the plan, eight voted against it. O & Y applied to the court under s. 6 of the CCAA for sanctioning of its final plan.

Held:

The application was allowed.

In considering whether to sanction a plan of arrangement, the court must consider whether: (1) there has been strict compliance with all statutory requirements; (2) all materials filed and procedures carried out are authorized by the CCAA; and (3) the plan is fair and reasonable.

The court found that the first two criteria had been complied with. O & Y met the criteria for access to the protection of

the CCAA, the creditors were divided into classes for the purpose of voting and those classes had voted on the plan. All meetings of creditors were duly convened and held pursuant to the court orders pertaining to them. Further, nothing had been done or purported to have been done that was not authorized by the CCAA.

In assessing whether a plan is fair and reasonable, the court must be satisfied that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders. One important measure of whether a plan is fair and reasonable is the parties' approval of the plan and the degree to which approval has been given. With the exception of the eight classes of creditors that did not vote to accept the plan, the plan met with the overwhelming approval of the secured creditors and unsecured creditors.

While s. 6 of the CCAA makes it clear that a plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class, the section does not make it clear whether the plan must be approved by *every* class of creditors before it can be sanctioned by the court. A court would not sanction a plan if the effect of doing so were to impose it upon a class or classes of creditors who rejected it and to bind them by it. However, in this case, the plan provided that the claims of the creditors who rejected the plan were to be treated as "unaffected claims" not bound by its provisions. Further, even if they approved the plan, secured creditors had the right to drop out at any time by exercising their realization rights. Finally, there was no prejudice to the eight classes of creditors that did not approve the plan because nothing was being imposed upon them that they had not accepted and none of their rights were being taken away.

Cases considered:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, 2 Meg. 377, [1886-90] All E.R. Rep. Ext. 1143, [1891] 1 Ch. at 231 (C.A.) — *referred to*

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

Canadian Vinyl Industries Inc., Re (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.) — *referred to*

Dairy Corp. of Canada, Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — *referred to*

École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987), Inc. (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.) — *referred to*

Keddy Motor Inns Ltd., Re (1992), 13 C.B.R. (3d) 245, 90 D.L.R. (4th) 175, 6 B.L.R. (2d) 116, 110 N.S.R. (2d) 246, 299 A.P.R. 246 (C.A.) — *referred to*

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *referred to*

Multidev Immobilia Inc. v. S.A. Just Invest, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.) — *considered*

NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41

O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *considered*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 193 (C.A.) [leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. xxxiii (note), 135 N.R. 317 (note)] — *considered*

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.) — *considered*

Statutes considered:

Companies Act, The, R.S.O. 1927, c. 218.

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

s. 4

s. 5

s. 6

Joint Stock Companies Arrangements Act, 1870 (U.K.), 33 & 34 Vict., c. 104.

Application for sanctioning of plan under *Companies' Creditors Arrangement Act.*

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

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

2 A Final Plan of Compromise or Arrangements has now been negotiated and voted on by the numerous classes of creditors. 27 of the 35 classes have voted in favour of the Final Plan; 8 have voted against it. The Applicants now bring the Final Plan before the Court for sanctioning, pursuant to section 6 of the *Companies' Creditors Arrangement Act.*

The Plan

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

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

4 The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals — with some common themes — for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.

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

1. The organization of O & Y Properties, a company to be owned as to 90% by OYDL and as to 10% by the Reichmann family, and which is to become OYDL's Canadian Real Estate Management Arm;

2. Subject to certain approvals and conditions, *and provided the secured creditors do not exercise their remedies against their security*, the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y properties, in exchange for shares; and,

3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

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

7 Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class by class basis, for dealing with the outstanding debt in question during the 5 year Plan period.

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

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

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

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

provides,

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

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

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

The Principles to be Applied on Sanctioning

13 In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289 (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the *Companies' Creditors Arrangement Act*, with this overview, at pp. 308-309:

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

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

15 Section 6 of the CCAA reads as follows:

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

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

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

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

tion.

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

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

18 In an earlier Ontario decision, *Re Dairy Corp. of Canada*, [1934] O.R. 436 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario *Companies Act*. The N.S.C.A. recently followed *Re Northland Properties Ltd.* in *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S.C.A.). Farley J. did as well in *Re Campeau Corp.*, [1992] O.J. No. 237 (Ont. Ct. of Justice, Gen. Div.) [now reported at 10 C.B.R. (3d) 104].

Strict Compliance with Statutory Requirements

19 Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: See *Re Campeau, supra.*

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

21 With the consent, and at the request of, the Applicants and the Creditors' Committees, The Honourable David H.W. Henry, a former Justice of this Court, was appointed "Claims Officer" by Order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or The Honourable M. Craig or The Honourable W. Gibson Gray — both also former Justices of this Court — as his designees, presided over the meetings of the Classes of Creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his Report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the Court Orders pertaining to them and the CCAA.

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

Unauthorized conduct

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

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

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

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

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

Fair and reasonable

28 The Plan must be "fair and reasonable". That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the *Companies' Creditors Arrangement Act*. "Fairness" is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

29 From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs whose decision in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 116, that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

30 If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors

of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced — or, "reasonable" — manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it — technical and procedural compliance with the Act aside — the plan should be sanctioned if it is "fair and reasonable".

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

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

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

33 In *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. at 231 (C.A.), a case involving a scheme and arrangement under the *Joint Stock Companies Arrangements Act, 1870* [(U.K.), 33 & 34 Vict., c. 104], Lord Justice Bowen put it this way, at p. 243:

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

Again at p. 245:

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

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

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

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

37 As other courts have done, I observe that it is not my function to second guess the business people with respect to

the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

38 This point has been made in numerous authorities, of which I note the following: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175, at p. 184 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195, at p. 205 (B.C.C.A.); *Re Langley's Ltd.*, [1938] O.R. 123 (C.A.), at p. 129; *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245; *École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987) Inc.* (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.).

39 In *Re Keddy Motors Inns Ltd., supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

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

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

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

42 With the exception of the 8 classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the Applicants. This level of approval is something the court must acknowledge with some deference.

43 Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of 5 years.

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

45 The claims of unsecured creditors under the Plan are postponed for 5 years, with interest to accrue at the relevant

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

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

47 Speaking as co-chair of the Unsecured Creditors' Committee at the meeting of that Class of Creditors, Mr. Ed Lundy made the following remarks:

> Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.
>
> The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.
>
> In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.
>
> The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.
>
> After such consideration, the members have indicated their intentions as follows ...
>
> Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

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

49 As for the O & Y Applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Proper-

ties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.

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

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

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

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

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

Lack of unanimity amongst the classes of creditors

55 As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In 8 of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50%/75% test of section 6.

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

Class 2 — First Canadian Place Lenders

Class 8 — Fifth Avenue Place Bondholders

Class 10 — Amoco Centre Lenders

Class 13 — L'Esplanade Laurier Bondholders

Class 20 — Star Top Road Lenders

Class 21 — Yonge-Sheppard Centre Lenders

Class 29 — Carena Lenders

Class 33a — Bank of Nova Scotia Other Secured Creditors

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

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

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

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

60 At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See *Re Keddy Motor Inns Ltd., supra*, at p. 20. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

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

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

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

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

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or *any*

> class of them, the court may, on the application in a summary way of the company or of any such creditor ... order a meeting of the creditors or class of creditors ... (Emphasis added)

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

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

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

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

67 This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 600):

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

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

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

70 The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the Court to ratify an arrangement which had been refused by a class or classes of

creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved *as regards the other creditors who voted in favour of the Plan.* The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

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

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

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

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

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

76 I am prepared to do so.

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

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

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

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

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

80 The provision in the proposed draft Order which is the most contentious is paragraph 4 thereof, which states:

> 4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

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

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

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

83 These suggestions are vigorously opposed by the Applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed Order is necessary in order to provided those creditors with the protection to which they say they are entitled. In

any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise — if arise they do.

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

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

(i) the Applicants shall treat such Class of Claims to be an Unaffected Class of Claims; and,

(ii) the Applicants *shall* apply to the Court "for a Sanction Order which sanctions the Plan *only insofar as it affects the Classes which have agreed to the Plan*.

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

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

88 Accordingly, an order will go in terms of the draft Order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.

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

Application allowed.

Appendix "A" — Counsel for Sanctioning Hearing Order

David A. Brown, Q.C.,	-- For the Olympia & York
Yoine Goldstein, Q.C.,	Applicants
Stephen Sharpe and	

Mark E. Meland	
Ronald N. Robertson, Q.C.	-- For Hong Kong & Shanghai Banking Corporation
David E. Baird, Q.C., and Ms Patricia Jackson	-- For Bank of Nova Scotia
Michael Barrack and S. Richard Orzy	-- For the First Canadian Place Bondholders, the Fifth Avenue Place Bondholders and the L'Esplanade Lauriere Bondholders
William G. Horton	-- For Royal Bank of Canada
Peter Howard and Ms J. Superina	-- For Citibank Canada
Frank J. C. Newbould, Q.C.	-- For the Unsecured/Under-Secured Creditors Committee
John W. Brown, Q.C., and J.J. Lucki	-- For Canadian Imperial Bank of Commerce
Harry Fogul and Harold S. Springer	-- For the Exchange Tower Bondholders
Allan Sternberg and Lawrence Geringer	-- For the O & Y Eurocreditco Debenture Holders
Arthur O. Jacques and Paul M. Kennedy	-- For Bank of Nova Scotia, Agent for Scotia Plaza Lenders
Lyndon Barnes and	-- For Credit Lyonnais,
J.E. Fordyce	Credit Lyonnais Canada
J. Carfagnini	-- For National Bank of Canada
J.L. McDougall, Q.C.	-- For Bank of Montreal
Carol V.E. Hitchman	-- For Bank of Montreal (Phase I First Canadian Place)

James A. Grout	-- For Credit Suisse
Robert I. Thornton	-- For I.B.J. Market Security Lenders
Ms C. Carron	-- For European Investment Bank
W.J. Burden	-- For some debtholders of O & Y Commercial Paper II Inc.
G.D. Capern	-- For Robert Campeau
Robert S. Harrison and A.T. Little	-- For Royal Trust Co. as Trustee

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TAB 5

1999 CarswellOnt 4661, 15 C.B.R. (4th) 311, [1999] O.J. No. 5322

C

1999 CarswellOnt 4661, 15 C.B.R. (4th) 311, [**1999**] O.J. No. 5322

T. Eaton Co., 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 T. Eaton Company Limited, Applicant

Ontario Superior Court of Justice [Commercial List]

Farley J.

Judgment: November 23, 1999
Docket: 99-CL-3516

Subject: Corporate and Commercial; Insolvency

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

Company brought application for court's approval for plan under Business Corporations Act — Application granted — To be approved, plan must strictly comply with all statutory requirements, determination must be made that nothing has been done or purported to be done that is not authorized by Act, and plan must be fair and reasonable — Perfection is not required for plan to be fair and reasonable, as plan is compromise — Both classes of creditors as well as shareholders voted overwhelmingly in favour of plan — Alternative plan was not presented — Concern was raised regarding amount going to shareholders under plan, and plan could be "closer to perfection", but plan was fair and reasonable — Business Corporations Act, R.S.O. 1990, c. B.16.

Cases considered by *Farley J.*:

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

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

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — 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.) — applied

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

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.) — applied

Olympia & York Developments Ltd., Re (1993), (sub nom. *Olympia & York Developments Ltd. v. Royal Trust Co.*) 18 C.B.R. (3d) 176, 102 D.L.R. (4th) 149 (Ont. Gen. Div.) — applied

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

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]) — applied

Sorsbie v. Tea Corp. [1904] 1 Ch. 12 (Eng. C.A.) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

APPLICATION by company for court approval of plan under *Business Corporations Act.*

***Farley J.*:**

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

(a) there must be strict compliance with all statutory requirements;

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

(c) the plan must be fair and reasonable.

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

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

3 It would appear to be undisputed by anyone (including myself) that items (a) and (b) have been met and

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

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

5 In *Sammi Atlas Inc., supra*, I cited *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.), *Northland Properties Ltd., supra*, and *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at pp.173-4 where I observed:

> ... A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights ...
>
> Those voting on the Plan (and I noted there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p. 510 of *Olympia & York Developments Ltd.*:
>
> > As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.
>
> The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests ...

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

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

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

9 What is of concern is the question of the size of the pot going to the shareholders. That was a bone of contention amongst the various creditors - but as I have observed, no one advanced a competing plan. I would also like to make it clear that I have no doubt that many of the shareholders have suffered significant losses as a result of the demise of Eaton's and I know that it is painful for them. It is not my intention to increase that pain but

I do think that it is important for at least future situations that in devising and considering plans persons recognize that there is a natural and legal "hierarchy of interest to receive value in a liquidation or liquidation related transaction" and that in that hierarchy the shareholders are at the bottom. See my endorsement of November 22, 1999 in *Re Royal Oak Mines Inc.* [(1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List])]:

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

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

11 I also think it helpful to note my observations in *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), at pp.11-16 and especially the analysis *Sorsbie v. Tea Corp*, [1904] 1 Ch. 12 (Eng. C.A.) as well as the other cases referred to therein.

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

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

Application granted.

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TAB 6

[Indexed as: Sammi Atlas Inc., Re]

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

In The Matter of the Courts of Justice Act, R.S.O. 1990, c.C.43

In The Matter of a Plan of Compromise or Arrangement of Sammi Atlas Inc.

Ontario Court of Justice, General Division [Commercial List]

Farley J.

Heard: February 27, 1998

Judgment: February 27, 1998

Docket: 97-BK-000219, B230/97

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

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues — Corporation brought motion for approval and sanctioning of plan of compromise and arrangement under Companies' Creditors Arrangement Act — There must be strict compliance with all statutory requirements and adherence to previous orders of court — All materials filed and procedures carried out must be examined to determine whether anything has been done or purported to be done which is not authorized by Act — Plan must be fair and reasonable — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable" — Corporation and majority of creditors approved plan of compromise and arrangement under Companies' Creditors Arrangements Act providing for distribution to creditors on sliding scale based on aggregate of all claims held by each claimant — Corporation brought motion for approval and sanctioning of plan — Creditor by way of assignment brought motion for direction that plan be amended — Motion for approval and sanctioning was granted, and motion for amendment was dismissed — Court should be reluctant to interfere with business decisions of creditors reached as a body — No exceptional circumstances supported motion to amend plan after it was voted on — No jurisdiction existed under Act to grant substantive change sought by creditor — Creditor and all unsecured creditors were treated fairly and reasonably — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Farley J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) — applied

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

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — applied

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

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.) — referred to

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.) — applied

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION for approval and sanctioning of plan of compromise and arrangement under *Companies' Creditors Arrangement Act*; MOTION by creditor for amendment of plan.

Farley J.:

1 This endorsement deals with two of the motions before me today:

1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and

2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

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

1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act* ("CCAA"); and

3) the Plan must be fair and reasonable.

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

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

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

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

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

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

> ... This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.
>
> The Courts should not second guess business people who have gone along with the Plan....

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

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

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

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

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

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

important to do so. Argo of course has not claimed it is a "little person" in the context of this CCAA proceeding.

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

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

Addendum:

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

Motion for approval granted; motion for amendment dismissed.

TAB 7

1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321

Royal Bank v. Soundair Corp.

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Ontario Court of Appeal

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman*, for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

J. T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and *L.E. Ritchie*, for plaintiff/respondent Royal Bank of Canada.

S.F. Dunphy and *G.K. Ketcheson*, for Ernst & Young Inc., receiver of respondent Soundair Corporation.

W.G. Horton, for Ontario Express Limited.

N.J. Spies, for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — General conduct of receiver.

Receivers — Sale of debtor's assets — Approval by court — Court appointing receiver to sell airline as going concern — Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unac-

ceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) —

referred to

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

***Galligan J.A.*:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

(b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the comple-

tion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver

acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it*. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL.* Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg*, supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out

his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a signi-

ficantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of Sound-Air.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg*, supra, and *Re Selkirk*, supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors*, supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser

ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk*, supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to*

compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 109 [O.R.]:

The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I

do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg*, supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate

> the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining

whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act*, R.S.O. 1980, c. 137, and the *Environmental Protection Act*, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements

with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A.:

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were

owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.), Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily

> available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.), Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10

million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first

time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it

knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them.*"

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

END OF DOCUMENT

TAB 8

H

2005 CarswellOnt 1240, 9 C.B.R. (5th) 315, 138 A.C.W.S. (3d) 221

Tiger Brand Knitting Co., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF: TIGER BRAND KNITTING COMPANY LIMITED (Applicants)

Ontario Superior Court of Justice

C. Campbell J.

Heard: April 1, 2005
Judgment: April 5, 2005
Docket: 04-CL-5532

Counsel: Scott A. Bomhof for Monitor RSM Richter Inc.

Orestes Pasparakis for GMAC Commercial Finance Corporation-Canada

Sean Dewart for USWA

Renée B. Brosseau for Tiger Brand Knitting Company Limited

Steven L. Gaff for Geetext Global Sourcing Inc.

Christopher Besant for Joan Fisk

Fred Myers for Prospective Purchaser

Hugh Mackenzie for Andrew Warnock, James Warnock

Leonard Alksnis for Majority of the Members of the board

Subject: Insolvency; Estates and Trusts

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous issues

Applicant applied for and received protection from its creditors under Companies' Creditors Arrangement Act —

Court ordered sale of assets rather than restructuring as asset sale was most likely result of ongoing efforts to maximize stakeholder returns — G made offer to purchase applicant's assets, subject to deadline for receipt of superior offers — Both trade union representing applicant's employees and major creditor believed superior offers were available and "break fee" was negotiated with G — When deadline for other offers passed G took position its offer should be accepted or it should be paid "break fee" — Monitor applied for extension of time to negotiate with potential purchasers — Trade union applied for order that monitor be directed not to close deal with prospective purchaser and to negotiate with company which might preserve jobs of some of applicant's employees — Application to extend time was granted; application by trade union was dismissed — Court had jurisdiction to make order sought by trade union but it was not appropriate — There was no suggestion that monitor had acted inappropriately or breached any of its obligations — To allow offering process to be reopened by enjoining monitor from completing proposed transaction would amount to unfairness to prospective purchaser, to G, and to secured creditor.

Cases considered by *C. Campbell J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — followed

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.) — followed

Stelco Inc., Re (2005), 2005 CarswellOnt 1188 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11 — referred to

APPLICATION by monitor for extension of time in which to negotiate with prospective purchaser; Application by trade union for order enjoining monitor from closing sale.

***C. Campbell J.*:**

1 Tiger Brand Knitting Company Limited ("the Applicant") and RSM Richter Inc. ("the Monitor") seek an extension of the time within which to present an offer to the Court for the sale of the business and assets of the Applicant.

2 The extension of up to 15 days is not opposed. Counsel on behalf of the United Steel Workers of America ("USWA") urges the Court to add a condition to the granting of any extension, namely, that the Monitor be directed not to accept a bid offer that it has received and to negotiate with another party that may make an offer.

3 USWA seeks to add the condition with the prospect that a new offer, if it comes forward, would provide

the opportunity of some or all of the 200 jobs now occupied by its members at the Applicant's facility in Cambridge.

4 Very simply, it is urged that the broad considerations available to the Court to provide remedy under *The Companies' Creditors Arrangement Act* ("CCAA") permit the Court to take into account and balance the interests of all stakeholders, not just those of a purchaser who would provide the greatest immediate monetary recovery to a secured creditor.

Background Facts

5 On August 30, 2004, the Applicant filed for, and obtained, protection from its creditors under the CCAA pursuant to the "Initial Order." The stay of proceedings was initially for a period of 30 days and since September 29, 2004, has been extended on a number of occasions, the last being March 15, 2005.

6 Tiger Brand, which is in the business of design and manufacture of casual clothing, has been subject to the impact of globalization, which has seen cheaper goods manufactured abroad displace domestic production. This, together with the rise of the Canadian dollar relative to the United States dollar, has resulted in a deterioration of financial performance.

7 The impact will particularly felt by the employees in head office and manufacturing facilities in Cambridge, Ontario, but as well by the Company's three retail outlets.

8 From the commencement of its involvement, the Monitor has recognized that a so-called multi-track process provided the only realistic opportunity to maximize stakeholder returns. As set out in the Monitor's First Report, these included (a) soliciting offers for the business and assets; (b) considering shareholders' restructuring plans; (c) the liquidation value of assets; and (d) assisting in identification of potential investors.

9 Subject to comments below, none of the interested parties has taken the position that the Monitor has not reasonably or appropriately carried out its duties in accordance with Court Orders.

10 By this Court's Order of September 13, 2004, a Sale Process was approved, as it was recognized that a sale of assets rather than a restructuring of the Company was the more likely result of the ongoing effort.

11 The marketing process was extended and by Order of November 3, 2004, amended as set out in that Order with the explanation and rationale for it contained in the Monitor's Fifth Report to the Court dated January 11, 2005:

> • The Monitor originally identified a sale transaction with Geetex which, at the time, provided the highest value to the stakeholders and had the greatest probability of closing. Importantly, the Geetex offer was premised on an asset acquisition which would likely result in Geetex carrying on an importing operation; and, as such, an orderly wind-down and termination of the Company's manufacturing and possibly other operations in Cambridge, Ontario;
>
> • Geetex agreed that its offer would be a "stalking horse" in the amended sale process. Parties interested in purchasing the Assets for an amount greater than the Geetex stalking horse bid had to submit offers by a November 12, 2004 deadline;

12 A deadline of November 12, 2004 was set for the receipt of offers pursuant to the Amended Sale Process, the short time period being considered necessary due to a belief by, among others, Geetex that, "if a transaction was not consummated in short order, the assets and the business of Tiger Brand generally would deteriorate significantly and rapidly in value."

13 Apparently, both the major secured creditor GMAC and the Union were of the view that superior offers were available, the process was extended and in early January 2005, a "stay fee" was negotiated between the Monitor and Geetex, whereby Geetex kept its offer open to February 15, 2005.

14 Geetex takes the position that there has not been until most recently an offer superior to its and that either the new offer from a new purchaser of assets should be accepted and closed, or Geetex's offer accepted and completed, or it be paid the break fee plus costs.

15 As of the time of its Sixth Report, the Monitor had executed non-binding non-exclusive memoranda of understanding with two prospective purchasers and looked forward to one or both of the parties presenting a final form of asset purchase agreement for consideration.

16 Since that time, the Monitor has been negotiating an agreement with one prospective purchaser, which is expected to be finalized and executed shortly. Hence the request for an extension to April 15, 2005.

17 The affidavit material filed on behalf of USWA identifies a potential bidder, which, if successful, would provide the opportunity for preservation of some employment in Cambridge.

18 In effect, USWA complains that the Monitor will not now consider and negotiate an offer from this bidder, which effectively eliminates the possibility of saving employment in Cambridge.

19 The Monitor reports in its Seventh Report that efforts to identify going-concern purchasers that would preserve employment at Cambridge have been unsuccessful.

20 The position of the Monitor, supported by the major secured creditor, Geetex and the prospective purchaser, is that to add a condition to the grant of extension would undermine and violate the process that has been followed to date.

Analysis & Law

21 Two principles involving the Court's jurisdiction and discretion are urged, one by USWA and another by those who oppose an extension of the time to complete a plan on terms.

22 USWA submits that the broad discretion given to the Court to take into account the interests of all stakeholders not just secured creditors, directs that in these circumstances, every reasonable consideration be given to the saving of jobs and of the Company to operate as an entity.

23 Mr. Dewart submits that the broad and flexible discretion given to the Court under the CCAA favours any reasonable effort to preserve the business under a restructuring as opposed to a liquidation, which is more properly achieved under the BIA.

24 The balancing effort, it is suggested, should allow those stakeholders who wish to achieve continuance of the enterprise every reasonable opportunity to do so and in this case, the only way to do so is to require the

Monitor to not accept an offer to purchase assets until it at least considers a bid from an entity that might allow continuance of at least some of the business.

25 The Court of Appeal for Ontario rendered a decision on March 31, 2005 dealing with the issue of removal of directors in the context of a CCAA proceeding.

26 In *Stelco Inc., Re* [2005 CarswellOnt 1188 (Ont. C.A.)], the reasons of Blair J. for the Court considered the extent to which the Court's "inherent jurisdiction" and "discretion" under the CCAA might be involved to provide the remedy sought.

27 After adopting the observation from I.H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems at p. 2, that there is a vital distinction between jurisdiction and discretion that must be observed, he went on to say at paragraph 38:

> [38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose." Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. [Footnote omitted]

28 At paragraph 39, in commenting on the discretion of a judge under s. 11 of the CCAA to, among other things, stay, restrain further proceedings or prohibit actions against the Company acting in good faith and with due diligence, Blair J.A. went on to say:

> In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself.

29 Paragraph 44 reads:

> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. ...

30 This leads to the principle relied on by those who oppose the extension on conditions that would favour a new offer.

31 The principle is that process that has been put in place for receiving offers in respect of either the busi-

ness as a going concern or of its assets, should be honoured. The process is integral to the administration of statutes such as the BIA and the CCAA.

32 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) is a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern.

33 At paragraph 42, Galligan J.A. for the majority (himself and McKinlay J.A.) said:

> While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected.

34 At paragraph 16, the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at p. 92 was adopted and the duties of the Court summarized as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

35 To my mind, those same duties of the Court are implicit in a marketing and sale process pursuant to Court Order under the CCAA.

36 There is nothing in the material before me or in the submissions of Mr. Dewart that suggest that any of those duties have to date been breached by the Monitor in the negotiation or offer process.

37 At this point in time, I am of the view that to allow the offering process to in effect be reopened by enjoining the Monitor from completing a proposed transaction would amount to an unfairness in the working out of the process to the prospective purchaser, to Geetex and to GMAC the secured creditor. As well, it would interfere with the efficacy and integrity of the process and prefer the interests of one party (the USWA, albeit an important one) over others. As noted at paragraph 46 of *Soundair*

> [46] It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

38 This is not to suggest that the interests urged by the USWA would be without remedy in appropriate circumstances.

39 The dissent of Goodman J.A. in *Soundair* was really on the factual side, as he concluded that in his view, the conditional offer accepted by the Receiver in that case was "...an improvident one..." [at paragraph 118.]

40 In this case, there is no accepted offer before the Court for approval. When there is, should there be an-

other offer that would meet the test of rendering the accepted offer improvident, the Court can and perhaps should intervene.

41 Until that occurs, I do not conclude on the facts before me, that the Monitor has acted improvidently in failing to negotiate with a party who did not bring forward an offer capable of acceptance within the process set out in the previous Order of the Court. The actions of the Monitor appear entirely appropriate.

42 For the above reasons, the motion to extend the time within which to present an offer for sale of the business and assets of the Applicant is extended to April 15, 2005 or such earlier date as may be appropriate without the condition as sought by the USWA.

43 If it is necessary to deal with any issue of costs, they may be spoken to at a 9:30 appointment.

Application by monitor granted; application by trade union dismissed.

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TAB 9

2009 CarswellOnt 1489,

2009 CarswellOnt 1489

Intertan Canada Ltd., 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 INTERTAN CANADA LTD. AND TOURMALET CORPORATION (APPLICANTS)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: March 9, 2009
Judgment: March 9, 2009
Docket: 08-CL-7841

Counsel: Jeremy Dacks, Gillian Scott for Applicants

Fred Myers, L. Joseph Latham for Monitor, Alvarez & Marsal Canada ULC

Ashley John Taylor for 4458729 Canada Inc., Bell Canada

Kevin McElcheran for Cadillac Fairview Corporation Limited

Natalie Renner for Star Choice Communications

Rahool Agarwal for Bank of America

Harvey Garman for Garmin International, Inc., Rogers Communications

David Foulds for Foto Source Canada Inc.

Linda Gallessiere for OMERS Realty Management Corporation, Ivanhoe Cambridge 1 Inc., Morguard Investments Limited, 20 VIC management Inc. on behalf of OPB Realty Inc., Retrocom Limited Partnership, 920076 Ontario Limited o/a The Southridge Mall

Subject: Insolvency; Contracts; Corporate and Commercial

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Ap-

proval by court — Miscellaneous issues

Applicants brought motion for approval of sale transaction contemplated by asset purchase agreement with 445 Inc. and B — Monitor believed that it was likely that applicants' unsecured creditors would be paid in full following closing of sale transaction — Motion granted — Asset purchase agreement was approved — Sales process was carried out fairly and appropriately at all stages — Asset purchase agreement considered interests of all stakeholders — It represented best option available — Principles were adhered to — Sale was commercially reasonable in circumstances — Sealing order of confidential supplement was granted.

Cases considered by *Morawetz J.*:

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — referred to

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.) — followed

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — referred to

MOTION by applicants for approval of sale transaction.

***Morawetz J.*:**

1 The Applicants move for approval of the sale transaction contemplated by the Asset Purchase Agreement ("APA") with 4458729 Canada Inc. (the "Purchaser") and Bell Canada (the "Sale Transaction").

2 The Sale Transaction is a going concern sale. The Sale Transaction covers the entire footprint of The Source. If completed, it will preserve the jobs of the employees as well as the operating locations of The Source. The Monitor believes that, subject to the outcome of the Pre-Filing Claims Process and any process related to the adjudication of any restructuring claims which may arise in connection with the Sale Transaction, it appears likely at this time that the Applicants' unsecured creditors will be paid in full, following closing of the Sale Transaction.

3 The motion was not opposed.

4 The sale process has been outlined in previous court motions. I am satisfied that the process has been conducted in accordance with the Sale Process Order which was granted December 5, 2008.

5 The record details the involvement of N. M. Rothschild and Sons Canada Securities Limited who were engaged to assist the Applicants in conducting a going concern sale process.

6 The record also details that there were eleven Indicative Bids which were subsequently followed by four pro-

posals from bidders.

7 Ultimately after discussions among the Applicants, the Monitor and Rothschild, it became apparent to these three parties that the offer of the Purchaser was superior to the other bids in price and other criteria.

8 The Affidavit of Mr. Wong, filed in support of this motion details the efforts of the Applicants and Rothschild to market the InterTAN business. The Monitor has reviewed the efforts undertaken by the Applicants and Rothschild and is of the view that the assets have had significant exposure to a substantial number of prospective purchasers, and that there has been sufficient marketing of the business to conclude that the APA represents the best value that can be reasonably realized for InterTAN's business in the circumstances.

9 I accept the views of the Monitor. I am satisfied that the sales process was carried out fairly and appropriately at all stages, with efficacy and integrity. I agree with the Monitor's assessment that the APA considers the interests of all stakeholders, including the Applicants' shareholder and that the APA represents the best option available.

10 The principles set forth by the Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) for the sale of assets in a receivership have been accepted as appropriate principles to consider in a sale of assets in a CCAA proceeding (see *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) and *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.)).

11 I am satisfied that the principles have been adhered to in this case such that it is appropriate to approve the APA. The sale is in my view commercially reasonable in the circumstances. In addition, I am satisfied that the Intercompany Agreement and the Foto Source Settlement Agreements should be approved as they are, in my view, necessary and reasonable adjuncts to the APA.

12 The Monitor filed a Confidential Supplement to the Sixth Report. Having reviewed the document I have reached the conclusion that this document contains sensitive commercial information, the disclosure of which could be prejudicial to the interests of the stakeholders of InterTAN. In my view, it is appropriate to grant a sealing order in respect of this document, which relief was requested by the Applicants and the Monitor.

13 The closing of the APA is not expected to take place for a few months. The current Stay Period expires March 31, 2009. I am satisfied that the Applicants continue to work in good faith and with due diligence such that an extension of the stay to the requested date of July 3, 2009 is appropriate. An order to this effect is granted.

14 The expected result of this CCAA proceeding is most beneficial to InterTAN's stakeholders and the Court extends its appreciation to those involved who have contributed to the result today.

Motion granted.

END OF DOCUMENT

TAB 10

CCAA: Sales of Assets

Clause by Clause Briefing Book

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

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- **Bill Clause No.** 131 - CCAA Section 36

Bill Clause No. 131
Section No. 36
Topic: Sale of Assets

Proposed Wording

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or dispose of any of its assets outside the ordinary course of its business unless authorized to do so by a court.

(2) A company that applies to the court for the authorization must give notice of the application to all secured creditors who are likely to be affected by the proposed sale or disposal of the assets to which the application relates.

(3) In deciding whether to grant the authorization, the court must consider, among other things,

- *(a)* whether the process leading to the proposed sale or disposal of the assets to which the application relates was reasonable in the circumstances;
- *(b)* whether the monitor approved the process leading to the proposed sale or disposal of the assets;
- *(c)* whether the monitor has filed with the court a report stating that in his or her opinion the sale or disposal of the assets would be more beneficial to the creditors than if the sale or disposal took place under the *Bankruptcy and Insolvency Act*;
- *(d)* the extent to which the creditors were consulted in respect of the proposed sale or disposal of the assets;
- *(e)* the effects of the proposed sale or disposal on the creditors and other interested parties; and
- *(f)* whether the consideration to be received for the assets is reasonable and fair, taking into account the market value of the assets.

(4) In addition to taking the factors referred to in subsection (3) into account, if the proposed sale or disposal of the assets is to a person who is related to the company, the court may grant the authorization only if it is satisfied that

- *(a)* good faith efforts were made to sell or dispose of the assets to persons who are not related to the company or who are neither directors or officers of the company nor individuals who control it; and
- *(b)* the consideration to be received is superior to the consideration that would be received under all other offers actually received in respect of the assets.

(5) In granting an authorization for the sale or disposal of assets, the court may order that the assets may be sold or disposed of free and clear of any security, charge or other restriction, but if it so orders, it shall also order that the proceeds realized from the sale or disposal of the assets are subject to a security, charge or other restriction in favour of the creditors whose security, charges or other restrictions are affected by the order.

(6) For the purpose of this section, a person who is related to the debtor company includes a person who controls the company, a director or an officer of the company and a person who is related to a director or an officer of the company.

Rationale

When a debtor company is engaged in proceedings under the CCAA, it is granted a stay of other proceedings. Secured creditors are unable to act upon their security and other creditors are unable to seek redress from the courts. The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse.

Subsection (1) sets out the basic prohibition against a debtor company selling or disposing of its assets out of the ordinary course of business without court approval.

Subsection (2) requires that secured creditors be given notice of the application to allow the secured creditor the opportunity to oppose the order should they determine it necessary to protect their interests.

Subsection (3) sets out the factors the court must consider before granting the order to sell the property. It provides legislative guidance for the court and provides direction for the debtor company. The provision should improve consistency of judicial decisions.

Subsection (4) is intended to prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.

Subsection (5) provides that a court may order that the property be sold to the purchaser free and clear of charges, liens and restrictions of any kind. The provision will increase the value of the property thereby creating greater wealth for the estate while also increasing the likelihood that property will be returned to productive use quickly. The interests of the secured creditor is protected by the requirement that the consideration received be subject to the same charges, liens or restrictions as the original property.

For example, a lumber mill may be subject to a lien for municipal taxes in an amount in excess of the market value of the lumber mill. Because the lien is attached to the property, a purchaser for value would be subject to the lien. The property could not be sold because it has a negative value. If a court has the authority to remove the lien, the lumber mill could be sold at market value and be put into production by the purchaser. At the same time, the consideration received would be subject to the original lien. The reform should increase efficiency in the insolvency system.

Subsection (6) expands the definition of "related person" for the purposes of the section to address corporations.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #34, however, the reform does not provide that provincial Bulk Sales legislation be overridden because of concerns regarding the constitutional validity of such action.

TAB 11

C

2009 CarswellOnt 7169

Canwest Global Communications Corp., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: November 12, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Jeremy Dacks for Applicants

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

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

Whether proposal subject to s. 36 of Companies' Creditors Arrangement Act — C Inc. owned various businesses including newspaper publisher, N Co. — In 2005, as part of income trust spin off, Limited Partnership (LP) was formed to acquire certain C Inc. businesses — N Co. was excluded from spin off — Despite spin off, C Inc. and LP entered agreements to share certain services (shared services agreements) — In 2007, LP became wholly owned indirect subsidiary of C Inc. — In 2009, N Co. and certain other C Inc. entities (applicants) were granted protection under Companies' Creditors Arrangement Act (Act) — LP did not seek protection but negotiated forbearance agreement with its lenders — Both applicants' recapitalization transaction as well as LP's forbearance agreement contemplated restructuring that involved disentanglement of shared services and transfer of N Co. to LP — Applicants and LP entered into Transition and Reorganization Agreement (TRA), which addressed such restructuring — Applicants brought motion for order approving TRA — Motion granted — Transfer of N Co. was not subject to requirements of s. 36 of Act — Section 36 applied to N Co. despite fact that it was general partnership and was therefore not "debtor company" as defined by Act — However, s. 36 was inapplicable in specific circumstances of case at bar — Businesses of N Co. and applicants were highly integrated and this business structure predated applicants' insolvency — TRA was internal reorganization transaction designed to realign shared services and assets — TRA provided framework for applicants and LP entities to restructure their

inter-entity arrangements for benefit of their respective stakeholders — It would be commercially unreasonable to require third party sale of N Co. under s. 36 of Act before permitting realignment of shared services agreements.

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

C Inc. owned various businesses including newspaper publisher, N Co. — In 2005, as part of income trust spin off, Limited Partnership (LP) was formed to acquire certain C Inc. businesses — N Co. was excluded from spin off — Despite spin off, C Inc. and LP entered agreements to share certain services (shared services agreements) — In 2007, LP became wholly owned indirect subsidiary of C Inc. — In 2009, N Co. and certain other C Inc. entities (applicants) were granted protection under Companies' Creditors Arrangement Act (Act) — LP did not seek protection but negotiated forbearance agreement with its lenders — Both applicants' recapitalization transaction as well as LP's forbearance agreement contemplated restructuring that involved disentanglement of shared services and transfer of N Co. to LP — Applicants and LP entered into Transition and Reorganization Agreement (TRA), which addressed such restructuring — Applicants brought motion for order approving TRA — Motion granted — Proposed transfer of N Co. facilitated restructuring and was fair — Recapitalization transaction was designed to restructure C Inc. into viable industry participant — This preserved value for stakeholders and maintained employment for as many of applicants' employees as possible — TRA was entered into after extensive negotiation and consultation among applicants, LP and their respective financial, legal advisers and restructuring advisers — There was no prejudice to applicants' major creditors of the CMI entities — Monitor supported TRA as being in best interests of broad range of stakeholders — In absence of TRA, it was likely that N Co. would be required to shut down and lay off most or all its employees — Under TRA, all N Co. employees would be offered employment and it pension obligations and liabilities would be assumed — No third party expressed any interest in acquiring N Co.

Cases considered by *Pepall J.*:

Millgate Financial Corp. v. BCED Holdings Ltd. (2003), 2003 CarswellOnt 5547, 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) — considered

Pacific Mobile Corp., Re (1985), 1985 CarswellQue 106, [1985] 1 S.C.R. 290, 55 C.B.R. (N.S.) 32, 16 D.L.R. (4th) 319, 57 N.R. 63, 1985 CarswellQue 30 (S.C.C.) — considered

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

Statutes considered:

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

Generally — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14

Generally — referred to

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

Generally — referred to

s. 2(1) "company" — referred to

s. 2(1) "debtor company" — referred to

s. 36 — considered

s. 36(1) — considered

s. 36(4) — considered

s. 36(7) — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

APPLICATION by corporations under protection of *Companies' Creditors Arrangement Act* for order approving Transition and Reorganization Agreement.

***Pepall J.*:**

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLP") and The National Post Company/ La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

2 In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

3 At the conclusion of oral argument, I granted the order requested with reasons to follow.

Backround Facts

(a) Parties

4 The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act ("CCAA")* protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

5 The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

6 To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

8 In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;
- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and
- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

9 The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

10 In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

11 Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their *CCAA* filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recap-

italization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

12 The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

14 Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

15 The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of $9.3 million in fiscal year ending August 31, 2009 and a net loss of $0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately $139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of $1.5 million and a wind up deficiency of $1.6 million.

16 The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note- $187.3 million

CIT Secured Facility- $10.7 million

CMI Senior Unsecured Subordinated Notes- US$393.2 million

Irish Holdco Unsecured Note- $430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been

due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately $139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately $1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

19 CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

20 The Transferee is to pay a portion of the price or cost in cash: (i) $2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of $1 million), less (ii) a reduction equal to the amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds $6.3 million.

21 The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately $14 million in the fiscal year ending August 31, 2010.

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

23 The Monitor has concluded that the transaction has the following advantages over a liquidation:

- it facilitates the reorganizaton and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;

- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;

• it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and

• the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

(a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;

(b) the Transition and Reorganization Agreement should be approved by the Court; and

(c) the stay should be extended to January 22, 2010.

Discussion

(A) Section 36 of the CCAA

25 Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

26 Court approval is required under section 36 if:

(a) a debtor company under CCAA protection

(b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act[FN1] is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

28 Specifically, section 36 states:

(1) Restriction on disposition of business assets - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) Factors to be considered - In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) Additional factors — related persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) Related persons - For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) Assets may be disposed of free and clear - The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) Restriction — employers - The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.[FN2]

29 While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

30 In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

31 The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under *CCAA* protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book[FN3] on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."[FN4]

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act*[FN5]. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.*[FN6], authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act*[FN7], courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller[FN8]. In *Pacific Mobile Corp., Re*[FN9], the Supreme Court of Canada stated:

> It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.
>
> We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business"...
>
> 'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse

the section was designed to prevent. That commentary suggests that section 36(4),which deals with dispositions of assets to a related party, was intended to:

> ...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.[FN10]

35 In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp.*[FN11]., a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

37 As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Stelco Inc., Re*[FN12] Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

38 I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which prompted the

Transition and Reorganization Agreement is designed to facilitate the restructuring of CMI into a viable and competitive industry participant and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns. This preserves value for stakeholders and maintains employment for as many employees of the CMI Entities as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

41 No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

42 The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

Application granted.

FN1 Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.

FN2 The reference to paragraph 6(4)a should presumably be 6(6)a.

FN3 Industry Canada "Bill C-55: Clause by Clause Analysis — Bill Clause No. 131 — CCAA Section 36".

FN4 Ibid.

FN5 R.S.C. 1985, c.C-36 as amended.

FN6 (2003), 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) at para.52.

FN7 R.S.O. 1990, c. B. 14, as amended.

FN8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

FN9 [1985] 1 S.C.R. 290 (S.C.C.).

FN10 Supra, note 3.

FN11 Supra, note 9.

FN12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

END OF DOCUMENT

TAB 12

Case Name:

Muscletech Research and Development Inc. (Re)

RE: Muscletech Research and Development Inc. et al.

[2006] O.J. No. 4087

25 C.B.R. (5th) 231

152 A.C.W.S. (3d) 16

2006 CarswellOnt 6230

Court File No. 06-CL-6241

Ontario Superior Court of Justice

J.D. Ground J.

Heard: September 29, 2006.
Judgment: October 13, 2006.

(22 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- The various motions for relief brought by the moving parties, claimants in three unresolved product liability claims, were all dismissed -- The claimants were in essence attempting to vary or set aside the Claims Resolution Order, which the courts were loathe to do -- An informal protocol had previously been established to deal with the cross-border CCAA proceeding, and the court intended to follow that practice.

Insolvency law -- Practice -- Proceedings in bankruptcy -- Orders -- Assisting foreign court -- The various motions for relief brought by the moving parties, claimants in three unresolved product liability claims, were all dismissed -- The claimants were in essence attempting to vary or set aside the Claims Resolution Order, which the courts were loathe to do -- An informal protocol had previously been established to deal with the cross-border CCAA proceeding, and the court intended to follow that practice.

In this proceeding under the Companies' Creditors Arrangement Act, the applicants had commenced

ancillary proceedings in the U.S., and sought relief under the CCAA as a means of globally resolving a large number of product liability claims -- Thirty of those claims were settled, but the moving parties, claimants in three unresolved claims now brought several motions seeking various forms of relief, including an order providing for joint hearings before Canadian and U.S. courts, and the development of a cross-border protocol, etc. -- HELD: The motions were dismissed -- What the claimants were in essence attempting to do was to vary or set aside the Claims Resolution Order, which the courts were loathe to do -- It was premature to bring a motion before the court at this stage to contest provisions of a Plan not fully developed -- There was no basis on which to conclude that the product liability claims against the third parties were deemed to have been accepted -- It was premature and unconstructive to order further and better notices of objection at this time -- An informal protocol had been established with the consent of all parties, and the court intended to follow the same practice.

Statutes, Regulations and Rules Cited:

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

Counsel:

Fred Myers, David Bish, for the Applicants, Muscletech Research and Development Inc. et al.

Natasha MacParland, Jay Swartz, for the Monitor, RSM Richter Inc.

Justin Fogarty, Fraser Hughes, Chris Robertson, for Ishman, McLaughlin and Jaramillo Claimants.

Jeff Carhart, for the Ad Hoc Tort Claimants Committee.

Sara J. Erskine for Ward et al.

Alan Mark, Suzanne Wood, for Iovate Companies and Paul Gardiner.

A. Kauffman, for GNC Oldco Inc.

Tony Kurian, for HVL Incorporated.

Steven Golick, for Zurich Insurance Company.

ENDORSEMENT

1 J.D. GROUND J.:-- This is a somewhat unique proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. (1985) c. C-36 as amended ("CCAA"). The Applicants have also

commenced ancillary proceedings under Chapter 15 of the U.S. Bankruptcy Code and are now before the United States District Court for the Southern District of New York ("U.S. Court"). All of the assets of the Applicants have been disposed of and no proceeds of such disposition remain in the estate. The Applicants no longer carry on business and have no employees. The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants against the Applicants and others (the "Third Parties") in the United States. In addition to the Applicants, the Third Parties, which include affiliated and non-affiliated parties, were named as defendants or otherwise involved in some 33 Product Liability Actions. The liability of the Third Parties in the Product Liability Actions is linked to the liability of the Applicants, as the Product Liability Actions relate to products formerly sold by the Applicants.

2 Certain of the Third Parties have agreed to provide funding for settlement of the Product Liability Actions and an ad hoc committee of tort claimants (the "Committee") has been formed to represent the Plaintiffs in such Products Liability Actions (the "Claimants"). Through its participation in a court-ordered mediation (the "Mediation Process") that included the Applicants and the Third Parties, the Committee played a fundamental role in the settlement of 30 of the 33 Product Liability Actions being the Product Liability Claims of all of those Product Liability Claimants represented in the Mediation Process by the Committee.

3 The Moving Parties in the motions now before this court, being the Claimants in the three Product Liability Actions which have not been settled (the "Objecting Claimants"), elected not to be represented by the Committee in the Mediation Process and mediated their cases individually. Such mediations were not successful and the Product Liability Actions of the Moving Parties remain unresolved.

4 Pursuant to a Call for a Claims Order issued by this court on March 3, 2006, and approved by the U.S. court on March 22, 2006, each of the Objecting Claimants filed Proofs of Claim providing details of their claims against the Applicants and Third Parties. The Call for Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, the Applicants engaged in a process of extensive discussions and negotiations. With the input of various key players, including the Committee, the Applicants established a claims resolution process (the "Claims Resolution Process"). The Committee negotiated numerous protections in the Claims Resolution Process for the benefit of its members and consented to the Claims Resolution Order issued by this court on August 1, 2006, and approved by the U.S. court on August 11, 2006.

5 The Claims Resolution Order appoints the Honourable Edward Saunders as Claims Officer. The Claims Resolution Order also sets out the Claims Resolution Process including the delivery of a Notice of Objection to Claimants for any claims not accepted by the Monitor, the provision for a Notice of Dispute to be delivered by the Claimants who do not accept the objection of the Monitor, the holding of a hearing by the Claims Officer to resolve Disputed Claims and an appeal therefrom to this court. The definition of "Product Liability Claims" in the Claims Resolution Order provides

in part:

> "Product Liability Claim" means any right or claim, including any action, proceeding or class action in respect of any such right or claim, other than a Claim, Related Claim or an Excluded Claim, of any Person which alleges, arises out of or is in any way related to wrongful death or personal injury (whether physical, economic, emotional or otherwise), whether or not asserted and however acquired, against any of the Subject Parties arising from, based on or in connection with the development, advertising and marketing, and sale of health supplements, weight-loss and sports nutrition or other products by the Applicants of any of them.

...

Nature of the Motions

6 The motions now before this court emanate from Notices of Motion originally returnable August 22, 2006 seeking:

1. An Order providing for joint hearings before Canadian and U.S. Courts and the establishment of a cross-border insolvency protocol in this CCAA proceeding, to determine the application or conflict of Canadian and U.S. law in respect of the relief requested herein.
2. An Order amending the June 8, 2006 Claims Resolution Claim to remove any portions that purport to determine the liabilities of third party non-debtors who have not properly applied for CCAA relief.

...

3. An Order requiring the Monitor and the Applicants herein,

   (a) to provide an investigator, funded by the Claimants (the "Investigator"), with access to all books and records relied upon by the Monitor in preparing its Sixth Report, including all documents listed at Appendix "2" to that report;
   (b) to provide the Investigator with copies of or access to documents relevant to the investigation of the impugned transactions as the Investigator may request, and
   (c) providing that the Investigator shall report back to this Honourable Court as to its findings, and a Notice of Motion returnable

September 29, 2006 seeking.

4. An Order finding that the Notices of Objection sent by the Monitor/Applicants do not properly object to the Claimants' claims against non-debtor third parties;
5. An Order that the Claimants' Product Liability Claims against non-debtor third parties are deemed to be accepted by the Applicants pursuant to paragraph 14 of the Claims Resolution Order;
6. In the alternative, an Order that the Monitor, on behalf of the Applicants, provide further and better Notices of Objection properly objecting to claims against non-debtor third parties so that the Claimants may know the case they are to meet and may respond appropriately.

Analysis

para7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

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

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

9 It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In

Re Canadian Airlines Corp. (2000) 20 C.B.R. (4th) 1, Paperney J. stated at p. 92:

> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

10 I do not regard the motions before this court with respect to claims against Third Parties as being made pursuant to paragraph 37 of the Claims Resolution Order which provides that a party may move before this court "to seek advice and directions or such other relief in respect of this Order and the Claims Resolution Process." The relief sought by the Objecting Creditors with respect to claims against Third Parties is an attack upon the substance of the Claims Resolution Order and of the whole structure of this CCAA proceeding which is to resolve claims against the Applicants and against Third Parties as part of a global settlement of the litigation in the United States arising out of the distribution and sale of the offending products by the Applicants. What the Objecting Claimants are, in essence, attempting to do is to vary or set aside the Claims Resolution Order. The courts have been loathe to vary or set aside an order unless it is established that there was:

(a) fraud in obtaining the order in question;
(b) a fundamental change in circumstances since the granting of the order making the order no longer appropriate;
(c) an overriding lack of fairness; or
(d) the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing and the time when a review is sought that was not known at the time of the original hearing and that could have led to a different result.

None of such circumstances can be established in the case at bar.

11 In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.

12 The Objecting Claimants also seek an order of this court that their claims against Third Parties are deemed to be accepted pursuant to paragraph 14 of the Claims Resolution Order. Section 14 of the Claims Resolution Order provides in part as follows:

> This Court Orders that, subject to further order of this Court, in respect of any Claim or Product Liability Claim set out in a Proof of Claim for which a Notice of Objection has not been sent by the Monitor in accordance with paragraph 12(b) above on or before 5:00 p.m. (Eastern Standard Time) on August 11, 2006, such Claim or Product Liability Claim is and shall be deemed to be accepted by the Applicants.

13 The submission of the Objecting Claimants appears to be based on the fact that, at least in one case, the Notice of Objection appears to be an objection solely on behalf of the Applicants in that Exhibit 1 to the Notice states "the Applicants hereby object to each and all of the Ishman Plaintiffs' allegations and claims." The Objecting Claimants also point out that none of the Notices of Objection provide particulars of the objections to the Objecting Claimants' direct claims against third parties. I have some difficulty with this submission. The structure of the Claims Resolution Order is that a claimant files a single Proof of Claim setting out its Claims or Product Liability Claims and that if the Applicants dispute the validity or quantum of any Claim or Product Liability Claim, they shall instruct the Monitor to send a single Notice of Objection to the Claimant. Paragraph 12 of the Claims Resolution Order states that the Applicants, with the assistance of the Monitor, may "dispute the validity and/or quantum or in whole on in part of a Claims or a Product Liability Claim as set out in a Proof of Claim." The Notices of Objection filed with the court do, in my view, make reference to certain Product Liability Claims against Third Parties and, in some cases, in detail. More importantly, the Notices of Objection clearly state that the Applicants, with the assistance of the Monitor, have reviewed the Proof of Claim and have valued the amount claimed at zero dollars for voting purposes and zero dollars for distribution purposes. I fail to understand how anyone could read the Notices of Objection as not applying to Product Liability Claims against Third Parties as set out in the Proof of Claim. The Objecting Claimants must have read the Notices of Objection that way initially as their Dispute Notices all appear to refer to all claims contained in their Proofs of Claim. Accordingly, I find no basis on which to conclude that the Product Liability Claims against the Third Parties are deemed to have been accepted.

14 The Objecting Claimants seek, in the alternative, an order that the Monitor provide further and better Notices of Objection with respect to the claims against the Third Parties so that the Objecting Claimants may know the case they have to meet and may respond appropriately. I have some difficulty with this position. In the context of the Claims Resolution Process, I view the Objecting Claimants as analogous to plaintiffs and it is the Applicants who need to know the case they have to meet. The Proofs of Claim set out in detail the nature of the claims of the Objecting Claimants against the Applicants and Third Parties and, to the extent that the Notices of Objection do not fully set out in detail the basis of the objection with respect to each particular claim, it appears to me that this is a procedural matter, which should be dealt with by the Claims Officer and then, if the Objecting Claimants remain dissatisfied, be appealed to this court. Section 25 of the Claims Resolution Order provides:

> This Court Orders that, subject to paragraph 29 hereof, the Claims Officer

> shall determine the manner, if any, in which evidence may be brought before him by the parties, as well as any other procedural or evidentiary matters that may arise in respect of the hearing of a Disputed Claim, including, without limitation, the production of documentation by any of the parties involved in the hearing of a Disputed Claim.

15 In fact, with respect to the medical causation issue which is the first issue to be determined by the Claims Officer, the Claims Officer has already held a scheduling hearing and has directed that by no later than August 16, 2006, all parties will file and serve all experts reports and will-say statements for all non-expert witnesses as well as comprehensive memoranda of fact of law in respect of the medical causation issues. To the extent that the Objecting Claimants appear to have some concerns as to natural justice, due process and fairness, in spite of the earlier decision of Judge Rakoff with respect to the Claims Resolution Order and the consequent amendments made to such Order, in my view, any such concerns are adequately addressed by the rulings made by the Claims Officer with respect to the hearing of the medical causation issue. I would expect that the Claims Officer would make similar rulings with respect to the other issues to be determined by him.

16 In addition, as I understand it, all three actions commenced by the Objecting Claimants in the United States were ready for trial at the time that the CCAA proceedings commenced and I would have thought, as a result, that the Objecting Claimants are well aware of the defences being raised by the Applicants and the Third Parties to their claims and as to the positions they are taking with respect to all of the claims.

17 Accordingly, it appears to me to be premature and unproductive to order further and better Notices of Objection at this time.

18 The motion seeking an order requiring the Monitor and the Applicants to provide an Investigator selected by the Objecting Claimants relates to transactions referred to by the Monitor in preparing its Sixth Report which dealt with certain transactions entered into by the Applicants with related parties prior to the institution of these CCAA proceedings. The Objecting Creditors also seek to have the Investigator provided with copies of, or access to, all documents relevant to an investigation of the impugned transactions as the Investigator may request. It appears from the evidence before this court that the Applicants prepared for the Monitor a two-volume report (the "Corporate Transactions Report") setting out in extensive detail the negotiation, documentation and implementation of the impugned transactions. Subsequently by order of this court dated February 6, 2006, the Monitor was directed to review the Corporate Transactions Report and prepare its own report to provide sufficient information to allow creditors to make an informed decision on any plan advanced by the Applicants. This review was incorporated in the Monitor's Sixth Report filed with this court and the U.S. court on March 31, 2006. In preparing its Sixth Report, the Monitor had the full cooperation of, and full access to the documents of, the Iovate Companies and Mr. Gardiner, the principal of the Iovate Companies. No stakeholder has made any formal allegation that the review conducted by the Monitor was flawed or incomplete in any way. The Monitor has also, pursuant to

further requests, provided documentation and additional information to stakeholders on several occasions, subject in certain instances to the execution of confidentiality agreements particularly with respect to commercially sensitive information of the Applicants and the Iovate Companies which are Third Parties in this proceeding. There is no evidence before this court that the Monitor has, at any time, refused to provide information or to provide access to documents other than in response to a further request from the Objecting Claimants made shortly before the return date of these motions, which request is still under consideration by the Monitor. The Sixth Report is, in the opinion of the Respondents, including the Committee, a comprehensive, thorough, detailed and impartial report on the impugned transactions and I fail to see any utility in appointing another person to duplicate the work of the Monitor in reviewing the impugned transactions where there has been no allegation of any deficiency, incompleteness or error in the Sixth Report of the Monitor.

19 I also fail to see how a further report of an Investigator duplicating the Monitor's work would be of any assistance to the Objecting Claimants in making a decision as to whether to support any Plan that may be presented to this court. The alternative to acceptance of a Plan is, of course, the bankruptcy of the Applicants and I would have thought that, equipped with the Corporate Transactions Report and the Sixth Report of the Monitor, the Objecting Claimants would have more than enough information to consider whether they wish to attempt to defeat any Plan and take their chances on the availability of relief in bankruptcy.

20 In any event, it is my understanding that, at the request of the Committee, any oppression claims or claims as to reviewable transactions have been excluded from the Claims Resolution Process.

21 The final relief sought in the motions before this court is for an Order providing for joint hearings before this court and the U.S. court and the establishment of a cross-border protocol in this proceeding to determine the application of Canadian and U.S. law or evidentiary rulings in respect of the determination of the liability of Third Parties. During the currency of the hearing of these motions, I believe it was conceded by the Objecting Claimants that the question of the applicability of U.S. law or evidentiary rulings would be addressed by the Claims Officer. The Objecting Claimants did not, on the hearing of these motions, press the need for the establishment of a protocol at this time. An informal protocol has been established with the consent of all parties whereby Justice Farley and Judge Rakoff have communicated with each other with respect to all aspects of this proceeding and I intend to follow the same practice. Any party may, of course, at any time bring a motion before this court and the U.S. court for an order for a joint hearing on any matter to be considered by both courts.

22 The motions are dismissed. Any party wishing to make submissions as to the costs of this proceeding may do so by brief written submissions to me prior to October 31, 2006.

J.D. GROUND J.

cp/e/qw/qlgxc/qlpwb

TAB 14

Case Name:

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

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto
Between
The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto,
Applicants, and
Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto,
Respondents

[2008] O.J. No. 2265

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

2008 CarswellOnt 3523

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

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

2008 CanLII 27820

Court File No. 08-CL-7440

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

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

(158 paras.)

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

Application by the investors represented by the Pan-Canadian Investors Committee for third-party structured asset-backed commercial paper for approval of a plan under the Companies Creditors Arrangement Act as filed and voted on by noteholders. Plan was opposed by a number of corporate and individual noteholders, primarily on the basis that the court did not have jurisdiction under the CCAA or, if it did, should decline to exercise discretion to approve third party releases. Between mid-2007 and the filing of the plan, the applicant Committee had diligently pursued the object of restructuring not just the specific trusts that were part of the plan, but faith in a market structure that had been a significant part of the Canadian financial market. Claims for damages included the face value of notes plus interest and additional penalties and damages that might be allowable at law. Information provided by the potential defendants indicated the likelihood of claims over and against parties such that no entity, institution or party involved in the restructuring plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

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

issues than those affecting those who felt strongly that personal redress should predominate.

Statutes, Regulations and Rules Cited:

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

Counsel:

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

For parties and their counsel see Appendix 1.

REASONS FOR DECISION

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

History of Proceedings

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

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

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

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

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

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

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

Background to the Plan

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

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

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

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

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

> [7] Before the week of August 13, 2007, there was an operating market in ABCP. Various corporations (referred to below as "Sponsors") arranged for the Conduits to make ABCP available as an investment vehicle bearing interest at rates slightly higher than might be available on government or bank short-term paper.
>
> [8] The ABCP represents debts owing by the trustees of the Conduits. Most of the ABCP is short-term commercial paper (usually 30 to 90 days). The balance of the ABCP is made up of commercial paper that is extendible for up to 364 days and longer-term floating rate notes. The money paid by investors to acquire ABCP was used to purchase a portfolio of

financial assets to be held, directly or through subsidiary trusts, by the trustees of the Conduits. Repayment of each series of ABCP is supported by the assets held for that series, which serves as collateral for the payment obligations. ABCP is therefore said to be "asset-backed."

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

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

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

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

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

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

> [45] Investors who bought ABCP often did not know the particular assets or mix of assets that backed their ABCP. In part, this was because ABCP was often issued and sold before or at about the same time the assets were acquired. In addition, many of the assets are extremely complex and parties to some underlying contracts took the position that the terms were confidential.
>
> [46] Lack of transparency became a significant problem as general market fears about the credit quality of certain types of investment mounted during the summer of 2007. As long as investors were willing to roll their ABCP or buy new ABCP to replace maturing notes, the ABCP market was stable. However, beginning in the first half of 2007, the economy in the United States was shaken by what is referred to as the "sub-prime" lending crisis.
>
> [47] U.S. sub-prime lending had an impact in Canada because ABCP investors became concerned that the assets underlying their ABCP either included U.S. sub-prime mortgages or were overvalued like the U.S. sub-prime mortgages. The lack of transparency into the pools of assets underlying ABCP made it difficult for investors to know if their ABCP investments included exposure to U.S. sub-prime mortgages or other similar products. In the week of August 13, that concern intensified to the point that investors stopped rolling their maturing ABCP, and instead demanded repayment, and new investors could not be found. Certain trustees of the Conduits then tried to draw on their Liquidity Agreements to repay ABCP. Most of the Liquidity Providers did not agree that the conditions for liquidity funding had occurred and did not provide funding, so the ABCP could not be repaid. Deteriorating conditions in the credit market affected all the ABCP, including ABCP backed by traditional assets not linked to sub-prime lending.
>
> [48] Some of the Asset Providers made margin calls under LSS swaps on certain of the Conduits, requiring them to post additional collateral. Since they could not issue new ABCP, roll over existing ABCP or draw on their Liquidity Agreements, those Conduits were not able to post the additional collateral. Had there been no standstill arrangement, as described below, these Asset Providers could have unwound the swaps and ultimately could have liquidated the collateral posted by the Conduits.
>
> [49] Any liquidation of assets under an LSS swap would likely have further depressed the LSS market, creating a domino effect under the remaining LSS swaps by triggering their "mark-to-market" triggers for additional margin calls, ultimately leading to the sale of more assets, at very depressed prices. The standstill arrangement has, to date, through successive extensions, prevented this from occurring, in anticipation of the restructuring.

18 The "Montreal Accord," as it has been called, brought together various industry representatives, Asset Providers and Liquidity Providers who entered into a "Standstill Agreement," which committed to the framework for restructuring the ABCP such that (a) all outstanding ABCP would be converted into term floating rate notes maturing at the same time as the corresponding underlying assets. This was intended to correct the mismatch between the long-term nature of the

financial assets and the short-term nature of the ABCP; and (b) margin provisions under certain swaps would be changed to create renewed stability, reducing the likelihood of margin calls. This contract was intended to reduce the risk that the Conduits would have to post additional collateral for the swap obligations or be subject to having their assets seized and sold, thereby preserving the value of the assets and of the ABCP.

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

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

The Vote

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

a) changing classification each in particular circumstances from the one vote per Noteholder regime;
b) provision of information of various kinds;
c) adjourning the vote of April 25, 2008 until issues of classification and information were fully dealt with;
d) amending the Plan to delete various parties from release.

22 By endorsement of April 24, 2008 the issue of releases was in effect adjourned for determination later. The vote was not postponed, as I was satisfied that the Monitor would be able to tally the votes in such a way that any issue of classification could be dealt with at this hearing.

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

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

25 On a one vote per Noteholder basis, the vote was overwhelmingly in favour of the Plan -- approximately 96%. At a case conference held on April 29, 2008, the Monitor was asked to tabulate

votes that would isolate into Class A all those entities in any way associated with the formulation of the Plan, whether or not they were Noteholders or sold or advised on notes, and into Class B all other Noteholders.

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

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

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

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

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

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

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

32 The chart prepared by the Monitor that is Appendix 3 to these Reasons shows graphically the extent of those entities that would be involved in future litigation. [Editor's note: Appendix 3 was not attached to the copy received from the Court and therefore is not included in the judgment.]

Law and Analysis

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

34 I am satisfied that the Court does not have the power to amend the Plan. The Plan is that of the Applicants and their supporters. They have made it clear that the Plan is a package that allows only for acceptance or rejection by the Court. The Plan has been amended to address the concerns expressed by the Court in the May 16, 2008 endorsement.

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

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

the value of the underlying assets is uncertain is an understatement after the secured interest of Asset Providers is taken into account.

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

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

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

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

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

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

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

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

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

> ... as of August 31, 2007, of the total amount of Canadian ABCP outstanding of approximately $116.8 billion (excluding medium-term and floating rate notes),

> approximately $83.8 billion was issued by Canadian Schedule I bank-administered Conduits and approximately $33 billion was issued by non-bank administered conduits)[1]

is unchallenged.

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

> ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling". Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption", ABCP would readily be saleable without the need for extraordinary funding measures. However, to protect investors in case of a market disruption, ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP outstanding. In the event that an ABCP issuer is unable to issue new ABCP, it may be able to draw down on the liquidity facility to ensure that proceeds are available to repay any maturing ABCP. As discussed below, there have been important distinctions between different kinds of liquidity agreements as to the nature and scope of drawing conditions which give rise to an obligation of a liquidity provider to fund[2]

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

48 Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

49 In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

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

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

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

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

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

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

> [10] I am not satisfied that the release proposed as part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or another.
>
> [11] I have also reached the conclusion that in the circumstances of this Plan, at this time, it may well be appropriate to approve releases that would circumscribe claims for negligence. I recognize the different legal positions but am satisfied that this Plan will not proceed unless negligence claims are released.

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

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

> The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forbearing from making collateral calls since August 15, 2007, participating in the MAV2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at par with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, co-operated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. The Original Issuer Trustees, the Issuer Trustees, the Existing Note Indenture Trustees and the Rating Agency have assisted in the restructuring process as needed and have co-operated with the Investors Committee in facilitating an essential aspect of the court proceedings required to complete the restructuring of the ABCP Conduits through the replacement of the Original Issuer Trustees where required.
>
> In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impracticable to identify and/or quantify any individual Released Party's contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not released by the Noteholders is unable to make a claim-over for contribution from a Released Party and thereby defeat the effectiveness of the releases. Certain entities represented on the Investors Committee have also participated in the Third-Party ABCP market in a variety of capacities other than as Noteholders and, accordingly, are also expected to benefit from these releases.

The evidence is unchallenged.

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

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

Restructuring under the CCAA

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

> [87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:
>
> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

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

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

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

...

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

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

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

"Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the

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

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

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

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

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an in-

ference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd., supra:*

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

62 The liberal interpretation to be given to the CCAA was and has been accepted in Ontario. In *Canadian Red Cross Society (Re)*[5], Blair J. (as he then was) has been referred to with approval in later cases:

[45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.*, [1995] O.J. No. 595, supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

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

> preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[Emphasis added]

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

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> "the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."

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

65 In a later decision[7] in the same matter, Ground J. said in 2007:

> [18] It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be con-

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

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

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

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

the CCAA filing.

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

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

> [51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the Plan of Arrangement was approved by Farley J. in April 1992. The Plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The Plan of Arrangement included the following term:
>
> > 6.03 Releases
> >
> > From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors. [Emphasis added.]
>
> ...
>
> [54] In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L. W. Houlden and C. H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

[Reference omitted]

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

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

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

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

> [23] In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
> > In summary, the cases establish the following principles applicable to assessing commonality of interest:
> >
> > 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
> > 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
> > 3. The commonality of interests are to be viewed purposively, bearing

> in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
> 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S.T.D.); *Re Woodward's Ltd.* 1993 CanLII 870 (BC S.C.), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, (*sub nom. Amoco Acquisition Co. v. Savage*) (Alta. C.A.); *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines* decision: *Re Canadian Airlines Corp.* 2000 ABCA 149 (CanLII), (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 27.

...

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

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

> a CCAA proceeding to determine disputes between parties other than the debtor company.

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

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

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

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

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

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

> The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of

> compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.

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

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

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

77 This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes. The only contract between creditors in this case relates directly to the Notes.

U.S. Law

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

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

80 A very comprehensive article authored by Joshua M. Silverstein of Emory University School of Law in 2006, 23 Bank. Dev. J. 13, outlines both the line of U.S. decisions that hold that bankruptcy courts may not use their general equitable powers to modify non-bankruptcy rights, and

those that hold that non-bankruptcy law is not an absolute bar to the exercise of equitable powers, particularly with respect to third party releases.

81 The author concludes at paragraph 137 that a decision of the Supreme Court of the United States in *United States v. Energy Resources* 495 US545 (1990) offers crucial support for the pro-release position.

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

***Steinberg* Decision**

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

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

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

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

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

> [54] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, trans-

form an arrangement into a potpourri.

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

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

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

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

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

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

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

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

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

93 The sponsoring parties have worked diligently to respond to that concern and have developed

an exemption to the release that in my view fairly balances the rights of Noteholders with serious claims, with the risk to the Plan as a whole.

Statutory Interpretation of the CCAA

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

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

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

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

> The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that it is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial tool box. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length.[17]
>
> Second, we suggest that inherent jurisdiction is a misnomer for much of what has occurred in decision making under the CCAA. Appeal court judgments in cases such as *Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, and *Stelco* discussed below, have begun to articulate this view. As part of this observation, we suggest that for the most part, the exercise of the court's authority is frequently, although not exclusively, made on the basis of statutory interpretation.[18]

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

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

> Iacobucci J., writing for the Court in *Rizzo Shoes,* [1998] 1 S.C.R. 27, reaffirmed Driedger's Modern Principle as the best approach to interpretation of the legislation and stated that "statutory interpretation cannot be founded on the wording of the legislation alone". He considered the history of the legislation and the benefit-conferring nature of the legislation and examined the purpose and object of the Act, the nature of the legislation and the consequences of a contrary finding, which he labeled an absurd result. Iacobucci J. also relied on s. 10 of the *Interpretation Act,* which provides that every Act "shall be deemed to be remedial" and directs that every Act "shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". The Court held:
>
> > 23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.
> >
> > ...
> >
> > 40 As I see the matter, when the express words of ss. 40 and 40a of the

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

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

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

> First, the judge is not legislating by adding what is already implicit. The issue is not the judge's power to actually add terms to a statute, but rather whether a particular concept is sufficiently implicit in the words of an enactment for the judge to allow it to produce effect, and if so, whether there is any principle preventing the judge from making explicit what is already implicit. Parliament is required to be particularly explicit with some types of legislation such as expropriation statutes, for example.
>
> Second, the Literal Rule suggests that as soon as the courts play any creative role in settling a dispute rather than merely administering the law, they assume the duties of Parliament. But by their very nature, judicial functions have a certain creative component. If the law is silent or unclear, the judge is still required to arrive at a decision. In doing so, he [she] may

> quite possibly be required to define rules which go beyond the written expression of the statute, but which in no way violate its spirit.
>
> In certain situations, the courts may refuse to correct lacunae in legislation. This is not necessarily because of a narrow definition of their role, but rather because general principles of interpretation require the judge, in some areas, to insist on explicit indications of legislative intent. It is common, for example, for judges to refuse to fill in the gaps in a tax statute, a retroactive law, or legislation that severely affects property rights. [Emphasis added. Footnotes omitted.][20]

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

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

> It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.
>
> The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights-based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations

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

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

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

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

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

themselves within the Plan.

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

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

Fraud Claims

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

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

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

109 The more serious nature of a civil fraud allegation, as opposed to a negligence allegation, has

an effect on the degree of probability required for the plaintiff to succeed. In *Continental Insurance Co. v. Dalton Cartage Co.*[22], Laskin J. wrote:

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in Bater v. Bater, *supra*, at p. 459, as follows:
>
> > It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
>
> I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

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

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

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

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

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

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

> Subsequently, in *H.L. Bolton (Engineering) Co. v. T.J Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 (C.A.), Denning L.J. said at p. 172:
>
> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the

> directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear by Lord Haldane's speech in *Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*

It is apparent that the law in Canada dealing with the responsibility of a corporation for the tort of deceit is still evolving. In view of the English decisions and the decision of the Supreme Court of Canada in the *Dredging* case, [1985] 1 S.C.R. 662, supra, it would appear that the concept of vicarious responsibility based upon *respondeat superior* is too narrow a basis to determine the liability of a corporation. The structure and operations of corporations are becoming more complex. However, the fundamental proposition that the plaintiff must establish an intention to deceive on the part of the defendant still applies.

See also: *Standard Investments Ltd. et al. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.) (Leave to appeal to Supreme Court of Canada refused Feb. 3, 1986, [1986] S.C.C.A. No. 29).

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

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

> There is much emphasis in the plaintiffs submissions and in the reasons of the trial judge on the circumstance that this is not a case of fraud "of the usual kind" involving positive representations of fact but is, rather, one concerned only with non-disclosure by a party which has become aware of an altered set of circumstances. It is, I think, potentially misleading to regard these as different categories of fraud rather than as a different factual basis for a finding of fraud. Where the fraud is alleged to arise from failure to disclose, the plaintiff remains subject to all of the stringent requirements which the law imposes upon those who allege fraud. The authority relied upon by the trial judge was the speech of Lord Blackburn in *Brownlie v. Campbell*. ... The trial judge quoted this excerpt:
>
> ... when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time at which it was made, but which he has not now retracted when he has become aware that it can be no long honestly perservered [sic] in.

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

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

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

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

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

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

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

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

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

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

119 The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite

fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

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

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

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

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

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

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

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

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

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

Hardship

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

142 The above quote is not directly about the ABCP market in Canada, but about the potential crisis to the worldwide banking system at this time. In my view it is applicable to the ABCP situation at this time. Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal.

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

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

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

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

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

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

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

of an Expected Claim.

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

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

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

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

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

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

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

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

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

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

C.L. CAMPBELL J.

* * * * *

SCHEDULE "A"

CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

* * * * *

SCHEDULE "B"

APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

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APPENDIX 1

PARTIES AND THEIR COUNSEL

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

Donald Milner Graham Phoenix Xeno C. Martis David Lemieux Robert Girard	Respondents: Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp.
Aubrey Kauffman Stuart Brotman	Respondents: 4446372 Canada Inc. and 6932819 Canada Inc., as Issuer Trustees
Craig J. Hill Sam P. Rappos Marc Duchesne	Monitor: Ernst & Young Inc.
Jeffrey Carhart Joseph Marin Jay Hoffman	Ad Hoc Committee and PricewaterhouseCoopers Inc., in its capacity as Financial Advisor
Arthur O. Jacques Thomas McRae	Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
Henry Juroviesky Eliezer Karp	Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
Jay A. Swartz Nathasha MacParland	Administrator of Aria Trust, Encore Trust, Newshore Canadian Trust and Symphony Trust
James A. Woods Mathieu Giguere Sébastien Richemont Marie-Anne Paquette	Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montreal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., L'Agence Métropolitaine de Transport (AMT), Domtar Inc., Domtar Pulp and Paper Products Inc., Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Services Hypothécaires La Patremoniale Inc. and Jazz Air LLP
Peter F.C. Howard Samaneh Hosseini William Scott	Asset Providers/Liquidity Suppliers: Bank of America, N.A.; Citibank, N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services Inc.; Swiss Re Financial Products Corporation; and UBS AG
George S. Glezos Lisa C. Munro	Becmar Investments Ltd, Dadrex Holdings Inc. and JTI-Macdonald Corp.
Jeremy E. Dacks	Blackrock Financial Management, Inc.
Virginie Gauthier Mario Forte	Caisse de Dépôt et Placement du Québec

Kevin P. McElcheran Malcolm M. Mercer Geoff R. Hall	Canadian Banks: Bank of Montreal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank
Harvey Chaiton	Canadian Imperial Bank of Commerce
S. Richard Orzy Jeffrey S. Leon	CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
Margaret L. Waddell	Cinar Corporation, Cinar Productions (2004) and Cookie Jar Animation Inc., ADR Capital Inc. and GMAC Leaseco Corporation
Robin B. Schwill James Rumball	Coventree Capital Inc. and Nereus Financial Inc.
J. Thomas Curry Usman M. Sheikh	Coventree Capital Inc.
Kenneth Kraft	DBRS Limited
David E. Baird, Q.C. Edmond Lamek Ian D. Collins	Desjardins Group
Allan Sternberg Sam R. Sasso	Hy Bloom Inc. and Cardacian Mortgages Services Inc.
Catherine Francis Phillip Bevans	Individual Noteholder
Howard Shapray, Q.C. Stephen Fitterman	Ivanhoe Mines Inc.
Kenneth T. Rosenberg Lily Harmer	

Massimo Starnino	Jura Energy Corporation, Redcorp Ventures Ltd. and as agent to Ivanhoe Mines Inc.
Joel Vale	I. Mucher Family
John Salmas	Natcan Trust Company, as Note Indenture Trustee
John B. Laskin Scott Bomhof	National Bank Financial Inc. and National Bank of Canada
Robin D. Walker Clifton Prophet Junior Sirivar	NAV Canada
Timothy Pinos	Northern Orion Canada Pampas Ltd.
Murray E. Stieber	Paquette & Associés Huissiers en Justice, s.e.n.c. and André Perron
Susan Grundy	Public Sector Pension Investment Board
Dan Dowdall	Royal Bank of Canada
Thomas N.T. Sutton	Securitus Capital Corp.
Daniel V. MacDonald Andrew Kent	The Bank of Nova Scotia
James H. Grout	The Goldfarb Corporation
Tamara Brooks	The Investment Dealers Association of Canada and the Investment In-

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

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APPENDIX 2

TERMS

"ABCP Conduits" means, collectively, the trusts that are subject to the Plan, namely the following: Apollo Trust, Apsley Trust, Aria Trust, Aurora Trust, Comet Trust, Encore Trust, Gemini Trust, Ironstone Trust, MMAI-I Trust, Newshore Canadian Trust, Opus Trust, Planet Trust, Rocket Trust, SAT, Selkirk Funding Trust, Silverstone Trust, SIT III, Slate Trust, Symphony Trust and Whitehall Trust, and their respective satellite trusts, where applicable.

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

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

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

"CCAA Parties" means, collectively, the Issuer Trustees in respect of the Affected ABCP, namely 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp. and the ABCP Conduits.

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

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

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

"Noteholder" means a holder of Affected ABCP.

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

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

* * * * *

APPENDIX 3

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

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

1 Information Statement, p. 18.

2 Information Statement, p. 18.

3 *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334.

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

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

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

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

8 *Vicwest Corp. (Re)*, [2003] O.J. No. 3772 per Pepall J. at paragraph 23.

9 The Court was provided with copies of 12 Plan approvals under the CCAA in which releases were granted. In various instances these included officers, directors and creditors. The moving parties note that no objection to the nature or extent of release was taken.

10 *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. No. 4749, 46 O.R (3d) 514, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391.

11 *Stelco Inc. (Re)*, [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623, 2005 CarswellOnt 6483.

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

13 *Stelco Inc. (Re)*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, 2007 CarswellOnt 4108.

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

15 *Michaud v. Steinberg Inc.* 1993 CanLII 3991 (Q.C. C.A.).

16 Annual Review of Insolvency Law, 2007 Thomson, Carswell. Janis Sarra edition.

17 Ibid, p. 42.

18 Ibid, pp. 44-45.

19 Ibid, p. 45.

20 Ibid pp. 49-51.

21 *Derry v. Peek*, (1889) 14 A.C. App. Cas., 337 (H.L.).

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

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

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

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

TAB 15

Case Name:

Nortel Networks 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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants

[2010] O.J. No. 1232

2010 ONSC 1708

63 C.B.R. (5th) 44

81 C.C.P.B. 56

2010 CarswellOnt 1754

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 3-5, 2010.
Judgment: March 26, 2010.

(106 paras.)

Bankruptcy and insolvency law -- Property of bankrupt -- Pensions and benefits -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies'

Creditors Arrangement Act, s. 5.1(2).

Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).

Motion by the applicant Nortel corporations for approval of a settlement agreement. The settlement agreement provided for the termination of pension payments and the termination of benefits paid through Nortel's Health and Welfare Trust (HWT). The applicants were granted a stay of proceedings on January 14, 2009, pursuant to the Companies' Creditors Arrangement Act, but had continued to provide the HWT benefits and had continued contributions and special payments to the pension plans. The opposing long-term disability employees opposed the settlement agreement, principally as a result of the inclusion of a release of Nortel and its successors, advisors, directors and officers, from all future claims regarding the pension plans and the HWT in the absence of fraud. The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), and the informal Nortel Noteholder Group (the "Noteholders") opposed Clause H.2 of the settlement agreement. Clause H.2 stated that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims. The Monitor supported the Settlement Agreement, submitting that it was necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The CAW and Board of Directors of Nortel also supported the settlement agreement.

HELD: Motion dismissed. Cause H.2 was not fair and reasonable. Clause H.2 resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue. The third party releases were necessary and connected to a resolution of the claims against the applicants, benefited creditors generally and were not overly broad or offensive to public policy.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2)

Counsel:

Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants.

Lyndon Barnes and Adam Hirsh, for the Nortel Directors.

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor.

Arthur O. Jacques, for the Nortel Canada Current Employees.

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF).

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees.

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund.

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group.

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada.

Pamela Huff, for the Northern Trust Company, Canada.

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees.

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration).

Sorin Gabriel Radulescu, In Person.

Guy Martin, In Person, on behalf of Marie Josee Perrault.

Peter Burns, In Person.

Stan and Barbara Arnelien, In Person.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

2 The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and
(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

3 Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

4 Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

5 The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

6 The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;
(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go

basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis;[1]

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

7 The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

8 The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

9 The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

10 The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

11 The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

THE FACTS

A. Status of Nortel's Restructuring

12 Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

13 In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

14 Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

15 Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

16 Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

17 On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

18 Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

19 On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

20 As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

21 In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

22 The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT

The Applicants

23 The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;
(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;

(c) prevents disruption in the transition of benefits for current employees;
(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;
(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and
(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

24 Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

25 The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

26 In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

27 Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

28 Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

29 In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

30 Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d)

513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

31 The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] O.J. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

32 The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

33 The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

34 The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

35 The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

36 Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

37 Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that

this is the best agreement they could have negotiated.

38 Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

39 In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

40 The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

41 The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

42 The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

43 The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

44 Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that

these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

45 The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

46 The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

47 Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

48 Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

49 Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

50 A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

51 The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

52 Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

53 The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

54 The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

55 Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

56 The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

57 The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

58 Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

LAW AND ANALYSIS

A. Representation and Notice Were Proper

59 It is well settled that the Former Employees' Representatives and the LTD Representative

(collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008, supra* at para. 32.

60 The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

61 In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

62 Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.*, [2009] O.J. No. 2529 at para. 16. I am satisfied that this objective has been achieved.

64 The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

65 I am satisfied that the notice process was properly implemented by the Monitor.

66 I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have

been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra,* at paras. 44 and 61.

68 Three sources for the court's authority to approve pre-plan agreements have been recognized:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
(b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

69 In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.,* [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra,* and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

72 Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

73 A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

74 The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

75 There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

76 There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

77 Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

78 The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

79 In *Grace 2008, supra,* and *Grace 2010, supra,* I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the

releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

80 In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

81 The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

82 Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

83 The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

84 The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

85 This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

86 The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

87 The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT

Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

88 Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

89 The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

90 It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

91 One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

92 The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

93 It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

94 I do not consider Clause H.2 to be fair and reasonable in the circumstances.

95 In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

96 Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;
(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and
(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

97 The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

98 With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

99 Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

DISPOSITION

100 I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

101 I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

102 In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

103 In *Grace 2008, supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992), 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

104 Accordingly, the motion is dismissed.

105 In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

106 Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

G.B. MORAWETZ J.

cp/e/qlrxg/qlpxm/qlaxw/qlced/qljyw

1 On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue concernant les dépens.):
<http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3 a/10-03-25.3a.html>

Case Name:

Nortel Networks 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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

[2010] O.J. No. 2361

2010 ONCA 402

68 C.B.R. (5th) 232

2010 CarswellOnt 3752

Docket: M38748

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., S.T. Goudge and J.C. MacPherson JJ.A.

Heard: May 31, 2010 by written submissions.
Judgment: June 3, 2010.

(4 paras.)

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Application by moving parties for leave to appeal approval of an amended and restated settlement agreement dismissed -- The agreement resulted from extensive negotiations between the parties and it was the best agreement achievable in the circumstances, balancing the interests of all stakeholders -- The moving parties had not demonstrated that they had been subjected to any procedural unfairness nor had they shown any substantive unfairness in the settlement.

Civil litigation -- Civil procedure -- Settlements -- Approval -- Application by moving parties for leave to appeal approval of an amended and restated settlement agreement dismissed -- The agreement resulted from extensive negotiations between the parties and it was the best agreement achievable in the circumstances, balancing the interests of all stakeholders -- The moving parties had not demonstrated that they had been subjected to any procedural unfairness nor had they shown any substantive unfairness in the settlement.

Appeal From:

On leave to appeal from the order of the Honourable Justice Geoffrey P. Morawetz of the Superior Court of Justice, dated March 31, 2010.

Counsel:

Joel Rochon, John Archibald, and Sakie Tambakos, for the Objecting LTD Beneficiaries.

Alan B. Merskey, and Suzanne M. Wood, for the Applicants.

Mark Zigler, Susan Philpott, and Andrea McKinnon, for the Former Employees and Disabled Employees of Nortel.

Barry E. Wadsworth, for the CAW-Canada, and George Borosh et al.

Lyndon Barnes and Adam Hirsh, for the Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited.

Richard B. Swan, for the Informal Nortel Noteholder Group.

Alex MacFarlane, for the Official Committee of Unsecured Creditors.

Fred Myers, Gale Rubenstein, and Melaney Wagner, for the Monitor, Ernst & Young Inc.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- Leave to appeal is denied.

2 The moving parties have not demonstrated that they have been subjected to any procedural unfairness. They have been represented throughout in a case that has been carefully judicially managed from the beginning. Their counsel accepts the settlement. No other LTD beneficiaries

assert any unfair process, and the applicants can show none that they have been exposed to.

3 Nor have they been able to show any substantive unfairness in the settlement. The motion judge exercised his discretion to carefully balance the various interests at stake in approving the settlement. In our view he made no demonstrable error in doing so. The settlement cannot be said to be unreasonable.

4 The motion is dismissed. No costs are sought by the respondent and none are ordered.

D.R. O'CONNOR A.C.J.O.
S.T. GOUDGE J.A.
J.C. MacPHERSON J.A.

cp/e/qllxr/qljxr/qljxh/qlana

TAB 16

C

2008 CarswellOnt 6284, 50 C.B.R. (5th) 25

Grace Canada Inc., Re

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF GRACE CANADA, INC.

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: September 30, 2008
Judgment: October 23, 2008
Docket: 01-CL-4081

Counsel: Derrick C. Tay, Orestes Pasparakis, Jennifer Stam for Grace Canada Inc.

Keith J. Ferbers for Raven Thundersky

Alexander Rose for Sealed Air (Canada)

Michel Bélanger, David Thompson, Matthew G. Moloci for CDN ZAI Claimants

Jacqueline Dais-Visca, Carmela Maiorino for Attorney General of Canada

Subject: Insolvency; Civil Practice and Procedure

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

Faced with product liability suits U.S. parent of applicant G Inc. filed for Chapter 11 re-organization — G Inc. spun off subsidiary SA and provided SA with indemnities relating to asbestos liabilities arising from attic insulation — G Inc commenced proceedings under Act seeking ancillary relief to facilitate and coordinate U.S. proceedings in Canada — Several proposed class actions were commenced in Canada and by court order were enjoined and brought within restructuring process — Representative counsel were appointed to represent claimants in restructuring — Minutes of settlement were reached settling all Canadian claims — Minutes contained provisions for relief in favour of SA and Crown — Crown objected to language of release removing claim over for contribution and indemnity — Minutes were submitted for court approval — The minutes were approved — Representative counsel had been given broad powers by court order to negotiate on behalf of Canadian

claimants so had authority to enter the minutes of settlement — Court had power to approve material agreements including settlement agreements before filing of any plan of compromise or arrangement — SA had contributed to settlement funds — Release not only necessary and essential but fair — Crown's release also necessary otherwise G Inc. could become indirectly liable through contribution and indemnity claims — Minutes released any claims for which Crown had right of contribution or indemnity — Since company released from claims Crown had no need to claim over — Minutes were to be approved or rejected as whole — Approval of minutes fair and reasonable especially given that company could have defended on limitation period and that U.S. bankruptcy court had determined that attic insulation did not pose unreasonable risk — Court awarded compensation to representative counsel, claims administrator and qualified expert in amount of $3,250,000.

Cases considered by *Morawetz J.*:

Association des consommateurs pour la qualité dans la construction v. Canada (Attorney General) (2005), 2005 CarswellQue 10587 (Que. S.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — considered

Calpine Canada Energy Ltd., Re (2007), 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 2007 ABCA 266, 2007 CarswellAlta 1097, 80 Alta. L.R. (4th) 60, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]) — referred to

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

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — referred to

s. 18.6(3) [en. 1997, c. 12, s. 125] — considered

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

MOTION to seek approval of minutes of settlement.

Morawetz J.:

1 Grace Canada Inc. ("Grace Canada" and with the U.S. debtors, "Grace") bring this motion to seek approval of the Minutes of Settlement ("the Minutes") in respect of claims against Grace relating to the manufacture and sale of Zonolite Attic Insulation ("ZAI") in Canada (the "CDN ZAI Claims").

2 Under the Minutes, Grace agrees to:

(a) fund a broad multimedia notice programme across Canada;

(b) establish a trust with $6.5 million for the payment of Canada ZAI property damage claims; and

(c) channel any Canadian ZAI personal injury claims to a U.S. asbestos trust which will have in excess of US$1.5 billion in funding.

3 In consideration, Grace would be discharged of any liability in connection with CDN ZAI Claims.

4 Although there was no direct opposition to the terms of the Minutes as being fair and reasonable, certain parties proposed amendments to the form of order sought by Grace.

5 Grace submits that the Minutes ought to be approved in the form submitted. Counsel submitted that Grace's significant settlement contribution is manifestly fair and reasonable, given Grace's defences to CDN ZAI Claims and, in particular, the judicial determination by the U.S. Bankruptcy Court (the "U.S. Court") that ZAI does not pose an unreasonable risk of harm.

6 Further, counsel to Grace submits that the Minutes are an important step towards the successful reorganization of Grace and with this settlement, these insolvency proceedings, which were filed in April 2001, are nearing completion.

7 W. R. Grace & Co. and its 61 subsidiaries (the "U.S. Debtors") have filed a joint Chapter 11 plan of reorganization (the "Plan") with the U.S. Court and expect to commence a confirmation hearing for the Plan in early 2009. The Plan incorporates the terms of the settlement before this Court and if confirmed, sees Grace emerging from Chapter 11 protection in 2009.

8 The chain of events that resulted in the Minutes began in 1963 with Grace's purchase of the assets of the Zonolite Company ("Zonolite"). Zonolite mined and processed vermiculite from a mine near Libby, Montana (the "Libby Mine"). Vermiculite is an insulator which apparently has no known toxic properties. However, the vermiculite ore from the Libby Mine contained impurities, including asbestiform minerals.

9 One of the products made from the U.S. Debtors' vermiculite was ZAI. ZAI was installed in attics of homes. Some ZAI contained trace amounts of asbestos.

10 In addition, 40 years ago the U.S. Debtors manufactured a product known as monokote-3 ("MK-3") which had chrysotile asbestos added during the manufacturing process.

11 Grace stopped manufacturing MK-3 in Canada by 1975 and ceased production of ZAI in 1984 and closed the Libby Mine in 1990.

12 By the 1970s, the U.S. Debtors began to be named in asbestos-related lawsuits. These included both asbestos-related personal injury claims ("PI Claims") and property damage claims relating to ZAI.

13 Due to a rise in the number of PI Claims in 2000 and 2001, the U.S. Debtors filed for protection under Chapter 11 of the *United States Bankruptcy Code* on April 2, 2001.

14 Grace Canada was incorporated in 1997. According to the affidavit of Mr. Finke, it had no direct involvement in any historic use of asbestos.

15 Rather, Grace's historic business operations in Canada were undertaken by a company now known as Sealed Air (Canada) Co./CIE ("Sealed Air Canada"). Sealed Air Canada is the successor to the Canadian companies with past involvement in the sale and distribution of ZAI and asbestos containing products such as MK-3.

16 Sealed Air Canada was spun-off from Grace in 1998 and as part of the transaction, Grace Canada and the U.S. Debtors provided certain indemnities to Sealed Air Canada and its parent, Sealed Air Corporation, relating to historic asbestos liabilities.

17 On April 4, 2001, two days after the Chapter 11 proceedings had been commenced, Grace Canada commenced these proceedings. The Canadian CCAA proceedings were commenced seeking ancillary relief to facilitate and coordinate the U.S. proceedings in Canada. An initial order was granted by this Court pursuant to s.18.6(4) of the CCAA (the "Initial Order").

18 By 2005, despite the Initial Order, 10 proposed class actions (the "Proposed Class Actions") were commenced across Canada in relation to the manufacture, distribution and sale of ZAI. Grace Canada, some of the U.S. Debtors and Sealed Air Canada were named as defendants, as was the Attorney General of Canada (the "Crown").

19 The allegations in the Proposed Class Actions include both ZAI PI Claims as well as damages for the cost of removing ZAI from homes across Canada ("CDN ZAI PD Claims").

20 On November 14, 2005, an order was issued (the "November 14th Order") enjoining the Proposed Class Actions against the U.S. Debtors, Sealed Air Canada and the Crown.

21 As a result, the Proposed Class Actions were brought within the overall restructuring process.

22 By order of February 8, 2006 (the "Representation Order"), Lauzon Bélanger S.E.N.C. ("Lauzon") and Scarfone Hawkins LLP ("Scarfone") (jointly, "Representative Counsel") were appointed to act as the single representative on behalf of all of the holders of Canadian ZAI Claims ("CDN ZAI Claimants") to advocate their interests in the restructuring process.

23 No one has taken issue with the authority of the Representative Counsel to represent all CDN ZAI Claimants in the U.S. Court, this Court or at any of the mediations. The Representation Order provided that Rep-

resentative Counsel would, among other things, have authority to negotiate a settlement with Grace.

24 After a long history of negotiations, on June 2, 2008, Grace, Representative Counsel and the Crown announced to the U.S. Court that they had reached an agreement in principle that remained subject to the Crown's acceptance. The Crown was not able to obtain firm instructions on whether to participate in the settlement.

25 On September 2, 2008, Grace and Representative Counsel signed the Minutes resolving all CDN ZAI Claims against Grace and Sealed Air Canada.

26 On April 7, 2008, the U.S. Debtors reached an agreement effectively settling all present and future PI Claims (the "PI Settlement") and under this agreement, the U.S. Debtors agreed to pay into trust various assets, including US$250 million, warrants to acquire common stock, proceeds of insurance, certain litigation and deferred payments and it estimates that the total value of the settlement is in excess of US$1.5 billion. Sealed Air Canada is making a contribution to the settlement in excess of $500 million, plus 18 million shares of stock.

27 On September 21, 2008, the U.S. Debtors filed their draft Plan with the U.S. Court and confirmation hearings are scheduled for early in 2009.

28 The Minutes contemplate a settlement of all CDN ZAI Claims, both personal injury ("CDN ZAI PI Claims") and property damage, on the following terms:

> (a) Grace agrees to provide in its Plan for the creation of a separate class of CDN ZAI PD Claims and to establish the CDN ZAI PD Claims Fund, which shall make payments in respect of CDN ZAI Claims;
>
> (b) on the effective date of Grace's Plan, Grace will contribute $6,500,000 through a U.S. PD Trust to the CDN ZAI PD Claims Fund;
>
> (c) Grace's Plan provides that any holder of a CDN ZAI PI Claim ("CDN ZAI PI Claimant") shall be entitled to file his or her claim with the Asbestos Personal Injury Trust to be created for all PI Claims and funded in accordance with the US$1.5 billion PI Settlement;
>
> (d) Representative Counsel shall vote, on behalf of CDN ZAI Claimants, in favour of the Plan incorporating the settlement; and
>
> (e) Representative Counsel shall be entitled to bring a fee application within the U.S. proceedings and any such payments received would reduce the amount otherwise payable to Representative Counsel under the Settlement.

In addition, Grace has agreed to fund a broad based media notice programme across Canada and an extended claims bar procedure for CDN ZAI PD Claims and Grace has also agreed to give direct notice to any known claimant.

29 Under the Minutes, the bar date for CDN ZAI PD Claims is not less than 180 days from substantial completion of the CDN ZAI Claims Notice Program. The period for filing ZAI PD Claims in the U.S. is considerably shorter and Grace has scheduled a motion with the U.S. Court on October 20, 2008 to approve the CDN ZAI PD Claims bar date. Grace has indicated that if granted, recognition of the U.S. order will be sought from this Court. There will be no bar date for CDN ZAI PI Claims.

30 Grace has indicated that it has contemplated that monies will be distributed out of the CDN ZAI PD Claims Fund based on a claimant's ability to prove that his or her property contained ZAI and that monies were expended to contain or remove ZAI from the property. Based on proof of ZAI in the home and the remediation measures taken by a claimant, that claimant may recover $300 or $600 per property.

31 The issues for consideration were stated by counsel to Grace as follows:

> (a) Does Representative Counsel have the authority to enter into the Minutes on behalf of all CDN ZAI Claimants?
>
> (b) Does the CCAA Court have the jurisdiction to approve the Minutes, including the relief in favour of Sealed Air Canada and the Crown?
>
> (c) Are the Minutes fair and reasonable? In particular, is their prejudice to the key constituencies?

32 The Representation Order is clear. It gives Representative Counsel broad powers, including the ability to negotiate on behalf of CDN ZAI Claimants. No party has objected to or taken issue with the Representation Order or with the authority of Representative Counsel to represent all CDN ZAI Claims.

33 I am satisfied that Lauzon and Scarfone have the authority, as Representative Counsel, to enter the Minutes of Settlement on behalf of all CDN ZAI Claimants.

34 I am also satisfied that the CCAA Court may approve material agreements, including settlement agreements, before the filing of any plan of compromise or arrangement. See *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (2007), 35 C.B.R. (5th) 27 (Alta. C.A. [In Chambers]).

35 It is noted that, in this case, the Plan will be voted on by creditors in the U.S. proceedings.

36 With respect to relief in favour of Sealed Air, Grace has agreed to indemnify Sealed Air Canada for certain liabilities in connection with ZAI. As part of the settlement, Grace seeks to ensure that the release of the CDN ZAI Claims includes a release for the benefit of Sealed Air Canada.

37 Counsel submits that such release is not only necessary and essential, but also fair given Sealed Air Canada's contribution to the PI Settlement under the Plan in excess of $500 million. I am satisfied that, in these circumstances, the release for the benefit of Sealed Air Canada is fair and reasonable.

38 The Minutes also provide a limited release in favour of the Crown. Pursuant to the Minutes, the Crown's claims for contribution and indemnity against Grace (being CDN ZAI Claims) are released. Counsel submits that the corollary is that the Crown is relieved of any joint liability it shares with Grace for CDN ZAI Claims.

39 Counsel to Grace again submits that such a release of the Crown is necessary. Otherwise, Grace could become indirectly liable through contribution and indemnity claims.

40 Counsel for Grace submits that, in certain circumstances, this Court has ordered third party releases where they are necessary and connected to a resolution of the debtor's claims, will benefit creditors generally,

and are not overly broad or offensive to public policy. (See: *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]) and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]), aff'd. 2008 ONCA 587 (Ont. C.A.) ("Metcalfe"), leave to appeal to S.C.C. denied. [2008 CarswellOnt 5432 (S.C.C.)])

41 Subsections 18.6(3) and (4) of the CCAA, allow the Ontario Court to make orders with respect to foreign insolvency proceedings, on such terms and conditions as the Court considers appropriate.

42 In assessing whether to grant its approval, the Court has to consider whether the Minutes are fair and reasonable in all of the circumstances.

43 It is the submission of Grace that the Minutes are fair and reasonable, and that resolutions of the CDN ZAI Claims in particular do not prejudice the Crown, CDN ZAI PD Claimants or, CDN ZAI PI Claimants.

44 Grace also submits that, given the strong defences which it believes are available, the Minutes provide a substantial compromise by Grace, considering the circumstances in which it believes it has no liability for CDN ZAI Claims.

45 Early in the insolvency proceedings, the U.S. Court held a hearing to determine, as a threshold scientific issue, whether the presence of ZAI in a home created an unreasonable risk of harm. The opinion of the U.S. Court was filed as part of the record. Grace states that the U.S. Court came to the conclusion that ZAI did not pose an unreasonable risk of harm. The background and conclusions of the U.S. Court have been summarized at paragraphs 72 to 85 of the Grace factum.

46 I have been persuaded by and accept these submissions.

47 In addition, even if ZAI had been found to pose an unreasonable risk of harm, Grace submits that it still has a complete defence to any claims under Canadian law for the reasons set out at paragraphs 86 to 97 of the factum.

48 Further, the passage of time is such that Grace submits that many cases would be dismissed outright based on the expiry of the limitation period.

49 With respect to the issue of prejudice to the Crown, on the one hand, the Crown has asserted claims against Grace. The Crown has estimated that over 2,000 homes located on military bases have been remediated to contain vermiculite attic insulation or ZAI from homes built by the Canadian military. Under the Settlement, the Crown, as a CDN ZAI Claimant, would receive $300 per unit for the sealing of ZAI. Based on the Crown's records, the Crown would potentially have a claim against the Fund for up to $660,000 and if it chose to pursue this claim, the Crown would recover approximately 50% of its remediation expenditures.

50 On the other hand, the Crown is also a defendant in the Proposed Class Actions. Through the Minutes, the Crown will release its CDN ZAI Claims against Grace, but at the same time, counsel to Grace submits that the Crown is effectively released from any joint liability it may share with Grace. Grace submits that the Crown will be relieved from all CDN ZAI Claims except those for which it is severally responsible.

51 It is with respect to the release language that the Crown takes exception.

52 The Crown acknowledges that Representative Counsel has the authority to negotiate on behalf of ZAI

Claimants. However, the Crown disputes the authority of Representative Counsel to purport to negotiate away the Crown's Chapter 11 "claim over" for contribution and indemnity.

53 The Crown supports the approval of the Settlement insofar as it purports to resolve all of Grace's liability with respect to CDN ZAI PD and PI Claims, provided that the approval order expressly recognizes that the Crown's protective "claim over" for contribution and indemnity against Grace is unimpaired by the Settlement and provided that the Approval Order expressly allows the Crown to third party Grace in ZAI related actions where the Crown is sued on a several basis.

54 Counsel to the Crown submits that to interpret the authority of Representative Counsel to have the power to release the Crown's "claim over" against Grace while they simultaneously reserve the right to pursue the claims against the Crown would conflict with the clear direction in the Representation Order. They submit that CCAA Representative Counsel does not represent the Crown's interest with respect to the contribution and indemnity claim, and would be in conflict of interest with respect to the members of the group it represents if it attempted to do so. They further submit that it has always been the position of the Crown that all ZAI related damages give rise to a contribution and indemnity claims against Grace and that no independent claim lies against the Crown; hence, the Crown has and will continue to assert a contribution and indemnity claim against Grace for the totality of the damages.

55 At the hearing, the argument of the Crown was presented without the benefit of a factum. I requested and received a factum from the Crown which was then responded to by counsel to Grace and by Representative Counsel.

56 In my view, the response of Grace is a complete answer to the Crown's submissions. Counsel to Grace notes that the Crown purports to support the Order sought on the proviso that its contribution and indemnity claims against Grace are unimpaired. However, the Minutes do impair the Crown's contribution claims, and with the Order, the Crown will have no claims for contribution and indemnity against Grace.

57 It is Grace's position that Representative Counsel has the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity. Further, in any event, there is no prejudice to the Crown as pursuant to the Minutes, CDN ZAI Claimants have agreed that they cannot pursue the Crown for claims for which Grace is ultimately responsible. Consequently, the Crown has no contribution claims to assert against Grace. Simply put, as submitted by counsel to Grace, there is nothing left.

58 The Representation Order applies to all claims "arising out of or in any way connected to damages or loss suffered, directly or indirectly, from the manufacture, sale or distribution of Zonolite attic insulation products in Canada".

59 It seems to me that the wording of the Representation Order is clear. Representative Counsel have the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity.

60 With respect to the Release itself, the Minutes release any claims or causes of action for which the Crown has a right of contribution and indemnity. As submitted by counsel to Grace, Representative Counsel may not pursue the Crown in respect of claims for which Grace is ultimately liable.

61 Paragraph 13(b)(iii) of the Minutes provides for a release of:

> ...any claims or causes of action asserted against the Grace Parties as a result of the Canadian ZAI Claims advanced by CCAA Representative Counsel against the Crown as a result of which the Crown is or may become entitled to contribution or indemnity from the Grace Parties.

62 I accept the submission of counsel to Grace that the purpose of this provision is to protect Grace from indirect claims through the Crown. Since any claim for which Grace is ultimately liable cannot be pursued, the Crown has no need nor any ability to "claim over" against Grace.

63 The Crown also relied on an order of November 7, 2005 of Chaput J. of the Québec Superior Court in the [*Association des consommateurs pour la qualité dans la construction v. Canada (Attorney General)*, 2005 CarswellQue 10587 (Que. S.C.)] case which was one of the Proposed Class Actions. The Crown relied on the order of Chaput J. to argue that all claims against the Crown flow through Grace and that Grace is therefore ultimately responsible for any Crown liability.

64 I agree with the position being taken by Grace to the effect that this argument is misplaced. It was made quite clear at this hearing that the scope of any remaining Crown liability will need to be addressed at a future hearing.

65 Submissions were also made by counsel on behalf of Ms. Thundersky.

66 Counsel pointed out certain concerns and suggested that it was appropriate to alter the proposed form of order.

67 The first concern raised related to the issue of preservation of claims against the Crown and counsel submitted that paragraph 13(b)(iv) creates some ambiguity in this area. In my view, paragraph 13(b)(iv) of the Minutes is clear. The concluding words read as follows:

> For greater certainty, nothing contained in these Minutes shall serve to discharge, extinguish or release Canadian ZAI Claims asserted against the Crown and which claims seek to establish and apportion independent and/or several liability against the Crown.

68 I do not share counsel's concern. The issue does not require clarification. In my view, this paragraph is not ambiguous.

69 Counsel to Ms. Thundersky also raises concern that the draft order provides that all of the legal actions in Canada be "permanently stayed" until all of the actions have formally removed the Grace Parties as defendants which would not occur until the Effective Date of any approved Plan of Reorganization. In my view, this is not a significant concern. This Court retains jurisdiction over the matters before it in these proceedings and to the extent that further direction is required, the appropriate motion can be brought before me.

70 The third concern raised by counsel to Ms. Thundersky was with respect to the Asbestos PI Fund to be established in the U.S. process. Concerns were raised with respect to the uncertainty surrounding when and in what manner the eligibility criteria for the fund would be established. Counsel to Grace advised that Mr. Ferbers would have the opportunity to provide comment during the Plan process on this issue. I expect that this should be sufficient to alleviate any concerns but, if not, further direction can be sought from this Court.

71 Finally, concern was also raised with respect to the absence of a personal injury notice program. Counsel

to Grace advised that this issue would be communicated to those involved in the U.S. Plan. In the circumstances, this would appear to be a pragmatic response to the concern raised by counsel to Ms. Thundersky.

72 Counsel to Ms. Thundersky acknowledged that it was difficult to propose a resolution which stayed within the four corners of the Minutes, but that Ms. Thundersky did wish to bring the foregoing concerns to the attention of the parties and the Court in the hopes that they could be taken into account.

73 Counsel to Grace and Representative Counsel are aware of these issues and will take them into account.

74 I indicated at the hearing that I was inclined to either approve the Minutes or to reject them. The Minutes are the product of extensive negotiation between the Representative Counsel and the Grace Parties. I am of the view that it is not appropriate for me to examine and evaluate the Minutes on a line-by-line basis, nor to amend or alter the agreement as reached between Representative Counsel and the Grace Parties.

75 In my view, to accept the submissions of the Crown and Ms. Thundersky would leave the Court in the position of having to reject the Minutes and refuse to approve the Settlement. Having considered all of the circumstances, I do not consider this to be an appropriate outcome.

76 I have been satisfied that the Minutes are fair and reasonable. The Minutes have been agreed to by Representative Counsel. In my view, the Minutes do not prejudice the interests of the Crown. I am also of the view that there is no prejudice to the ZAI PD Claimants who will have access to a significant fund to assist with their remediation costs. Their alternative is more litigation which, at the end of the day, would have a very uncertain outcome. I am also of the view that there is no prejudice to the ZAI PI Claimants who will have the opportunity to make a claim to the asbestos trust in the U.S. I am satisfied that the ZAI PI Claimants will be receiving treatment that is fair and equal with other PI Claimants. Further, it is noted that counsel to Grace advised that the Thundersky family are the only known ZAI PI Claimants. Their alternative is the continuation of a claim that on its face, would appear to have been statute barred in 1994.

77 I also accept the conclusions as put forth by counsel to Grace. This Settlement provides CDN ZAI PD Claimants with clear recourse to the CDN ZAI PD Claims Fund and CDN ZAI PI Claimants with recourse to the Asbestos Personal Injury Trust in situations where it is Grace's view that the Canadian claims have little or no value.

78 I am also satisfied that third party releases are, in the circumstances of this case, directly connected to the resolution of the debtor's claims and are necessary. The third party releases are not, in my view, overly broad nor offensive to public policy.

79 Counsel to Grace also submitted that Representative Counsel have been continuously active and diligent in both the U.S. and Canadian proceedings and Grace is of the view that it is appropriate that a portion of the funds paid under the settlement go towards compensation of Representative Counsel's fees. I accept this submission and specifically note that the Minutes provide for specified payments to Representative Counsel, a Claims Administrator and a qualified expert to assist in the claims process, in a total amount of approximately CDN$3,250,000.

80 In conclusion, the Minutes, in my view, represent an important component of the Plan. They provide a mechanism for the resolution of CDN ZAI Claims without the uncertainty and delay associated with ongoing litigation.

81 The Minutes are approved and an order shall issue in the form requested, as amended.

Order accordingly.

END OF DOCUMENT

TAB 17

2001 CarswellAlta 575, 2001 ABCA 110, [2001] A.W.L.D. 397, 4 C.P.C. (5th) 20, [2001] 6 W.W.R. 628, 281 A.R. 185, 248 W.A.C. 185, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13

2001 CarswellAlta 575, 2001 ABCA 110, [2001] A.W.L.D. 397, 4 C.P.C. (5th) 20, [2001] 6 W.W.R. 628, 281 A.R. 185, 248 W.A.C. 185, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13

Amoco Canada Petroleum Co. v. Propak Systems Ltd.

Amoco Canada Petroleum Company Ltd., The George R. Brown Partnership, Encor Energy Corporation Inc., David W. Feeney, Trustee of the Estate of Eleanor Deering, deceased, Feliciana Corporation, Heather Oil Ltd., Joli Fou Petroleums Ltd., Lacana Petroleum Limited, Ralph S. O'Connor, Mark Resources Inc., Star Oil and Gas Ltd., Union Pacific Resources Inc., Westcoast Petroleum Ltd. and Wintershall Oil of Canada Ltd. (Respondents/Plaintiffs) and Propak Systems Ltd., Lynn Tylosky, L. Moore (Appellants/Defendants) and Quantel Engineering (1981) Ltd., V.J. Pamensky Canada Inc., WEG Exportadora S.A., Electromotores WEG S.A. and Gerry Brooks carrying on business as SDL Trucking and Cawa Operating & Consulting Ltd. (Respondents/Defendants) and Standard Electric Ltd., Mark Resources Inc., Able Industries Limited, Terrence Dingwall operating as Able Industries, Cawa Operating & Consulting Ltd., Flint Canada Inc. formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc. and Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd. (Respondents/Third Parties) and ABC Company Ltd. (Not a Party to this Appeal/Third Party) and Able Industries Limited, Terrence Dingwall operating as Able Industries or Able Industries Limited, Cawa Operating & Consulting Ltd. and Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc., Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd. (Respondents/Fourth Parties) and Able Industries Limited, Standard Electric Ltd., Gerry Brooks, carrying on business as SDL Trucking, Quantel Engineering (1981) Ltd., Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., V.J. Pamensky Canada Inc. WEG Exportadora S.A. (Respondents/Fifth Parties) and Propak Systems Ltd. (Appellant/Fifth Party)

Alberta Court of Appeal

Conrad, Sulatycky, Fruman JJ.A.

Heard: June 12, 2000
Judgment: May 4, 2001
Docket: Calgary Appeal 99-18589

Proceedings: affirming *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (1999), 74 Alta. L.R. (3d) 194, 39 C.P.C. (4th) 308 (Alta. Q.B.)

Counsel: *D.A. McDermott, Q.C.*, for Appellants.

J.J.S. Peacock, for Respondents, Amoco Canada et al.

A.D. Lytle, for Respondent, Quantel Engineering.

J.B. Rooney, Q.C., for Respondent, V.J. Pamensky Canada Inc.

G.S. Dunnigan, for Respondent, Gerry Brooks.

D.K. Yasui, for Respondent, Cawa Operating and Consulting Ltd.

D.J. Chernichen, Q.C., for Respondent, Standard Electric Ltd.

D.J. Cichy, for Respondent, Mark Resources Inc.

H.D.D. Lloyd, for Respondent, Lovejoy Inc.

Subject: Civil Practice and Procedure

Practice --- Disposition without trial — Settlement — Effect — General

Plaintiff brought action against defendants for damages for negligence and breach of contract — Defendants claimed contribution and indemnity from third, fourth, and fifth parties — Parties entered into Pierringer Agreement to settle all claims between and among parties except for matter of several liability of defendant P Ltd. to plaintiffs — Settling parties' application to dismiss P Ltd.'s claims for contribution and indemnity was granted, reducing number of litigants from twelve to two groups — Application by plaintiffs to amend statement of claim to focus on liability of P Ltd. was granted — Case management judge found that only in very rare cases will optimizing non-settling party's access to discovery and/or production of documents outweigh benefits of multi-party settlement and shortened trial — Judge found P Ltd. had advantage of significant oral examination and discovery of documents — Case management judge held that P Ltd. would not be prejudiced or disadvantaged by losing opportunity of further discovery of parties to whom it would no longer be adverse in interest — P Ltd. appealed — Appeal dismissed — Case management judge committed no error — Public policy strongly favours settlement — Restricted rights of third party disclosure available to P Ltd. under Rules of Court did not justify refusing to give effect to proportionate share settlement agreement — P Ltd.'s liability was strictly limited to loss it actually caused, for which it had no remaining right to indemnification — Alberta Rules of Court, Alta. Reg. 390/68.

Cases considered by *Fruman J.A.*:

British Columbia Ferry Corp. v. T & N plc (1995), 16 B.C.L.R. (3d) 115, 65 B.C.A.C. 118, 106 W.A.C. 118, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287 (B.C. C.A.) — considered

Brown v. Alberta (1998), 64 Alta. L.R. (3d) 62, (sub nom. *Brown v. Canada (Attorney General)*) 225 A.R. 333, [1999] 3 W.W.R. 730, 24 C.P.C. (4th) 269 (Alta. Q.B.) — considered

Geleta v. Alberta (Minister of Transportation & Utilities) (1996), 193 A.R. 67, 48 Alta. L.R. (3d) 158, 135 W.A.C. 67, 60 L.C.R. 105 (Alta. C.A.) — considered

Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright, (sub nom. *Hudson Bay Mining & Smelting Co. v. Wright)* 120 Man. R. (2d) 214, 12 C.P.C. (4th) 94, [1997] 10 W.W.R. 622 (Man. Q.B.) — applied

Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright (1998), 23 C.P.C. (4th) 268, (sub nom. *Hudson*

Bay Mining & Smelting Co. v. Wright) 131 Man. R. (2d) 133, (sub nom. *Hudson Bay Mining & Smelting Co. v. Wright)* 187 W.A.C. 133 (Man. C.A.) — considered

Loewen, Ondaatje, McCutcheon & Co. c. Sparling, 143 N.R. 191, (sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, (sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, (sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49 (S.C.C.) — considered

Margetts (Next Friend of) v. Timmer Estate (1996), (sub nom. *Margetts v. Timmer)* 192 A.R. 42, 5 C.P.C. (4th) 52, 43 Alta. L.R. (3d) 283, [1997] 1 W.W.R. 25 (Alta. Q.B.) — considered

Margetts (Next Friend of) v. Timmer Estate (1999), 178 D.L.R. (4th) 577, (sub nom. *Margetts v. Timmer)* 244 A.R. 114, (sub nom. *Margetts v. Timmer)* 209 W.A.C. 114, 73 Alta. L.R. (3d) 110, [2000] 2 W.W.R. 85, 39 C.P.C. (4th) 146 (Alta. C.A.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — considered

Pierringer v. Hoger (1963), 124 N.W.2d 106 (U.S. Wis. S.C.) — considered

Slaferek v. TCG International Inc., 46 Alta. L.R. (3d) 279, [1997] 3 W.W.R. 240, 199 A.R. 63, 8 C.P.C. (4th) 117 (Alta. Q.B.) — considered

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) — considered

Vandevelde v. Smith (1999), 243 A.R. 161, 77 Alta. L.R. (3d) 160, [2000] 5 W.W.R. 405 (Alta. Q.B.) — considered

Viridian Inc. v. Dresser Canada Inc. (1999), 73 Alta. L.R. (3d) 348, 247 A.R. 23, [2000] 2 W.W.R. 389 (Alta. Q.B.) — considered

Wright (Next Friend of) v. VIA Rail Canada Inc., 76 Alta. L.R. (3d) 166, [2000] 4 W.W.R. 232, 40 C.P.C. (4th) 128, (sub nom. *Wright Estate v. VIA Rail Canada Inc.)* 256 A.R. 148 (Alta. Q.B.) — considered

Statutes considered:

Contributory Negligence Act, R.S.A. 1980, c. C-23

s. 2 — considered

s. 2(1) — considered

Tort-Feasors Act, R.S.A. 1980, c. T-6

s. 3 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — considered

R. 77 — considered

Civil Practice Note 7 — considered

Civil Practice Note 7, item 23 — considered

Civil Practice Note 7, item 48 — considered

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

R. 28(1) — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 31.10 — referred to

APPEAL by non-settling defendant from judgment reported at (1999), 39 C.P.C. (4th) 308, 74 Alta. L.R. (3d) 194 (Alta. Q.B.), dismissing defendant's claims for contribution and indemnity from settling parties.

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

1 The question in this appeal is whether Alberta courts should permit some defendants in complex multi-party litigation to settle, even though the defendants who are left behind might encounter difficulties gathering pre-trial evidence to defend the lawsuit. The answer is yes.

BACKGROUND

2 On November 1, 1990, a fire occurred at the Eta Lake Gas Processing facility, near Drayton Valley, Alberta. The resulting claims for loss of property and profit allege both negligence and breach of contract for which the plaintiffs seek damages of several million dollars. Given the sizeable stakes, the plaintiffs cast their litigation nets as widely as possible, adding more defendants in successive amended versions of the statement of claim. The defendants in turn endeavoured to minimize their respective risk by maximizing the number of parties potentially responsible for the loss. They issued notices to co-defendants and added third, fourth and fifth parties to this action. With the current tally at eleven groups of defendants, a schematic diagram of who is suing whom looks like the "triple reverse" from a football play book.

3 The case has meandered towards trial, with extensive though as yet incomplete discovery and document production. Now, nearly a decade after the fire occurred, ten groups of defendants want out and the plaintiffs want to let them go. They have entered into a type of settlement agreement known as a "Pierringer agreement" named after *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C., 1963), the Wisconsin case in which this type of agreement was first considered. Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a "proportionate share settlement agreement".

4 If given effect, the settlement agreement in this case would greatly simplify the trial by reducing the number of litigants from twelve groups, represented by twelve different lawyers, to two groups: the plaintiffs, and the appellants, Propak Systems Ltd. together with two of its employees, Lynn Tylosky and L. Moore ("Propak").

The settlement agreement entered into on June 23, 1999 (AB II at 150), stipulates the removal from this suit of the third, fourth and fifth parties and co-defendants (the "settling defendants") as a condition precedent to its main provisions coming into effect. It provides that:

1. The plaintiffs will discontinue their claims against all of the settling defendants (s. 1);

2. The plaintiffs covenant not to sue any of the settling defendants (s. 2);

3. The plaintiffs will amend their pleadings to abandon their claims against Propak, except to the extent of Propak's several share of liability, and will not seek to recover from Propak any amounts for which Propak would be entitled to contribution or indemnity from the settling defendants (s. 3);

4. All of the settling defendants will abandon their indemnity claims and any claims for costs against one another, and against Propak (s. 6);

5. The settling defendants will cooperate with the plaintiffs by making witnesses, documents and expert reports available to them (s. 10); and

6. To the extent required by law and the rulings and guidelines of the Law Society of Alberta, the agreement will be disclosed to the Court of Queen's Bench and to Propak (s. 11).

5 The agreement requires amendments to the statement of claim that would focus the issue for determination at trial solely on Propak's proportionate share of the loss. The previous version of the statement of claim set out diverse claims of alternative liability against various defendants in 28 paragraphs and sub-paragraphs (AB I at P-39). The newly amended statement of claim refers to four specific breaches by Propak relating to its faulty reinstallation of a motor in a refrigeration compressor on the Eta Lake Gas Processing facility (AB II at 145, paras. 29 - 31). It alleges that Propak's failure to properly preload the bolts fastening the coupling to the hub of the motor and its failure to align the motor led to the escape of gas and resulting fire.

6 The litigation is under case management. On September 3, 1999, the settling defendants brought an application before the case management judge to remove them from the lawsuit. At the same time, the plaintiffs applied to amend the statement of claim.

7 Propak resisted both applications, arguing that due to potential prejudice it would be made a scapegoat for liability at trial. It noted that because the *Alberta Rules of Court*, Alta. Reg. 390/68 do not contain an express rule permitting pre-trial discovery against third parties, Propak would lose its pre-trial procedural rights against the settling defendants if they were released from the lawsuit. Propak contended that this would affect its ability to gather evidence to show that the fire resulted from the settling defendants' actions, and would impede the court's ability to apportion Propak's share of the liability fairly.

THE CASE MANAGEMENT JUDGE'S DECISION

8 The case management judge granted both applications. He noted that the settlement agreement limits Propak's liability to its own several liability to the plaintiffs. Given Propak's limited exposure, he queried the basis on which Propak's claims for contribution and indemnity from the settling defendants could continue (AB I at 100).

9 The judge then observed that even if the settling defendants were removed from the suit, leaving the

plaintiffs and Propak as the only remaining litigants, the court would nevertheless be compelled to determine the degrees of fault of all contributors to the plaintiffs' damages, whether parties to the action or not. The court would be required to make this assessment for two reasons: in order to isolate Propak's several liability, and because s. 2(1) of the *Contributory Negligence Act*, R.S.A. 1980, c. C-23 compels the court to do so (AB I at 102). Therefore, even though the settlement agreement sufficed to extinguish all issues of liability among the plaintiffs and settling defendants, and the settling defendants and Propak, removing the settling defendants from the suit could affect the court's ability to apportion fault properly.

10 The case management judge recognized that removing the settling defendants from the action would cause Propak to lose its rights of discovery and production of documents in respect of those parties. The judge noted that although examinations for discovery were not complete, Propak had the advantage of significant oral examination and discovery of the documents. He was unable to find that "Propak would be in any way prejudiced or disadvantaged by 'losing' the opportunity of further discovery of parties to whom it would no longer be adverse in interest [by virtue of the agreement taking effect]" (AB I at 105). Accordingly, he directed that the third, fourth and fifth party notices and notices to co-defendants be struck, the respective parties be dismissed from the suit, and the amendments to the statement of claim be allowed (AB I at 105-106).

PROPORTIONATE SHARE SETTLEMENT AGREEMENTS

An Introduction

11 The litigation of large losses in Canada has been characterized by two opposing trends: first, the practice of adding every conceivable party as a defendant or third party in order to spread out the risk of liability, which complicates and slows the litigation process; and second, the use of settlement agreements to help speed litigation and curb legal fees. See Barbara Billingsley, "*Margetts v. Timmer Estate*: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" (1998), 36 Alta. L. Rev. (No. 4) 1017.

12 Now past is the day when "settlement agreement" can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.

13 The new settlement agreements, which include such exotically named species as the Mary Carter agreement and the Pierringer agreement, endeavour to attain a more limited objective: rather than trying to resolve all outstanding issues among all parties, a difficult task in complicated suits, they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome. This "risk-management" objective is accomplished by settling issues of liability between some but not all of the parties, thereby reducing the number of issues in dispute, simplifying the action, and expediting the suit. Ancillary benefits include a reduction in the financial and opportunity costs associated with complex, protracted litigation, as well as savings of court time and resources.

14 To the extent that a proportionate share settlement agreement completely removes the settling defendants from the suit, it is like a conventional settlement agreement that brings all outstanding issues between the settling parties to a conclusion. Proportionate share settlement agreements therefore typically include the following elements:

1. The plaintiff receives a payment from the settling defendants in full satisfaction of the plaintiff's claim against them;

2. In return, the settling defendants receive from the plaintiff a promise to discontinue proceedings, effectively removing the settling defendants from the suit;

3. Subsequent amendments to the pleadings formally remove the settling defendants from the suit; and

4. The plaintiff then continues its suit against the non-settling defendants.

15 There is, however, an added complication that a proportionate share settlement agreement must address. As a result of third party proceedings, settling defendants are almost always subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the fault of the settling defendants. Before the settling defendants can be released from the suit, some provision must be made to satisfy these claims.

16 This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability. Alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants. It is the latter approach that prevails in the agreement at issue in this suit, but in either case the goal of the proportionate share settlement agreement is to limit the liability of the non-settling party to its several liability.

The Competing Positions

17 This court recently considered the validity of a "new generation" settlement agreement in *Margetts (Next Friend of) v. Timmer Estate* (1996), [1997] 1 W.W.R. 25 (Alta. Q.B.), aff'd (1999), 178 D.L.R. (4th) 577 (Alta. C.A.). There, the trial court recognized and this court affirmed that a tortfeasor has a legitimate and "undoubted right to contract to minimize his financial exposure to the plaintiffs": at W.W.R. 39.

18 However, in *Margetts*, *supra*, the settlement was in the nature of a Mary Carter agreement, which did not completely remove the settling defendants from the suit. As the settling parties continued to be adversarial in interest, a non-settling party remained entitled to full pre-trial disclosure from them. In *Margetts*, therefore, the court did not need to reconcile settlement rights with a non-settling defendant's ability to exercise its pre-trial procedural rights in an effort to deflect the plaintiff's accusation of fault.

19 In addition to being grounded in fundamental principles of justice and framed in the *Alberta Rules of Court*, a non-settling defendant's ability to defend against a suit is anchored in the statutory requirement found in s. 2(1) of the *Contributory Negligence Act*:

> 2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

20 The effect of this provision is to compel the court to determine the degrees of fault of all contributors to the plaintiffs' damage, whether or not they currently are or ever have been parties to the action. In effect, this provision acts as a safeguard to establish the proportionate share of each defendant's liability, whether settling or

non-settling.

21 It therefore becomes apparent that the right to settle, fixing a settling defendant's financial liability to the plaintiff through contract, may have a direct effect on a non-settling defendant's pre-trial rights of discovery and production of documents in order to gather evidence to defend the lawsuit.

The B.C. Ferry Approach

22 The Canadian cases in which proportionate share settlement agreements have been considered attempt to balance the right to settle against the right to pre-trial disclosure. One approach is represented by the decision of the British Columbia Court of Appeal in *British Columbia Ferry Corp. v. T & N plc* (1995), 27 C.C.L.T. (2d) 287 (B.C. C.A.). There, the court decided that the non-settling defendants could not maintain a claim for contribution or indemnity against third parties that had settled with the plaintiffs, pursuant to the terms of a proportionate share settlement agreement. However, the court allowed the non-settling defendants to maintain a claim for a declaration to determine the degree to which the plaintiff's damages were attributable to the settling defendants. The court therefore permitted the action for declaratory relief to remain, keeping the settling defendants in the lawsuit for the purely procedural purpose of allowing the non-settling parties access to pre-trial procedural rights.

23 The court concluded that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full pre-trial procedural rights against the settling parties: at 302. The decision is based on the proposition that it would be "manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action": at 302 (emphasis added).

24 The difficulty with the *B.C. Ferry* approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it is likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. That is true whether a partial settlement occurs during the course of litigation or even before an action is launched. The *B.C. Ferry* approach would seem to permit an action for declaratory relief to be maintained for purely procedural purposes against anyone who settled, whether or not they were ever a named party to the litigation, and even though there were no possibility that they might be liable.

25 Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty. Nor does prejudice run in only one direction. Failure to allow settlement by parties who want an exit ramp from costly and prolonged litigation may give a party who refuses to settle an even stronger tactical advantage. An unreasonable party can hold the other parties at ransom, virtually dictating the terms of settlement.

26 It is argued that without complete pre-trial disclosure a court will be unable to properly apportion the loss. This argument cuts both ways. The plaintiff always bears the burden of proof at trial. By agreeing to remove the settling defendants from the suit and focussing only on the non-settling defendant's alleged misdeeds, a plaintiff runs the risk of no recovery at trial, for it may fail to prove any basis on which a trial court could assign liability to the non-settling party. Decisions to settle with some but not all defendants give rise to challenging issues. What use can be made by the non-settling defendant of settling defendants' discoveries? Will adverse inferences be drawn against the plaintiff if it does not call settling defendants as witnesses? A plaintiff may encounter

considerable obstacles in its attempt to recover any damages. It by no means follows that as a result of a partial settlement the non-settling defendant will shoulder a greater portion of the liability than it ought.

27 The *B.C. Ferry* approach undervalues the importance of settlement. In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice. The Supreme Court of Canada noted the strong public policy reason which encourages settlement in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (Ont. H.C.):

> [T]he Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [Emphasis deleted.]

In *Geleta v. Alberta (Minister of Transportation & Utilities)* (1996), 193 A.R. 67 (Alta. C.A.) at 69, this court recognized that "public policy is to encourage compromise, whether it is partial or full".

28 Indeed, the Court of Queen's Bench of Alberta gives a high priority towards settlement. It has devoted considerable judicial resources to a successful judicial dispute resolution initiative and case management program. Proportionate share settlement agreements are most likely to be used in complex multi-party lawsuits, which are expected to consume more than 25 days of trial time. Such cases are considered to be "very long" trials which are subject to mandatory case management under *Court of Queen's Bench of Alberta Civil Practice Note No. 7 — The Very Long Trial* (September 1, 1995). *Practice Note No. 7* focuses on full or partial settlement. One of its purposes is "to canvass settlement or other disposition of all or as many of the issues as possible" (s. 23). It provides for mandatory settlement conferences, "to settle some or all of the issues in the action" (s. 48). In decisions upholding proportionate share settlement agreements, Alberta trial courts have relied upon the public policy reason which supports settlement: *Slaferek v. TCG International Inc.* (1997), 46 Alta. L.R. (3d) 279 (Alta. Q.B.) at 286; and *Wright (Next Friend of) v. VIA Rail Canada Inc.* (2000), 76 Alta. L.R. (3d) 166 (Alta. Q.B.) at 175.

Potential Prejudice

29 Alberta courts have grappled with the *B.C. Ferry* approach, attempting to balance the certain benefit of settlement against the potential problem of prejudice. Faced with the difficulty of predicting future prejudice, they have looked to the past, assessing such things as the age and complexity of the action; the number of parties involved; how long the present structure of defendants and third parties has been in place; at what stage in the proceedings the application was made; whether discoveries have taken place, documents been produced and expert reports exchanged; whether a trial date has been set; delays and the reason for them; and whether the non-settling party has diligently exercised discovery rights. See *Slaferek*, *supra*; *Viridian Inc. v. Dresser Canada Inc.* (1999), 73 Alta. L.R. (3d) 348 (Alta. Q.B.) at 363; *Vandevelde v. Smith* (1999), 243 A.R. 161 (Alta. Q.B.); and *Wright*, *supra*.

30 Generally, the longer the action has been in existence and the greater the pre-trial disclosure received by the non-settling defendant, the less likely an Alberta judge will find potential prejudice and the more likely the settlement agreement will be given effect. See *Slaferek*, *supra*; and *Wright*, *supra*. Indeed, that approach was followed in the present case. The case management judge concluded that because Propak had the advantage of significant oral examination and discovery of documents, it was "clearly better off" than if the settling parties had

not been sued or had been formally released by the plaintiffs from the outset, and would not "in any way" be disadvantaged or prejudiced (AB I at 105).

31 This approach has a number of flaws. First, the analysis tends to be superficial and the conclusions unpersuasive. From a pre-trial disclosure point of view, most parties will be better off at a more advanced stage in the litigation process. But a non-settling party, although better off, could still be disadvantaged if a court were to truncate its pre-trial procedural rights by giving effect to a proportionate share settlement agreement. No matter how dilatory the defendant has been, no matter how interminable its efforts to mine for information, the potential always exists for the next discovery question it asks to be the one that blows the litigation apart. It is difficult for any judge to definitively conclude that there is no potential for prejudice.

32 A second flaw is that this approach always favours settlement at advanced stages rather than earlier stages of litigation. But public policy dictates otherwise. Early settlement means reduced legal costs and less strain on the court system. In modern, complex litigation, it is the pre-trial skirmishes that consume most of the court's calendar. The surge in the number of cases under case management, and the need for intricate practice notes regulating long trials, such as *Practice Note No. 7,* confirm this.

33 A third flaw is that it gives little guidance to judges, and creates uncertainty for litigants. Because courts are looking at potential rather than actual prejudice, they sometimes have a difficult time evaluating the competing positions. In *Viridian, supra* at 363, for example, the judge noted that he did not "have a clear appreciation of the comparative procedural consequences" and was uncertain whether the negative effects would be of substantial significance. He concluded that "the appropriate response to my uncertainty [...] is to maintain the existing structure of this action".

34 A test which institutionalizes this degree of uncertainty is no test at all. By properly drafting a proportionate share settlement agreement, settling parties can ensure that a non-settling defendant is responsible only for its proportionate share of the loss. But a non-settling defendant can always assert some form of potential prejudice, which settling parties cannot avoid by contractual means. Litigants will no doubt be reluctant to spend time evaluating their legal position and displaying their hand in settlement negotiations if there is little ability to predict whether a proportionate share settlement agreement will be given effect by the court.

35 The fundamental problem with the current approach is that it requires judges to balance two competing interests, but gives judges few tools with which to do so. The *Alberta Rules of Court* contain no express rule permitting third party discovery and at least to this point, no one has come up with a creative way of achieving equivalent disclosure by practice note, statute or private agreement.

36 Judges in other jurisdictions do not face the same difficulty. For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) the court evaluated the non-settling defendant's procedural objections in light of the public policy which encourages settlement, concluding that the procedural complaints could be addressed without "a wholesale rejection of the proposed settlement agreement": at 147. The court made specific orders requiring pre-trial disclosure by the settling parties, as permitted by the Ontario class action statute being considered in that case. See also *The Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 31.10 and British Columbia *Supreme Court Civil Rules,* B.C. Reg. 221/90, R. 28(1), which permit parties to apply to examine on discovery third parties, who may have information relevant to a material issue in an action.

37 Alberta judges do not enjoy this type of flexibility. Because they can do little to remedy potential preju-

dice, the so-called balance they are supposed to achieve is no balance at all: to uphold a settlement agreement, a judge must conclude that there is little or no potential for prejudice. But in reality, curtailing pre-trial disclosure rights will almost always result in possible procedural disadvantage to the non-settling defendant. In most cases the disadvantage does not stem from the fact of settlement, but from the pre-trial disclosure regime which exists in this province. It is therefore more productive to focus on the cause, rather than the potential for prejudice.

38 Alberta's current pre-trial disclosure regime severely restricts third party discovery rights. This limitation, which affects all litigants equally, should not be equated to prejudice. Nor should it be used to justify jettisoning proportionate share settlement agreements in this province. A better solution is to introduce some form of third party discovery in Alberta, to address the type of procedural complaints levied in this case. The fact that non-settling defendants are confined to a statutory disclosure regime constrained by the *Alberta Rules of Court* is not a proper basis for refusing to give effect to proportionate share settlement agreements.

39 It is one thing when the *Alberta Rules of Court* limit rights of pre-trial disclosure. It is another matter entirely when settling parties deliberately thwart a non-settling party's ability to get at the truth. Courts need not countenance agreements containing express provisions that narrow the procedural rights a non-settling defendant would otherwise have or create other obstacles, for example, prohibiting a settling party from cooperating with a non-settling party, participating in interviews, or voluntarily making documents available.

40 A proportionate share settlement agreement should be disclosed to the non-settling party: *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright*, [1997] 10 W.W.R. 622 (Man. Q.B.), aff'd (1998) 131 Man. R. (2d) 133 (Man. C.A.). To ensure that the trial judge is aware of the circumstances under which the non-settling defendant has operated, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

Summary

41 In summary, in evaluating proportionate share settlement agreements:

1. A court must keep in mind the strong public policy reason which encourages settlement;

2. The fact that a non-settling defendant has restricted rights of third party disclosure under the *Alberta Rules of Court* does not justify refusing to give effect to a proportionate share settlement agreement;

3. A court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling defendant would otherwise have; and

4. A proportionate share settlement agreement should be disclosed to the non-settling party. To further reduce potential prejudice, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

APPLICATION

42 The case management judge decided that Propak's liability was strictly limited to its own several liability to the plaintiffs and that it faced "no exposure for anything beyond that" as all claims, including claims for contribution and indemnity, had been settled (AB I at 100). That finding was not attacked by Propak on appeal. However, during oral argument the panel asked whether Propak asserted that its third party notices established

independent duties which continue to give rise to a claim for indemnification.

43 Some confusion exists about claims for contribution and claims for indemnity. Although it is common practice for multiple defendants to issue cross-claims against one another seeking "contribution and indemnity" in respect of the plaintiff's loss, a claim for contribution is usually based on s. 2 of the *Contributory Negligence Act* and s. 3 of the *Tort-feasors Act*, R.S.A. 1980, c. T-6. The combined effect of these statutory provisions is the creation of joint and several liability, whereby a plaintiff may claim the whole of its loss from any one defendant, and that defendant may in turn claim contribution from the other defendants in proportion to their respective degree of fault. In contrast to the statutory basis for a claim for contribution, a claim for indemnity is grounded in either contract or tort, arising from an independent duty of care that one defendant or third party owed to another.

44 Proportionate share settlement agreements are relatively straightforward when all defendants are potentially liable to the plaintiff. A settlement is proper so long as the non-settling defendant's liability is strictly limited to the loss it actually caused. The situation is more complicated when the non-settling defendant has issued a third party notice claiming an independent duty that is owed to it, but not to the plaintiff. A settlement cannot extinguish the non-settling defendant's entitlement to indemnification from the third party unless it also extinguishes the non-settling defendant's liability to the plaintiff in respect of claims for which it could seek indemnification from the third party.

45 Propak was invited to present additional written submissions on these points, but did not avail itself of this opportunity. Having reviewed the settlement agreement, amended statement of claim and pleadings, we see no reason to question the case management judge's determination that Propak faces no exposure beyond its several liability for which it has no remaining right to indemnification.

46 The case management judge distinguished *B.C. Ferry*, *supra*, in which an action for declaratory relief was permitted to remain for purely procedural purposes, on the basis that no claim for declaratory relief had been advanced in this case. While *B.C. Ferry* should not be applied, the case need not have been distinguished on this basis. In Alberta, claims for declaratory relief are rarely maintained for purely procedural purposes; instead a legal right or interest must be at stake: *Brown v. Alberta* (1998), 64 Alta. L.R. (3d) 62 (Alta. Q.B.) at 74. Whether or not the non-settling party has asked for a declaration setting out its proportionate share of fault, a court is compelled to determine the degree of fault of all contributors to a plaintiff's damages, pursuant to s. 2(1) of the *Contributory Negligence Act*. The presence, or absence, of a request for declaratory relief adds little to the analytical framework and is not a factor which weighs in the balance.

47 The case management judge commented that "it would be a rare case [...] in which optimizing a non-settling party's access to discovery and/or production of documents would outweigh the benefits of a multi-party settlement and a shortened trial" (AB I at 105). He therefore properly considered the strong public policy reason which favours settlement. The judge noted that under the *Rules* only parties who are adverse in interest have discovery rights and that no such rights would exist with respect to the settling parties, who would be "mere witnesses". He commented that Propak "would have full recourse to all rights of subpoena and production which would apply to any party seeking to call evidence in a civil trial in Alberta" (AB I at 105). He therefore recognized that potential prejudice which arises as a result of the third party disclosure regime in the *Alberta Rules of Court* is not a proper basis for refusing to give effect to a proportionate share settlement agreement.

48 The case management judge did not mention disclosure provisions contained in the agreement, although

he undoubtedly considered them. In fact, they do not limit Propak's procedural rights. Section 10 requires the settling defendants to cooperate with the plaintiffs, by making witnesses, documents and expert reports available to them, but does not restrict the settling defendants from cooperating with Propak. As Propak has a continuing right to examine the plaintiffs, it will also be entitled to any documents received by the plaintiffs from the settling defendants. Section 11 provides for disclosure of the settlement agreement to both Propak and the Court of Queen's Bench.

49 Propak has failed to show that the case management judge erred.

OTHER ISSUES

50 Propak has advanced several other issues in this appeal, which will be dealt with summarily.

51 Although R. 77 requires that a notice to a co-defendant be filed and served within ten days after filing a defence, Propak filed notices to co-defendants more than five years after its statement of defence. Propak sought leave for late filing in the application heard by the case management judge on September 3, 1999. The judge declined to grant leave. Noting that the delay was inordinate, he found the real issue to be whether Propak had advanced a reasonable excuse for the delay. On the evidence before him, he was unable to make such a finding (AB I at 111). Propak appeals this decision.

52 In light of the decision giving effect to the proportionate share settlement agreement, this issue is academic. In any event, a review of the evidence filed in support of Propak's leave application indicates no error in the case management judge's conclusion.

53 Second, Propak asks that this court "deem [it] released along with [the] other joint tortfeasors" on the basis of its interpretation of the *Tort-feasors Act*, R.S.A. 1980, c. T-6 (Propak's Factum at 26). Whether the settling defendants and Propak are joint tort-feasors is a question of mixed fact and law, requiring an evidentiary basis and fact finding. Whether a proper interpretation of the *Tort-feasors Act* supports Propak's release from this action is a question of law. Neither issue was put before the case management judge and no evidence was adduced. It is inappropriate for this court to consider such questions for the first time on appeal.

54 Finally, Propak asks this court to provide guidance on the procedural and substantive limits they have "as to what response they may make to the restructured lawsuit" (Propak's Factum at 26). As a court of appeal sitting in review, it is not our job to provide this type of guidance. Propak should address its request to the case management judge.

55 The appeal is dismissed.

Appeal dismissed.

END OF DOCUMENT

TAB 18

C

2010 CarswellOnt 4813, 2010 ONSC 2720

Noonan v. Alpha-Vico

Sandra Noonan et. al. v. Alpha-Vico et. al.

Ontario Superior Court of Justice

Master Calum MacLeod

Heard: January 28 - March 30, 2010
Judgment: June 28, 2010
Docket: 08-CV-43478

Counsel: C. Jill Alexander, for "Sico Defendants"

Dawn M. Searle, for "Alpha-Vico Defendants"

Thomas P. Connolly, for Plaintiffs

Thomas P. Connolly (Agent), for Mr. O'Brien

Allan R. O'Brien (written), for Upper Canada District School Board

Subject: Civil Practice and Procedure; Torts; Family

Civil practice and procedure --- Discovery — Examination for discovery — Who may be examined — Non-party — Miscellaneous

Boy was killed when folding cafeteria table fell on him while he was moving it at his school — Plaintiffs brought action for damages against school board and two of its employees ("school board action"), and later brought separate action for damages against designer, manufacturer and distributors of table ("products liability action") — No third party claim or other claim was launched by school board against product liability defendants — In products liability action, plaintiff claimed damages in manner designed to prevent product liability defendants claiming contribution or indemnity from school board under Negligence Act — Plaintiffs reached settlement in school board action, and discontinued that action — There was no discovery as yet in products liability action — Products liability defendants brought motion for production and discovery against settling defendants — Motion dismissed — Case law dealing with proportional share agreements such as Pierrenger and Mary Carter agreements was of assistance — Request was premature — Before seeking remedies against non parties,

litigant must generally discover opposing parties and seek access to information in that manner — School board had agreed to make documents available to plaintiffs, so presumably they would form part of plaintiff's productions — Preconditions for discovery of non party were not yet met — Even had products liability defendants appeared before judge approving settlement, it was highly unlikely court would have made it term of approval that settling defendants automatically produce documents or submit to discoveries — As ordinary rules addressed availability of relief, no reason to grant it prematurely.

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Miscellaneous

Boy was killed when folding cafeteria table fell on him while he was moving it at his school — Plaintiffs brought action for damages against school board and two of its employees ("school board action"), and later brought separate action for damages against designer, manufacturer and distributors of table ("products liability action") — No third party claim or other claim was launched by school board against defendants in products liability action — In products liability action, plaintiff claimed damages in manner designed to prevent product liability defendants claiming contribution or indemnity from school board under Negligence Act — Plaintiffs reached settlement in school board action, and discontinued that action — Products liability defendants brought motion for full disclosure of settlement agreement including amounts received by plaintiffs and all other terms of settlement — Motion granted — Case law dealing with proportional share agreements such as Pierrenger and Mary Carter agreements was of assistance — Amounts received in partial settlement were relevant to issues in dispute — Amounts received in mitigation were discoverable and ought to be disclosed as soon as they could be ascertained — Other aspects of partial settlements may also be relevant — There was no question that parties to school board settlement intended their agreement to be confidential — Settlement privilege did not extend to executed settlement agreement — Minutes of settlement and approval order were relevant and were not privileged in this action, and so had to be disclosed to defendants.

Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous

Boy was killed when folding cafeteria table fell on him while he was moving it at his school — Plaintiffs brought action for damages against school board and two of its employees ("school board action"), and later brought separate action for damages against designer, manufacturer and distributors of table ("products liability action") — No third party claim or other claim was launched by school board against defendants in products liability action — In products liability action, plaintiff claimed damages in manner designed to prevent product liability defendants claiming contribution or indemnity from school board under Negligence Act — Plaintiffs reached settlement in school board action, and discontinued that action — Products liability defendants brought motion for full disclosure of settlement agreement including amounts received by plaintiffs and all other terms of settlement — Motion granted — Case law dealing with proportional share agreements such as Pierrenger and Mary Carter agreements was of assistance — Amounts received in partial settlement were relevant to issues in dispute — Amounts received in mitigation were discoverable and ought to be disclosed as soon as they could be ascertained — Other aspects of partial settlements may also be relevant — There was no question that parties to school board settlement intended their agreement to be confidential — Settlement privilege did not extend to executed settlement agreement — Minutes of settlement and approval order were relevant and were not privileged in this action, and so had to be disclosed to defendants.

Cases considered by *Master Calum MacLeod*:

Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2001), [2001] 6 W.W.R. 628, 2001 CarswellAlta 575, 2001 ABCA 110, 281 A.R. 185, 248 W.A.C. 185, 4 C.P.C. (5th) 20, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13 (Alta. C.A.) — considered

Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2002), 2002 CarswellAlta 522, 2002 CarswellAlta 523, 292 N.R. 396 (note), 312 A.R. 398 (note), 281 W.A.C. 398 (note) (S.C.C.) — referred to

Booth v. Mary Carter Paint Co. (1967), 202 So. 2d 8 (U.S. Fla. Ct. App. 2 Dist.) — referred to

British Columbia Ferry Corp. v. T & N plc (1995), 16 B.C.L.R. (3d) 115, 65 B.C.A.C. 118, 106 W.A.C. 118, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287, 1995 CarswellBC 1060 (B.C. C.A.) — referred to

Gariepy v. Shell Oil Co. (2002), 2002 CarswellOnt 3472, 21 C.L.R. (3d) 98, 26 C.P.C. (5th) 358 (Ont. S.C.J.) — considered

Laudon v. Roberts (2009), 2009 CarswellOnt 2377, 77 M.V.R. (5th) 165, 2009 ONCA 383, 308 D.L.R. (4th) 422, 66 C.C.L.T. (3d) 207, 249 O.A.C. 72 (Ont. C.A.) — considered

Laudon v. Roberts (2009), 402 N.R. 398 (note), 2009 CarswellOnt 6911, 2009 CarswellOnt 6912 (S.C.C.) — referred to

Martin v. Listowel Memorial Hospital (2000), 2000 CarswellOnt 3839, 138 O.A.C. 77, 192 D.L.R. (4th) 250, 48 C.P.C. (4th) 195, 51 O.R. (3d) 384 (Ont. C.A.) — referred to

Ontario (Attorney General) v. Ballard Estate (1995), 129 D.L.R. (4th) 52, 44 C.P.C. (3d) 91, (sub nom. *Ontario (Attorney General) v. Stavro)* 86 O.A.C. 43, (sub nom. *Ontario (Attorney General) v. Stavro)* 26 O.R. (3d) 39, 1995 CarswellOnt 1332 (Ont. C.A.) — referred to

Ontario (Liquor Control Board) v. Magnotta Winery Corp. (2009), 97 O.R. (3d) 665, 2009 CarswellOnt 8846, 2 Admin. L.R. (5th) 273 (Ont. Div. Ct.) — referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — referred to

Pastway v. Pastway (2000), 2 C.P.C. (5th) 18, 2000 CarswellOnt 2849 (Ont. S.C.J.) — referred to

Pettey v. Avis Car Inc. (1993), 1993 CarswellOnt 425, 13 O.R. (3d) 725, 103 D.L.R. (4th) 298, 18 C.P.C. (3d) 50 (Ont. Gen. Div.) — considered

***Pierringer** v. Hoger* (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — referred to

Taylor v. Canada (Attorney General) (2009), 2009 CarswellOnt 3443, 2009 ONCA 487, 95 O.R. (3d) 561, (sub nom. *Taylor v. Canada (Minister of Health))* 309 D.L.R. (4th) 400 (Ont. C.A.) — referred to

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3

s. 61 — referred to

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 1.04(1.1) [en. O. Reg. 438/08] — referred to

R. 29.1.03(3)(e) [en. O. Reg. 438/08] — referred to

R. 29.2.03(1)(b) [en. O. Reg. 438/08] — referred to

R. 30.04(6) — referred to

R. 30.09 — referred to

R. 30.10 — referred to

R. 31.10 — referred to

R. 39.03 — referred to

MOTION by defendant moving parties for order for production and discovery against defendants who had settled claims, and for full disclosure of settlement agreement.

***Master Calum MacLeod*:**

1 This motion deals with an important practice point. The plaintiffs sued nine alleged tortfeasors as a consequence of a fatal accident in a school. They have settled their claims against three of the defendants and discontinued the action against them. What obligation the settling parties have towards the non settling defendants is the question giving rise to the motion.

2 The defendant moving parties ask for an order for production and discovery against the settling defendants. They also seek full disclosure of the settlement agreement including the amounts received by the plaintiffs and all other terms of settlement. The procedural matrix against which this motion takes place is a bit unusual because, unlike many of the reported decisions, the non-settling defendants in the case at bar were sued in a separate action from the settling defendants. A subsidiary question then is whether this makes any difference or whether the principles that apply to proportionate liability settlement agreements such as **Pierringer** and Mary Carter agreements apply? In short, do such agreements have to be disclosed, at what time, and should suing in separate actions make any difference?

3 These reasons discuss the general principles that apply to disclosure of such agreements, to discovery of the settling defendants, and the application of those principles to the case at bar. I have concluded that the terms of settlement must be disclosed but the request for discovery of non-party former defendants is premature. I am prepared to make a preservation order as a term of the dismissal of that part of the motion. My reasons are as

follows.

Background and structure of the two actions

4 This action results from the tragic death of an eight year old school boy. In December of 2006, J.N. was killed when a folding cafeteria table fell on him while he was moving it across the gymnasium at his school. This action is brought by his family against the designer, manufacturer and distributors of the table. It was commenced in December of 2008 but is only at a preliminary stage. There has as yet been no discovery and no mediation. For simplicity, I will refer to the current action as the "products liability action".

5 The family had commenced an earlier action against the Upper Canada District School Board and two of its employees. That action was commenced on November 29th, 2007. (Court file no. 07-CV-40073) I will refer to this as "the school board action".

6 In each action, the plaintiffs seek damages for the fatal accident. The only difference in the prayer for relief is that the products liability action claims damages that appear to be substantially higher than the damages claimed in the school board action and in the products liability action, there is a claim for "mental anguish" which is absent from the earlier action. Otherwise both actions seek damages under s. 61 of the *Family Law Act* for loss of guidance, care and companionship and special damages for income loss or other pecuniary losses. The plaintiffs have served a jury notice in the products liability action but did not do so in the school board action.

7 In fact the school board action did not progress beyond the pleading stage. The school board delivered a notice of intent to defend but no defence. Importantly for the purposes of this motion, there was no third party claim or other claim launched by the school board against the defendants in the products liability action. Those defendants of course are the manufacturer, distributor and vendor of the tables acquired by the school board for use in its school. The board did not advance a claim for contribution or indemnity from these defendants. Counsel for the school board has confirmed that the school board consciously elected not to make such a claim and he also confirms that due to the passing of the limitation period, it is not open to the board to do so now.

8 In the products liability action, the plaintiff has claimed damages in a manner designed to prevent the product liability defendants claiming contribution or indemnity from the school board under the *Negligence Act*. The plaintiffs' demands include *"damages, costs and interest attributable only to each Defendant's several share of liability to the Plaintiffs and joint liability to one another, if any, such that the Plaintiff's recovery shall be limited to recovering the damages, costs and interest attributable to each Defendant's several share of liability, or joint share of liability among them, proven against them at trial"*[FN1] For "*greater certainty*" according to the statement of claim, the plaintiffs "*limit their claim against the Defendants so as to exclude any additional claims for contribution and indemnity against any other unnamed party*".

9 By thus limiting the claim in the products liability action, the plaintiffs exclude any claim against the defendants for the share of liability which is the responsibility of the defendants in the school board action. As recently affirmed by the Court of Appeal, the effect of such a pleading is also to prevent the defendants in the products liability action from claiming contribution or indemnity against the defendants in the school board action.[FN2]

10 As a consequence neither the school board defendants nor the products liability defendants can cross claim or issue third party claims against each other. Despite this fact, if the products liability action continues to

trial, the proportionate fault of the board and its employees will be a central issue. This is because quite apart from substantive defences, the products liability defendants will be interested in minimizing their proportionate share of fault and proving that the causal acts or omissions giving rise to the accident were those of the board and its employees. Consequently the documents in the possession of the board and the evidence of its employees will be material and critical. Though the board will have no standing at the trial and no further exposure, it will in a very real sense be a participant.

The consolidation motion, the settlement, and the secret approval process

11 On November 12th, 2009 the defendants in the products liability action launched a motion to consolidate the school board action with the products liability action. Before that motion was heard, however, the plaintiffs discontinued the school board action. The discontinuance was filed on December 2nd, 2009 pursuant to a settlement that was apparently reached on October 5th, 2009. Though the settlement was apparently reached before the motion was launched, it required judicial approval because there are under age plaintiffs. The discontinuance was filed once that approval was obtained.

12 Because of the discontinuance, there was no longer a live school board action when the motion to consolidate came before me on January 28th, 2010. As a result the motion proceeded for the alternative relief. In particular the defendants argued for production of the settlement agreement and leave to discover the former defendants.

13 For reasons that are now apparent, there was a bit of confusion about the exact sequence of events. There was no material pinpointing the date and terms of the settlement or the terms of judicial approval. Of course the defendants were at somewhat of a disadvantage because they did not have an opportunity to participate in the hearing for judicial approval. In fact they were not even provided with proof of such approval. The plaintiffs were vague about the particulars.

14 What the court was told at the original hearing of the motion, was the settlement predated the commencement of the motion, the settlement had subsequently been approved by a judge and the record of the settlement and approval had been sealed. Counsel for the plaintiffs advised that he was not prepared to produce a copy of that order to the defendants or even to disclose the name of the judge to them. He indicated he would produce the order to the court. But he objected to anyone — even the court — inspecting the settlement agreement itself.[FN3]

15 Needless to say the defendants viewed this invisible approval process as both extraordinary and unjust. There was no notice to the defendants in the products liability action of the date and time for a hearing to approve the settlement in the school board action. Oddly, there was no record in the school board court file of judicial approval of the notice of discontinuance.

16 The mystery was dispelled for me at least when I subsequently reviewed the approval and sealing order. In a remarkable effort to keep the terms of settlement secret, the parties in the school board action did not bring a motion in that action. Instead they brought a separate free standing application for approval of the settlement in Brockville.[FN4] On December 2nd, 2009 the court in Brockville issued a consent order approving the minutes of settlement and also sealing the Brockville court file. The approval application and the order itself are therefore not matters of public record.[FN5] Because the defendants in the products liability action were not parties to the school board action and were not served with the notice of application, they could make no submissions to the judge hearing the matter about the propriety of sealing the file. Nor, obviously, could they re-

quest terms.

17 The issue before me is whether or not the settlement with the school board must now be disclosed to the defendants in the products liability action. The propriety of bringing an approval application in Brockville and the question of whether the defendants in this action should have been given an opportunity to participate in that hearing are not before me. Some of the cases I was referred to contain strong suggestions that any defendant that might be affected by approval of a partial settlement should be on notice and have a right to be heard[FN6] but none of those cases deal with defendants sued in separate actions. There may be counter arguments and it would be unfair for me to express a view on a point that could not be argued.

18 For that reason and because I expect the defendants will view the Brockville procedure as surprising and even surreptitious, I wish to be crystal clear that I am not ruling on that point. I have serious misgivings about the propriety of a secret approval process but those misgivings play no part in my decision. The point could not have been addressed in argument because the defendants did not know about it. I have no idea what was disclosed to the judge in Brockville in what was probably a "basket motion" and I do not know whether the judge in making the sealing order was aware there were other defendants or that the action being settled was an Ottawa action. In fairness to the plaintiffs, the actions taken by counsel are entirely consistent with the position taken on the motion that the plaintiffs ought not to be required to reveal the terms of the agreement. I am told by both Mr. Connolly and Mr. O'Brien that the plaintiffs and the school board had agreed the settlement should be confidential. No doubt approval in Brockville appeared to be a process that might prevent inadvertent disclosure. The important point is I am making no findings one way or the other about the transparency or propriety of the Brockville application.

The hearing of the motion & position of the parties

19 Following the original hearing of the motion when I began to review my notes preparatory to writing a decision, I sent a memo to all counsel asking they confirm certain positions and statements made in argument or in response to questions from the bench. This was because representations were made in court that did not appear to me to be in the affidavit evidence or the factums. My memo also posed certain questions that had not been addressed in court but on reflection appeared to me to have potential importance to my decision.

20 I received detailed responses and I then permitted counsel an opportunity for further oral submissions. Counsel for the plaintiffs asked to make such submissions and also tendered another affidavit. At the follow up hearing on March 30th, I declined to take the new affidavit in substitution for the original but I did allow it to be filed as a supplementary affidavit. As a consequence, I have now had the benefit of the original argument, a follow up written response to queries set out in my memo, a supplementary affidavit, reattendance of counsel, further argument and inspection of the order made in the Brockville application. Though counsel for the board did not appear except through Mr. Connolly, he did make some written submissions. The positions of all parties are now clear.

The position of the parties

21 The moving party defendants seek disclosure of the amounts paid in settlement by the board and also the terms of settlement. They wish to know whether the settlement amounts were allocated amongst different heads of damage and whether there are terms of the settlement that might affect the position or the evidence of the board or its employees. The plaintiffs also wish an order directing the board to produce documents and to submit to discovery even though it is not a party to this action and is no longer a defendant in the discontinued school

board action.

22 The plaintiffs acknowledge that the amounts received in settlement of the claims against the board must ultimately be disclosed. It is the plaintiffs' position however that this should take place only after trial when the damages have been assessed. Then and only then they say may the defendants be entitled to a deduction for amounts already paid in compensation by the school board. The plaintiffs argue that these defendants should not be allowed the benefit of knowing at this time what the settlement with the school board is when according to the plaintiffs the products liability defendants have refused to discuss settlement.

23 I am advised it is a term of the school board settlement that the terms of settlement remain confidential. In addition to objecting to disclosure of amounts paid until after the trial, the plaintiffs vigorously oppose any disclosure of the actual terms of agreement or of the negotiations leading up to settlement over which litigation privilege is claimed.

24 The board agrees with the plaintiffs. The board asserts settlement privilege and its interest in keeping the terms of settlement confidential. The board advises that the settlement was without prejudice and without admission of liability and represents a decision to make a payment for reasons that are internal to the board and have not been disclosed to the plaintiffs or of course to these defendants.

25 The board acknowledges its role as a custodian of relevant documents and the role of its employees as key witnesses. Counsel for the board is prepared to provide relevant documents to the plaintiffs upon request. He also agrees that the defendants in this action have the right to seek discovery against the non party board in certain circumstances but he argues that such an order is premature prior to discovery of the plaintiffs in the products liability action.

26 Both the board and the plaintiffs object to court inspection of the minutes of settlement for the purposes of this motion and while they both acknowledge that the court may review the order approving settlement, they object to that order being revealed to the defendants because it contains information that would reveal aspects of the settlement they wish to hold in confidence.

27 Finally, in answer to my question on the point, both the board and the plaintiffs assert that the arrangement in question is not a ***Pierringer*** agreement because it "lacks certain of the hallmarks" of such an agreement. In particular the defendants are not co-defendants with the school board in the same action. The board does confirm that it has no right to claim against the defendants in this action because the right to claim over "expired on December 6, 2008" and because the board "chose for confidential reasons not to sue". The board in other words consciously chose not to make such a claim and the plaintiffs and the board both understand that any right to do so is foreclosed by the limitation period.

Analysis

28 I begin my analysis with a discussion of proportionate share settlements such as "**Pierringer** Agreements".[FN7] Whether the current situation may technically be described by this name is hardly the point. In my view the issue is not to create artificial technical classifications drawn from American case law. Reference to **Pierringer** agreements in Canadian case law has generally been used to describe proportionate share settlement agreements in which the settling defendant is removed from the action in contrast to "Mary Carter" type agreements in which the settling defendant remains in the action and participates at the trial.[FN8] There are various kinds of agreements parties can enter into that may not mirror exactly the terms of the agreements in the original

Pierringer or *Mary Carter* cases.

29 The outcome of the settlement with the board, notwithstanding the fact the defendants were sued in two separate actions, is very similar to the result in a **Pierringer** agreement. In such agreements, the plaintiff typically settles with one of the defendants in an action and releases it while continuing to pursue the remaining defendants. The plaintiff then limits its recovery against the non settling defendants to their several liability and typically indemnifies the settling defendant against any claims over by the co-defendants. It is also typical in such agreements for the settling defendant to agree not to claim indemnity from the non settling defendants and to agree to co-operate with the plaintiff by making documents and witnesses available for trial. In the case at bar, the pleading in the second action constrains the ability of the products liability defendants to claim over from the school board defendants and the school board has limited its own ability to claim against the products liability defendants. The result is very similar.

30 Although the consolidation motion was never argued it is probable it would have been granted since the actions arise from the same incident and the same set of facts. Had consolidation not been granted because the plaintiffs had been able to show prejudice, it is at least likely the actions would have been tried together or one after the other. In reality the products liability defendants are now in almost exactly the same position they would have been in had all defendants been joined in one action and a **Pierringer** agreement made with the school board. The court must now assess the degree of fault of a defendant that is no longer in the action without the active participation of that former defendant. The remaining defendants will require evidence from the settling defendant but will have no automatic discovery rights due to the fact that discovery and production did not take place before the settlement was reached. The products liability defendants have no right to claim indemnity from the school board and no automatic right to seek costs against the board even if the board is shown to have been 100% at fault.

31 In my view the case law dealing with proportional share settlement agreements such as Pierrenger and Mary Carter agreements is of assistance. Artificial division of causes of action into separate proceedings should not affect the outcome. The plaintiffs have settled with the board and pleaded the products liability action to avoid the application of the *Negligence Act*. Had the board not precluded itself from suing the product liability defendants and had the plaintiffs not limited the scope of their claim against the products liability defendants, there would have been cross claims or third party claims between the 9 defendants.

32 The point of this discussion is simply to stress that the case law in relation to **Pierringer** type of agreements is instructive whether or not the facts of this case should be classified as such an agreement. With that in mind, I will first discuss the question of discovery of the school board defendants.

Should the products liability defendants have discovery of the school board?

33 The defendants now seek discovery and production from the school board and its employees who were defendants in the school board action. There is a limited right to discovery of non parties to litigation provided in the Rules of Civil Procedure. This right to seek discovery of a non party exists whether or not the person or entity with relevant information has ever been sued. In the circumstances of this case, given the issues in dispute, it is abundantly clear that the board is a potential target for non party discovery. Counsel for the board acknowledges this possibility. The board is therefore on notice and it has a duty to continue to preserve relevant documents and evidence. The question at hand is whether the right to discovery should be granted now and whether the board should also be ordered to prepare an affidavit of documents?

34 Ontario's discovery and production regime is broader than some jurisdictions but more limited than others. I need not summarize our rules at length since they are well known to the parties and have recently been thoroughly examined by the Discovery Task Force and also by the Honourable Coulter Osborne. The principles underlying the Ontario regime were discussed at some length by the Court of Appeal in the case of *Ontario (Attorney General) v. Ballard Estate*[FN9] and reviewed by Riley J. in *Pastway v. Pastway*[FN10] The rules impose a regime of full disclosure prior to trial. Part of the trade-off is that non-parties are "reasonably immune from the potentially intrusive costly and time-consuming process of discovery and production."

35 As a consequence of this trade off in our rules, parties have the right to production and either oral or written discovery from all other parties as of right. With respect to non-parties, discovery is available and orders for production of documents are also available with leave of the court. See rules 30.10 & 31.10.[FN11] These kinds of orders will be granted if justice requires it.

36 The caselaw has established that before seeking remedies against non parties, a litigant must generally discover the opposing parties and seek access to the information in that manner. In the case at bar, the school board has agreed to make documents available to the plaintiffs so presumably they will form part of the plaintiff's productions. It is possible those documents will include witness statements. While discovery of the board or its employees therefore remains a distinct possibility the preconditions for discovery of a non party have not yet been met. The question on a partial settlement is whether the settling defendants should be treated as non parties — which they are now by virtue of the notice of discontinuance — or be subjected to special terms as a consequence of the fact that they were parties to litigation until recently?

37 Various cases were cited to me in argument on this point. There have been regular attempts to impose conditions on settling defendants in the context of court approval of partial settlements particularly settlements in the nature of **Pierringer** agreements. This has usually arisen in Ontario in the context either of class proceedings or infant settlements which are both regimes specifically requiring court approval of any settlement.

38 In the context of class proceedings the court is frequently asked to make a "bar order" prohibiting future claims for contribution and indemnity. In the majority of cases, the imposition of a discovery obligation has been denied on the basis that the ordinary test for discovery of non parties is sufficient. It has not been thought necessary to create a special rule for settling former defendants.

39 In *Ontario New Home Warranty Program v. Chevron Chemical Co.*[FN12] (*"ONHWP"*) Winkler J. (as he then was) referred to the rights of the plaintiff to seek discovery and production under the Ontario rules as ameliorating the prejudice the non settling defendants might suffer if the settlement was approved. He did not order the settling co-defendants to submit to discovery but simply provided for these possibilities "on motion" by the non settling defendants and retained case management control over the proceeding. The record is silent as to whether or not any such order was subsequently sought or granted.

40 In *Gariepy v. Shell Oil Co.*[FN13] Nordheimer J. reviewed the decision and he emphasized the fact that Winkler J. had not imposed a positive duty on the settling defendants beyond that which might be imposed by the ordinary discovery rules. In *Gariepy* the court declined to make a discovery order "at this time" while approving a partial settlement in that class proceeding. "The non-settling defendants", wrote the judge, "retain their rights to seek discovery from DuPont if they can satisfy the court that such discovery is necessary".

41 Even in Alberta where discovery of a non party is not as readily available as in Ontario, the courts have been reluctant to impose discovery obligations on the settling parties. In *Amoco Canada Petroleum Co. v. Pro-*

pak Systems Ltd.[FN14] the Alberta Court of Appeal expressed the view that the rules in Alberta should be amended to provide a right of discovery against non parties similar to that in Ontario. The Alberta court approved the settlement even in the absence of such a rule even though the effect of doing so might deprive the defendants of discovery rights. In doing so, the Alberta court disagreed with the Court of Appeal of British Columbia which had declined to approve a similar agreement in *British Columbia Ferry Corp. v. T & N plc* [FN15] . The Alberta court felt the B.C. court had been overly concerned with prejudice to a non-settling defendant and undervalued the importance of settlement. *Amoco v. Propak* has been cited with approval by our Court of Appeal.

42 Ontario courts have generally not imposed a term requiring the settling party to produce documents or submit for discovery but have left it open for the non settling defendants to obtain that relief under the ordinary rules of civil procedure. I conclude from the above that even had the products liability defendants appeared before the judge approving the school board settlement, it is highly unlikely that the court would have made it a term of approval that the settling defendants automatically produce documents or submit to discoveries in this action. Since the ordinary rules address the availability of the relief, I see no reason to grant it prematurely.

43 The request for direct production and discovery may be renewed when discovery of the plaintiffs has been completed if proper grounds exist at that time. I certainly think it is appropriate that the board continue to preserve all evidence in its possession, power or control relating to the accident and its investigation. That information, including any witness statements is highly relevant in this action. A preservation order would be justifiable under the circumstances.

44 I turn now to the more complicated question of disclosure of the settlement.

Disclosure of the terms of settlement

45 The question of disclosure may be dealt with on the basis of first principles. Disclosure and withholding of information in civil proceedings is based on two competing principles of relevance and privilege. Under the first principle, all relevant evidence and information must be disclosed. Under the second principle, relevant information that is subject to a recognized claim of privilege may be withheld. This is subject to the important caveat that you cannot claim privilege and then use the information as evidence.[FN16] In addition, the court must now consider proportionality as an important interpretive element of the rules.[FN17]

46 Amounts received in partial settlement are relevant to the issues in dispute for several reasons. Firstly, defendants are entitled to know what losses and damages the plaintiffs are claiming and they are entitled to know what amounts have been recovered in mitigation of those losses. The relevance of all amounts received in mitigation was recently starkly illustrated by the decision of the Court of Appeal in *Laudon v. Roberts*[FN18] In *Laudon* the plaintiff had entered into a Mary Carter agreement with one of the defendants in which regardless of the outcome at trial, that defendant would pay a fixed sum.. At trial, the jury found the plaintiff's damages to be less than the settlement amount. The consequence of this according to the Court of Appeal was that the plaintiff had already more than recovered his damages so he was unable to recover any damages from the other defendants.

47 This outcome has been criticized because it seems to eliminate any advantage of entering into a Mary Carter agreement. That is a debate for another day and another forum. The point is that amounts received from any other defendant that have the effect of providing compensation will be considered in determining if the plaintiff has suffered losses that remain legally compensable. The extent to which plaintiffs have mitigated is

relevant. This principle of avoiding double recovery of course is not confined to Mary Carter agreements. What was surprising to some in the decision of the Court of Appeal in *Laudon* was that it was applied even in the face of a Mary Carter agreement.

48 The plaintiffs concede that the amounts received must be revealed eventually but they take the view this should only occur after the trial. *Laudon* is cited as authority for this proposition because the procedure adopted at trial as discussed in paragraph 11 indicates that "the amount of the settlement ... was to remain undisclosed until the jury rendered its verdict". There are sound reasons why the trier of fact should not be made privy to the amount of a partial settlement until after the assessment of damages. Similarly the trier of fact will not be told about insurance policies. This is not the same question as whether or not the amounts must be disclosed to the opposing parties? The questions of discoverability and of what documents must be produced in the disclosure phase of litigation are not the same question as admissibility at trial. In my view amounts received in mitigation are discoverable and should be disclosed as soon as they can be ascertained.

49 Calculation is a central issue at trial but knowing the amount actually in dispute is also critical to litigation planning and strategy. In general a defendant is entitled to know what the actual amounts in dispute are so that informed decisions may be made about whether to defend or offer to settle and what procedures may or may not be justified.

50 The principle of proportionality makes the actual damages as opposed to the pleaded damages additionally relevant because if the parties do not know what amounts are really at stake it is difficult to make informed decisions including proportionality as a principle. Proportionality is supposed to inform not only the decisions of the court concerning the application of the rules but also to inform the discovery planning that is now a mandatory step.[FN19] I do not suggest that the amount of damages is the only question in applying proportionality. For example, the family of the deceased child may think it is very important to hold these defendants to account in a public forum regardless of the amount of damages they can recover. Nevertheless the defendants are entitled to the information necessary to make informed cost benefit decisions about litigation and settlement strategy.

51 Other aspects of a partial settlement may also be relevant. For example it would be relevant if the former defendant has obligated itself to give access to all of its documents, to make witnesses available for interviewing or conversely if the plaintiff has restricted its ability to access such documents or information. It would be relevant if the former defendant has contractually bound itself not to co-operate with the other defendants or has agreed that it will extend such co-operation. One reason these kinds of agreements are relevant is because they may bring the documents or witnesses into the possession, power or control of the plaintiffs. This will be important for production and discovery planning. Similarly the former defendant may or may not have obliged itself to preserve documents and other evidence. All of this will be important for the non settling defendants to know so that they may bring appropriate motions or factor this into the discovery plan.

52 Finally, it is fundamental to the operation of the adversary system that all parties know who is adverse in interest. This problem is particularly acute in *Mary Carter* type agreements because the settling defendant remains in the action but its position may be significantly different than that set out in the pleadings.[FN20] It will also be relevant however when the settling defendant is no longer in the action but will nevertheless be providing key evidence at trial. It will be relevant to know whether or not the settling defendants retain a financial or other interest in the outcome of the litigation.[FN21] It will also be important to know how the settlement might influence the position taken by the plaintiffs and the plaintiffs' witnesses at trial. The terms of settlement are thus broadly relevant to the conduct of the litigation.

Does privilege protect the settlement agreement?

53 There is no question that the parties to the school board settlement intended their agreement to be confidential. Privilege protects relevant confidential information under appropriate circumstances. Generally privilege trumps relevance if the importance of protecting the confidentiality interest outweighs the importance of compelling its production in order to ascertain the truth. In many instances this analysis results in the conclusion that confidentiality must give way to the imperatives of justice. The most notable exceptions are those privileges that are themselves integral to the operation of the justice system; solicitor client privilege and litigation privilege being the most obvious.

54 More recently settlement privilege has emerged as a separate protected area so that information exchanged, proposals made and discussions taking place for the purpose of attempting settlement will be immune from production even if they are otherwise relevant.[FN22] Obviously settlement privilege will in many cases overlap with either litigation privilege or solicitor client privilege. Nor is it necessary for the purpose of this motion to explore the outer limits of the privilege, in what cases it may yield to the imperatives of justice and the extent which, like litigation privilege, it may be temporary.

55 Suffice to say that for the purpose of the products liability action, the negotiations between the school board and the plaintiffs would be protected by settlement privilege. Even if it is relevant and not otherwise privileged, I would not order production of notes of meetings, settlement proposals, settlement conference briefs or analysis or discussion leading up to the settlement itself. This is squarely covered by privilege.

56 In my view settlement privilege does not extend to the executed settlement agreement. The agreement itself is a contract entered into between the settling parties which is relevant to the remaining action with the non settling parties. Since I am speaking only hypothetically at this point, I would not rule out the possibility that in certain circumstances there may be aspects of a settlement agreement that must be disclosed and aspects of it that remain privileged. An agreement might contain terms that are irrelevant to the litigation or might disclose otherwise privileged information but it is impossible to determine whether or not there are any such provisions without inspecting the agreement itself.

57 Having reached this conclusion, despite the objections of counsel, I decided to inspect the minutes of settlement. My authority to do so is clearly set out in Rule 30.04 (6).

Actual Contents of the Agreement

58 After reading the minutes of settlement and the order of Pedlar J. approving the infant settlement, I am satisfied that few of the hypothetical issues addressed above apply. The minutes contain the amount to be paid to the plaintiffs and certain terms of release and indemnification of the defendants. The order allocates certain of the settlement funds for the benefit of the minor plaintiffs and of course also contains the confidentiality and sealing order. There is nothing in the minutes about production of documents, co-operation with the parties in the products liability action or conversely any restriction on such co-operation. The minutes recite that the agreement will be kept confidential and not disclosed except as required by law. As confirmed by counsel for the board, this contemplates court ordered disclosure in certain circumstances.

59 In my view the minutes of settlement and the approval order are relevant and are not privileged in this action. They must therefore be disclosed to counsel for the defendants. Because these documents remain subject to the sealing order in the Brockville application, the copies furnished to me for inspection will not form part of

the motion record. The copies provided to counsel for the defendants will be marked confidential by the plaintiffs and they are not to be disclosed to any non party to the litigation. The agreement and the order may be provided to the trial judge in a sealed envelope for the use of the court but unless the judge otherwise orders, the amounts paid in partial settlement will not be disclosed to the trier(s) of fact until after the court has assessed the plaintiffs' damages. This is consistent with the procedure adopted in *Pettey v. Avis Car Inc.*, *supra.*

Conclusion and order

60 In conclusion, for the reasons given above, an order will issue as follows:

a. The plaintiffs are to produce the minutes of settlement and the approval order resolving the school board action to counsel for the defendants in this action.

b. The said agreement and order remain subject to the confidentiality order of Pedlar J. made in Brockville application no. 09-12110.

c. The defendants may not disclose the minutes or the order to any other person without the consent of the plaintiffs or further order. The said documents may be provided to the trial judge in a sealed envelope for the use of the court but unless otherwise ordered by the trial judge, the amounts received in settlement of the school board action will not be disclosed to the trier(s) of fact until after the plaintiffs' damages have been assessed.

d. The motion for a production and discovery order against the Upper Canada District School Board is dismissed but without prejudice to such a motion being renewed after discovery of the plaintiffs on proper grounds.

e. As a term of this order, the Board is directed to preserve all relevant documents or other evidence in its possession, power or control which relate to the issues in this action and without limiting the generality of the foregoing is to preserve any witness statements or investigation reports.

61 The defendants have been partially successful on the motion. Although they did not succeed on the motion to compel the board to submit to discovery, they have been successful on the disclosure motion. Counsel for the plaintiff argued the motion on behalf of the board. Counsel for the Sico defendants argued the motion on behalf of both defendants. As a consequence, taking into account the nature of the relief sought and granted and on reviewing the costs outlines submitted by all parties, the moving party defendants shall have modest costs of the motion on single counsel basis and on a partial indemnity scale. Those costs are fixed at $4,500.00.

62 The action remains case managed and I may be spoken to for further direction if required.

Motion for discovery of settling defendants dismissed; motion for disclosure regarding settlement agreement granted.

FN1 Para 37, statement of claim

FN2 See *Taylor v. Canada (Attorney General)*, 2009 ONCA 487, 95 O.R. (3d) 561 (Ont. C.A.) and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

FN3 Counsel did not suggest that the sealing order constrained my jurisdiction to inspect the agreement if I felt it necessary to do so but he urged me to take notice of the fact that a judge had been satisfied that sealing was an appropriate order.

FN4 I should note that though both the school board action and the products liability action are Ottawa proceedings, the events in question happened in Prescott and Brockville is named as the place of trial.

FN5 Brockville court file no. 09-1210

FN6 See in particular *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (Ont. C.A.) @ paras. 53 & 54. and *Laudon v. Roberts*, 2009 ONCA 383 (Ont. C.A.) @ para. 39. This also appears to be the law in Alberta. See *Amoco v. Propak*, discussed later in these reasons.

FN7 Named after the Wisconsin case of ***Pierringer*** *v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963)

FN8 See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (U.S. Fla. Ct. App. 2 Dist. 1967). The principal difference in a Mary Carter agreement is that the settling defendant remains in the lawsuit but caps its contribution to the damages regardless of liability. The settling defendant generally participates in the trial and actively seeks to establish the liability of the non settling co-defendants.

FN9 (1995), 129 D.L.R. (4th) 52 (Ont. C.A.)

FN10 (2000), 2 C.P.C. (5th) 18 (Ont. S.C.J.)

FN11 Non parties may also be examined in aid of motions in appropriate circumstances. See rule 39.03.

FN12 (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

FN13 (2002), 26 C.P.C. (5th) 358 (Ont. S.C.J.)

FN14 (2001), 200 D.L.R. (4th) 667 (Alta. C.A.); leave to appeal refused, (2002) (S.C.C.)

FN15 (1995), 27 C.C.L.T. (2d) 287 (B.C. C.A.)

FN16 See rule 30.09 for example

FN17 See rule 1.04 (1.1)

FN18 (2009), 308 D.L.R. (4th) 422, 2009 ONCA 383 (Ont. C.A.); leave to appeal denied (S.C.C.)

FN19 See Rules 1.04 (1.1), Rule 29.2.03 (b) and Rule 29.1.03 (3) (e)

FN20 *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 (Ont. Gen. Div.)

FN21 See *Laudon, supra* @ para 39

FN22 See for example *Ontario (Liquor Control Board) v. Magnotta Winery Corp.* (2009), 97 O.R. (3d) 665 (Ont. Div. Ct.). Of course it is also true that settlement discussions are largely irrelevant to the merits because unless they contain actual admissions they are probative of nothing while conversely actual evidence may not be concealed simply by using it as part of a privileged discussion.

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2004 CarswellOnt 2243, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234, 187 O.A.C. 201, 71 O.R. (3d) 171

M. (J.) v. Bradley

J.M., K.P., J.P., C.S., B.H., a minor under the age of majority by his litigation guardian C.S., P.C., J.D.P., P.S., C.W., W.M., P.M., L.L., B.F., D.F., a minor under the age of majority by his litigation guardian B.F., D.M., C.P., J.S., a minor under the age of majority by his litigation guardian C.S., A.P., H.W., a minor under the age of majority by her litigation guardian L.L., S.L., a minor under the age of majority by her litigation guardian L.L. (Plaintiffs / Respondents / Appellants) and William Bradley, Earl McDonald, The Governing Council of the Salvation Army, The Grand Orange Lodge of British America, Dr. Archibald Kerr, Victor Greenwood, Lillian Greenwood, Cyril Fisher, Bill Topping, John Whitmen, Doug Dixon, William Young, William Brown, Bill Parkes, Doug Hiltz, Vera Burrows, Harold Peckford (Defendants / Appellants / Respondents)

Ontario Court of Appeal

Rosenberg, Goudge, Cronk JJ.A.

Heard: January 9, 2004
Judgment: June 3, 2004
Docket: CA C39867, C39881, C39899

Proceedings: reversing *M. (J.) v. Bradley* (2003), 2003 CarswellOnt 6052 (Ont. S.C.J.)

Counsel: Peter J. Cronyn for J.M. et al

M. Philip Tunley for Governing Council of Salvation Army, Victor Greenwood, Lillian Greenwood, Estate of Cyril Fisher, Doug Hiltz, Harold Peckford

M. Philip Tunley (Agent) for Respondent, Vera Burrows

P. David McCutcheon, Kate Broer for Grand Orange Lodge of British America

Paul A. Millican for Dr. Archibald Kerr

Subject: Torts; Civil Practice and Procedure

Negligence --- Contributory negligence — Apportionment of liability — Miscellaneous issues

Plaintiffs began action for damages for alleged historical sexual abuses and assaults between 1961 and 1990 — Plaintiffs reached partial agreements with defendants save B, M, and K — Order was granted approving agree-

ments to extent that they affected interests of minors and dismissing plaintiffs' action against settling defendants — K became only remaining non-settling defendant active in action — Prior to dismissal order, K and settling defendants reserved rights to cross-claim against each other at any time during action — K moved to set aside dismissal order and for leave to amend pleading to cross-claim against settling defendants — Special case for opinion of court held that Superior Court of Justice lacked jurisdiction to apportion fault or neglect at trial against settling defendants who would not be parties to action at trial — Plaintiffs and some settling defendants appealed — Appeal allowed — In respect to non-settling defendants, agreements were contractual opting out from joint liability provision of s. 1 of Negligence Act — As terms of agreements had been disclosed to K and court, consideration of fairness of settlement was possible — Section 1 of Act was not undermined by agreements and no question of possible unfairness or prejudice to any party would arise from implementation of part of agreement contemplating apportionment to settling defendants — Settling defendants had proper notice of allegations made against them and chose to terminate involvement in proceedings on terms contemplating that non-settling defendants continued to have right to seek apportionment at trial — Overriding public interest existed in encouragement of pre-trial settlement of civil cases.

Negligence --- Practice and procedure — Parties — General

Plaintiffs began action for damages for alleged historical sexual abuses and assaults between 1961 and 1990 — Plaintiffs reached partial agreements with defendants save B, M, and K — Order was granted approving agreements to extent that they affected interests of minors and dismissing plaintiffs' action against settling defendants — K became only remaining non-settling defendant active in action — Prior to dismissal order, K and settling defendants reserved rights to cross-claim against each other at any time during action — K moved to set aside dismissal order and for leave to amend pleading to cross-claim against settling defendants — Special case for opinion of court held that Superior Court of Justice lacked jurisdiction to apportion fault or neglect at trial against settling defendants who would not be parties to action at trial — Plaintiffs and some settling defendants appealed — Appeal allowed — In respect to non-settling defendants, agreements were contractual opting out from joint liability provision of s. 1 of Negligence Act — As terms of agreements had been disclosed to K and court, consideration of fairness of settlement was possible — Section 1 of Act was not undermined by agreements and no question of possible unfairness or prejudice to any party would arise from implementation of part of agreement contemplating apportionment to settling defendants — Settling defendants had proper notice of allegations made against them and chose to terminate involvement in proceedings on terms contemplating that non-settling defendants continued to have right to seek apportionment at trial — Overriding public interest existed in encouragement of pre-trial settlement of civil cases.

Civil practice and procedure --- Disposition without trial — Settlement — Effect — General principles

Plaintiffs began action for damages for alleged historical sexual abuses and assaults between 1961 and 1990 — Plaintiffs reached partial agreements with defendants save B, M, and K — Order was granted approving agreements to extent that they affected interests of minors and dismissing plaintiffs' action against settling defendants — K became only remaining non-settling defendant active in action — Prior to dismissal order, K and settling defendants reserved rights to cross-claim against each other at any time during action — K moved to set aside dismissal order and for leave to amend pleading to cross-claim against settling defendants — Special case for opinion of court held that Superior Court of Justice lacked jurisdiction to apportion fault or neglect at trial against settling defendants who would not be parties to action at trial — Plaintiffs and some settling defendants appealed — Appeal allowed — In respect to non-settling defendants, agreements were contractual opting out from joint liability provision of s. 1 of Negligence Act — As terms of agreements had been disclosed to K and

court, consideration of fairness of settlement was possible — Section 1 of Act was not undermined by agreements and no question of possible unfairness or prejudice to any party would arise from implementation of part of agreement contemplating apportionment to settling defendants — Settling defendants had proper notice of allegations made against them and chose to terminate involvement in proceedings on terms contemplating that non-settling defendants continued to have right to seek apportionment at trial — Overriding public interest existed in encouragement of pre-trial settlement of civil cases.

Cases considered by *Cronk J.A.*:

Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2001), [2001] 6 W.W.R. 628, 2001 ABCA 110, 2001 CarswellAlta 575, 4 C.P.C. (5th) 20, 281 A.R. 186, 248 W.A.C. 186, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13 (Alta. C.A.) — considered

British Columbia Ferry Corp. v. T & N plc (1995), 16 B.C.L.R. (3d) 115, 65 B.C.A.C. 118, 106 W.A.C. 118, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287, 1995 CarswellBC 1060 (B.C. C.A.) — considered

Cook v. Ip (1985), 52 O.R. (2d) 289, 5 C.P.C. (2d) 81, 22 D.L.R. (4th) 1, (sub nom. *Cook v. Washuta)* 11 O.A.C. 171, 1985 CarswellOnt 586 (Ont. C.A.) — considered

Cook v. Ip (1986), 55 O.R. (2d) 288 (note), (sub nom. *Ontario Health Insurance Plan v. Cook)* 68 N.R. 400 (note), (sub nom. *Cook v. Washuta)* 18 O.A.C. 80 (note) (S.C.C.) — referred to

Loewen, Ondaatje, McCutcheon & Co. c. Sparling (1992), (sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, (sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, (sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49, 143 N.R. 191, 1992 CarswellQue 126, 1992 CarswellQue 126F (S.C.C.) — referred to

Martin v. Listowel Memorial Hospital (2000), 2000 CarswellOnt 3839, 192 D.L.R. (4th) 250, 48 C.P.C. (4th) 195, 51 O.R. (3d) 384, 138 O.A.C. 77 (Ont. C.A.) — distinguished

Maxfield v. Llewellyn (1961), [1961] 1 W.L.R. 1119, [1961] 3 All E.R. 95 (Eng. C.A.) — referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 1999 CarswellOnt 1851, 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — referred to

Pierringer v. Hoger (1963), 124 N.W.2d 106 (U.S. Wis. S.C.) — considered

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225, 1988 CarswellOnt 121 (Ont. H.C.) — referred to

Wells v. McBrine (1988), 54 D.L.R. (4th) 708, [1989] 2 W.W.R. 695, 47 C.C.L.T. 94, 33 B.C.L.R. (2d) 86, 1988 CarswellBC 431 (B.C. C.A.) — considered

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), [1972] 2 O.R. 280, 25 D.L.R. (3d) 386 (Ont. C.A.) — considered

Statutes considered:

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

s. 11 — considered

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

s. 1 — considered

s. 4 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 22 — referred to

APPEAL by plaintiffs and some settling defendants from judgment reported at *M. (J.) v. Bradley* (2003), 2003 CarswellOnt 6052 (Ont. S.C.J.), holding that Superior Court of Justice lacked jursidiction to apportion fault or neglect at trial against settling defendants who would not be parties to action at time of trial.

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

1 The sole issue in these proceedings is whether the Superior Court of Justice has jurisdiction under s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1 (the "Act") to apportion fault or neglect in a multi-party tort action against persons who were originally named as party defendants but who, as a result of pre-trial settlements, will not be parties to the action at the time of trial.

2 Twenty individual plaintiffs commenced this action in January 1997, claiming damages for historical sexual abuses and assaults that they allege were perpetrated upon fourteen of them, when they were children, by the defendants William Bradley and Earl McDonald. They also allege that there may be other victims of similar tortious conduct by these defendants, apart from any of the plaintiffs. As well, they claim that the remaining defendants breached duties owed to the plaintiffs by failing to take steps that would have prevented the alleged abusive and assaultive activities of Bradley and McDonald, or by permitting such activities to occur.

3 The incidents in question are alleged to have occurred between 1960 and 1991, thus spanning a period of about thirty-one years. As a result, several of the defendants are now elderly or in poor health.

4 After the commencement of the action, the following events transpired:

(i) Bradley, McDonald, and one other defendant died;

(ii) the claims of several plaintiffs were discontinued or dismissed on consent;

(iii) some of the defendants defaulted in defending the action;

(iv) the defendant, Dr. Archibald Kerr, defended the action and cross-claimed against some of his co-defendants, seeking contribution and indemnity from them and reserving his right to cross-claim against

other co-defendants following discoveries; and

(v) third party claims were initiated by the defendant, The Governing Council of the Salvation Army, and Kerr against two individuals: the mother of some of the plaintiffs, who was married first to Bradley and subsequently to McDonald, and a second individual who the plaintiffs assert was a witness to some of the abuse involving children other than the plaintiffs.

5 By September 2002, those plaintiffs who remained involved in the litigation had each entered into partial settlement agreements (the "Agreements") with all the defendants (the "Settling Defendants") save for Bradley, McDonald and Kerr (the "Non-Settling Defendants"). Under the Agreements, the plaintiffs settled their claims against the Settling Defendants and agreed to limit their claims against the Non-Settling Defendants.

6 On September 26, 2002, Métivier, R.S.J. of the Superior Court of Justice granted an order approving the Agreements, to the extent that they affected the interests of minors, and dismissing the plaintiffs' action as against the Settling Defendants, without costs.

7 As a result of all these events, Kerr became the only remaining Non-Settling Defendant active in the action.

8 Prior to the dismissal order, Kerr and the Settling Defendants reserved their respective rights to bring cross-claims against each other at any time during the action. Although Kerr was aware that the plaintiffs were negotiating the Agreements, and was provided with copies of two of the Agreements after they were executed, he did not receive notice of the plaintiffs' dismissal motion before Métivier, R.S.J..

9 Given the terms of the Agreements and the granting of the dismissal order, Kerr was concerned that the judge who presided over the trial might lack jurisdiction to determine the degree, if any, in which the fault or neglect of the Settling Defendants caused or contributed to the plaintiffs' alleged injuries and damages. Kerr feared that, by virtue of the dismissal order, he could be deprived of his right to obtain such an apportionment of liability, if any, against the Settling Defendants.

10 Accordingly, Kerr moved to set aside the dismissal order and for leave to amend his pleading to assert cross-claims against the Settling Defendants.

11 In response to Kerr's motion, the Settling Defendants amended their statement of claim, on consent, to refer to the Agreements and some of their essential terms. They also agreed that, if requested by Kerr or the plaintiffs, they would consent to being examined for discovery.

12 To address the jurisdictional issue raised by Kerr and the ability of the court to give full effect to the terms of the Agreements at trial, the parties also agreed to adjourn parts of Kerr's motion and to submit a special case for the opinion of the court under rule 22 of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194. With the concurrence of all parties, the following question was posed for the opinion of the court:

> Does the Court have the jurisdiction to determine whether any fault or neglect of the Settling Defendants or any of them caused or contributed to the damages alleged by the plaintiffs, and the degree of any such contribution, if the Settling Defendants are not parties to the action at the time of trial, in circumstances where the Settling Defendants have entered into Partial Settlement Agreements with the plaintiffs, and consent to the Court so determining the fault or neglect of the Settling Defendants?

13 The special case was heard by Forget J. of the Superior Court of Justice on February 18, 2003. By order dated March 17, 2003, he held that the Superior Court of Justice did not have jurisdiction to apportion fault or neglect at trial against the Settling Defendants who, by then, would not be parties to the action.

14 The plaintiffs and some of the Settling Defendants now jointly appeal from that decision. Although three separate appeals were initiated, the appeals were consolidated and heard together by this court. For ease of reference, I refer throughout the balance of these reasons to the plaintiffs as the appellants.

15 For the reasons that follow, I conclude that the Superior Court of Justice has jurisdiction, in the circumstances of this case, to determine whether and to what extent any fault or neglect of the Settling Defendants caused or contributed to the damages alleged by the appellants, although the Settling Defendants will not be parties to the action at trial. Accordingly, I would allow the appeals.

II. ADDITIONAL FACTS

16 The appellants allege in their statement of claim, among other matters, that Bradley was a senior soldier, employee and agent of the Salvation Army and a member of The Grand Orange Lodge of British America at the time of his alleged tortious conduct. Similarly, they assert that McDonald was a member, employee and officer of the Orange Lodge at the time of the alleged sexual abuses and assaults. The appellants claim that, while active as supervisors or participants in a variety of Salvation Army or Orange Lodge youth activities, Bradley and McDonald sexually, emotionally and physically abused numerous children, including fourteen of the appellants, at several locations, some of which were controlled or owned by the Salvation Army or the Orange Lodge.

17 The appellants seek damages against Bradley and McDonald for assault and battery and intentional infliction of nervous shock rising from their alleged paedophiliac activities. As against the Settling Defendants and Kerr, the latter of whom was allegedly the physician to several of the appellants and Bradley, the appellants claim damages for negligence and breach of fiduciary duty. They also assert that either or both of the Salvation Army and the Orange Lodge are vicariously liable for the damages claimed in respect of the individual conduct of Bradley, McDonald and various of the Settling Defendants.

18 By September 2002, all the appellants who continued as participants in the action had entered into Agreements with the Settling Defendants. The terms of the Agreements are identical and modelled on a type of settlement agreement known as a 'Pierringer' agreement, as described in the Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963).

19 The parties indicated in the special case that the Agreements are intended, in part, "to permit the Settling Defendants to exit the action by settling their claims with the plaintiffs, and by attempting to eliminate any joint liability the Settling Defendants might be found to have with the remaining defendants".

20 The Agreements each provide:

> (i) that the settlement and payment contemplated thereunder are not to be taken as an admission of liability on the part of the Settling Defendants;
>
> (ii) that the action will be dismissed as against the Settling Defendants, on consent and without costs;
>
> (iii) that the appellants will use their best efforts to cause any cross-claims against the Settling Defendants to be similarly dismissed, without costs, "in order to fully and finally conclude all litigation arising

from the matters pleaded" in the action against the Settling Defendants;

(iv) a full and final release by the appellants in favor of the Settling Defendants;

(v) that the appellants will indemnify and hold harmless the Settling Defendants from any cross-claim or third party claim, and any other proceeding or claim arising from the issues and allegations in the action; and

(vi) for the disclosure of the Agreement, including the settlement amount provided thereunder, to the trial court, on certain conditions.

21 The indemnity provision contained in each of the Agreements states:

> The [appellants] restrict their claim to whatever the non-settling defendants may be directly liable for and as such non-settling defendants cannot be jointly liable with the settling defendants. This clause means non-settling defendants have no basis to seek contribution, indemnity, relief over by way of equitable subrogation, declaratory relief or otherwise against the [Settling Defendants].

22 In February 2003, after the dismissal of the appellants' claims against the Settling Defendants, the appellants amended their statement of claim, on consent, to reflect the compromises of their claims detailed in the Agreements. The amended version of their pleading states:

> 89. The Plaintiffs have agreed with the Settling Defendants that they shall limit their claims against the Non-settling Defendants to claims for damages, costs and interest attributable only to the Non-settling Defendants' several share of liability to the Plaintiffs and joint liability to one another, if any, such that *the Plaintiffs' recovery shall be limited to recovering the damages, costs and interest attributable to the Non-settling Defendants' several share of liability, or joint share of liability among them, proven against them at trial.*
>
> 90. For greater certainty, the Plaintiffs shall have no claim directly or indirectly against the Settling Defendants and *the Plaintiffs shall limit their claims against the Non-settling Defendants so as to exclude any cross-claim or third party claim made against or which could be made against the Settling Defendants arising from the issues in this action.*
>
> 91. The Plaintiffs admit that the Court at any trial of this matter has and shall have full authority to adjudicate upon the apportionment of liability, if any, between all Defendants named in this Statement of Claim, including the Settling Defendants, whether or not the Settling Defendants remain as parties by cross-claim or third party claim in this action.
>
> [emphasis added]

The Non-Settling Defendants are defined in the appellants' amended pleading to mean Bradley, McDonald and Kerr.

23 All parties agree that the terms of the Agreements require that Kerr should have the opportunity and right, if so advised, to obtain an adjudication at trial as to whether the neglect or fault of one or more of the Settling Defendants caused or contributed to the damages alleged by the appellants. Indeed, it is common ground that the trial judge who presides over the trial of the action will be required to determine the degree to which the

Settling Defendants are at fault or negligent in order to give effect to the Agreements.

24 The parties, including Kerr, also agree that if the appeals are allowed, the factual and legal issues in dispute will be reduced, costs savings for all parties will be realized, and no prejudice will be caused to any party.

25 Kerr, therefore, does not oppose the dismissal of the appellants' claims against the Settling Defendants so long as he is not deprived of his right to seek to limit his potential liability, if any, by having the Settling Defendants' share of liability adjudicated at trial. Kerr's proposed cross-claims against the Settling Defendants are intended to preserve his access to such an apportionment. However, if the Settling Defendants are required to remain in the action as defendants to cross-claims brought by Kerr, the substance of their settlement bargain with the appellants will be threatened and, potentially, lost entirely.

III. MOTIONS JUDGE'S DECISION

26 In his reasons dated March 17, 2003, the motions judge implicitly acknowledged that the active parties to this action either agreed to, or did not oppose, the terms of settlement contained in the Agreements. He also recognized that the parties consented to the jurisdiction of the Superior Court of Justice to apportion liability at trial as against the Settling Defendants.

27 The motions judge held that the proposed apportionment of liability to the Settling Defendants, "[did] not pose a risk of prejudice to any of the persons involved in the present proceedings . . . ".

28 However, the motions judge also reviewed the decision in *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (Ont. C.A.), in which this court stated in *obiter* that a court could only apportion degrees of fault under s. 1 of the Act to a defendant who was a party to the applicable proceedings. Primarily on the basis of that case, the motions judge concluded that the Superior Court of Justice lacked the asserted jurisdiction to apportion fault or neglect to the Settling Defendants at trial.

IV. ANALYSIS

(1) 'Pierringer' Settlement Agreements

29 In recent years, 'Pierringer' settlement agreements have been increasingly utilized in Canada in a variety of litigation settings. In *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2001), 200 D.L.R. (4th) 667 (Alta. C.A.), at 673-74, the Alberta Court of Appeal outlined the factors leading to their emergent use:

> Now past is the day when "settlement agreement" can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.
>
> The new settlement agreements, which include such exotically named species as the Mary Carter agreement and the Pierringer agreement, endeavour to attain a more limited objective: rather than trying to resolve all outstanding issues among all parties, a difficult task in complicated suits, they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome. This "risk-management" objective is accomplished by settling issues of liability between some but not all of the parties, thereby reducing the number of issues in dispute, simplifying the action, and expediting the suit. Ancillary benefits in-

clude a reduction in the financial and opportunity costs associated with complex, protracted litigation, as well as savings of court time and resources.

30 The court in *Amoco* described a 'Pierringer" settlement agreement in this way (at p. 671):

> Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a 'proportionate share settlement agreement'.

31 'Pierringer' agreements, however, are not free from settlement complications. As observed by the court in *Amoco* (at pp. 674-75):

> As a result of third party proceedings, settling defendants are almost always subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the fault of the settling defendants. Before the settling defendants can be released from the suit, some provision must be made to satisfy these claims.
>
> This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability. Alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants. . . . [I]n either case the goal of the proportionate share settlement agreement is to limit the liability of the non-settling party to its several liability.

32 The Agreements in this case, as I have said, contain both an indemnity clause in favour of the Settling Defendants and an agreement by the appellants to restrict their claims against the Non-Settling Defendants to only those defendants' *several*, rather than *joint and several*, shares of liability. In respect of the Non-Settling Defendants, therefore, the Agreements effectively represent a contractual 'opting-out' by the appellants of the joint liability provision set out in s. 1 of the Act, save for joint liability, if any, among the Non-Settling Defendants.

(2) Implementation of the Agreements in this Case

33 The parties who appeal from the motions judge's decision challenge it on three main grounds. First, they argue that there is nothing in the reasoning of this court in *Martin*, *supra*, or under the Act, that operates in the circumstances of this case to preclude the requested liability apportionment at trial against the Settling Defendants. Second, they maintain that the motions judge's decision is contrary to the decisions of other courts in Canada, which have endorsed the implementation of 'Pierringer' settlement agreements. Finally, they assert that the motions judge's decision is also contrary to the settled policy of Canadian courts to encourage settlement. I will address each of these submissions in turn.

(i) Lack of Legal Impediment to the Asserted Jurisdiction of the Superior Court

34 In Ontario, the implications of a 'Pierringer' settlement agreement for the apportionment of liability at trial must be assessed in light of s. 1 of the Act. That section reads:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

35 The terms of s. 1 of the Act are mandatory. They require the court, in a negligence action involving two or more tortfeasors, to "determine the degree in which *each of such persons* is at fault or negligent" [emphasis added]. In contrast to other sections of the Act, in which express reference is made to the "parties" to an action, s. 1 refers to the apportionment of fault or neglect among "persons" found to have caused or contributed to the damages established at a trial. Thus, Ontario courts have been required to determine whether the word "persons", as used in s. 1, includes persons who are not parties to the negligence action in which damages are proven.

36 In *Martin*, this court considered the scope of s. 1 of the Act. In that case, the infant plaintiff suffered serious brain damage at birth due to the negligence of two doctors and a nurse and the lack of adequate training of ambulance attendants by the hospital where the infant plaintiff was born. The infant plaintiff and his family members sued the doctors, the ambulance attendants and the hospital in negligence. They did not sue the nurse, who was added as a third party by the doctors. A pre-trial settlement was reached between the plaintiffs and the doctors, with the result that the doctors did not participate at trial. The terms of the settlement agreement were not disclosed to the other defendants, or to the court.

37 The trial judge in *Martin* held that the doctors, the nurse and the hospital were negligent and that the hospital was also vicariously liable for the nurse's negligence. He made no finding of negligence against the ambulance attendants. In addition, although he made express findings of negligence against the nurse, he did not determine the degree of her fault. He ultimately concluded that he was unable to determine the respective degrees of fault of those defendants whom he found to be negligent. In his view, the nurse, who was not a named defendant in the main action, was not a "party" to the litigation and the nurse and the hospital could not be held separately negligent.

38 Section 4 of the Act provides: "If it is not practicable to determine the respective degrees of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent." In reliance on s. 4 of the Act, the trial judge in *Martin* apportioned negligence in equal shares among the hospital and the two doctors, thereby essentially treating the doctors as if they were still parties to the action. He then granted judgment in favour of the plaintiffs against the hospital for one-third of the plaintiffs' total damages but, in recognition of the pre-trial settlement with the doctors, directed that no judgment should issue in favour of the hospital against the doctors.

39 On appeal to this court, it was argued that the trial judge's apportionment of liability based on s. 4 of the Act was in error. In the alternative, the plaintiffs submitted that s. 1 of the Act required the trial judge to determine the degree of fault of the nurse.

40 The plaintiffs' appeal was successful on the grounds that the trial judge erred by applying s. 4 of the Act in circumstances where the degrees of fault of the hospital and the two doctors could be determined, and by failing to correctly apportion liability between the hospital and the nurse. In the latter respect, this court held that

the degree of fault of vicariously responsible defendants should be apportioned in order to reflect the contributions of each of the persons for whom the responsible defendants are vicariously liable. Accordingly, contrary to the holding of the trial judge, the apportionment of fault to the hospital should have reflected both its direct negligence and its vicarious liability for the nurse's negligence. To arrive at that apportionment, it was necessary that the nurse's degree of fault be determined to establish the degree of fault for which the hospital was vicariously liable.

41 In commenting on the plaintiffs' alternative argument regarding s. 1 of the Act, the court considered the import of the word "persons" as used in that section (at para. 31):

> The trial judge fully considered [the nurse's] involvement in the birth of the plaintiff Steven Martin, and made several findings of negligence against her, concluding that her negligence materially contributed to the damage he suffered. However, he did not go on to determine her degree of fault because he did not consider her to be a party to the action. The plaintiffs submit that because s. 1 refers to persons and not parties, he should have done so, even if she was not a party.
>
> We would not give effect to that submission. *There is no basis in s. 1 or anywhere in the Act for a judge to attribute a portion of fault to a non-party. Furthermore, although s. 1 refers to "persons", in any particular action its effect is to impose joint and several liability to the plaintiff only on defendants found at fault or negligent, and not on any other person.*
>
> The use of the word "persons" in the section, where "parties" is used elsewhere in the Act, has led to the suggestion that the section is intended to apply to anyone at fault. However, the authorities which have considered the issue have consistently held that the section does not allow the court to apportion any degree of fault to a non-party. Furthermore, this interpretation is consistent with the proper operation of the Act [emphasis added].

42 The motions judge appears to have regarded *Martin* as dispositive of the jurisdictional question posed by the parties on the special case. I disagree. With respect, I am of the view that neither the reasoning in *Martin* nor the language of s. 1 of the Act precludes the apportionment of fault or neglect at trial to one or more of the Settling Defendants. I reach that conclusion for the following reasons.

43 First, the Superior Court of Justice enjoys a wide jurisdiction under s. 11 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 that encompasses, "all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario". This jurisdiction cannot be displaced absent clear and unequivocal statutory language: see *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 at 282 (Ont. C.A.) and *Cook v. Ip* (1985), 52 O.R. (2d) 289 (Ont. C.A.), at 296, leave to appeal to S.C.C. refused (1986), 55 O.R. (2d) 288 (note) (S.C.C.).

44 There is no express indication in s. 1 of the Act of a legislative intention to limit the jurisdiction of the Superior Court of Justice in the apportionment of liability in negligence cases. To the contrary, s. 1 of the Act is a substantive law provision that confirms the jurisdiction of the Superior Court to apportion liability among concurrent tortfeasors: see *Martin* at para. 48.

45 Second, the facts in *Martin* are markedly different from the facts in this case. In *Martin*, the nurse was never sued by the plaintiffs and, thus, had never been a party to the main action. Accordingly, she had no opportunity to respond directly to the plaintiffs' allegations of negligence against her, or to their claims for relief. As

between the plaintiffs and the nurse, the nurse was a stranger to the action.

46 In contrast, in this case, the Settling Defendants were sued by the appellants and defended the action. They are aware of the allegations made by the appellants and had an opportunity to resist any potential findings of fault or negligence against them. Similarly, from the outset of the litigation, the appellants were aware of the involvement of the Settling Defendants and, knowing this, chose to voluntarily compromise their claims against them under the Agreements. In those important respects, the Settling Defendants are in a position analogous to that of the doctors, rather than to that of the nurse, in *Martin*.

47 It is significant that findings of negligence and an apportionment of fault were made against the doctors in *Martin*, although they took no part in the trial. It is unclear from the reported decision in *Martin* whether the doctors consented to such an apportionment, notwithstanding the settlement entered into by them with the plaintiffs. The trial judge indicated in *Martin* that, had the nurse been a named defendant, he would have assigned equal fault to each of the two doctors, the nurse and the hospital. That apportionment of degrees of fault was ultimately accepted by this court, without any suggestion that the trial judge erred by apportioning liability to the doctors.

48 Third, *Martin* is also distinguishable from this case on another fundamental factual basis. In *Martin*, the settlement agreements entered into by the defendant doctors were secret, and were not disclosed to the other defendants or to the courts. In contrast, the parties to the Agreements here have agreed to the disclosure of the Agreements to the trial court and copies of two of the Agreements have been provided to Kerr, the single remaining active defendant. Thus, consideration of the fairness of the settlement with the Settling Defendants, insofar as it relates to minors, was possible by the court prior to the approval of the settlement by Métivier R.S.J. and it is open to the judge at trial to assess the impact of the settlement on the Non-Settling Defendants and Settling Defendants alike.

49 Fourth, the court emphasized in *Martin* at para. 34 that the purpose of the joint and several liability provision contained in s. 1 of the Act is, "to facilitate full recovery of the loss for the plaintiff, while at the same time providing a mechanism for each of those who contributed to the loss to share the financial responsibility in the proportions of their respective degrees of fault". In the same paragraph of its reasons, the court also said that, to accomplish this primary objective: "The effect of s. 1 of the *Negligence Act* is to make *all persons sued* who caused or contributed to the damage suffered by the plaintiff jointly and severally liable to the plaintiff for the damage [emphasis added]." See also the court's comments in *Martin* at para. 41 concerning *Maxfield v. Llewellyn*, [1961] 3 All E.R. 95 (Eng. C.A.).

50 Thus, the reasoning in *Martin* concerning the apportionment of liability against the nurse and the doctors was premised on the view that the word "persons" in s. 1 of the Act is intended to refer to persons *sued* in the litigation. For that reason, the determination of the degree of fault or neglect of the doctors, who had been sued by the plaintiffs, was permissible, whereas such a determination regarding the nurse, who had not been sued by the plaintiffs, was not.

51 It is noteworthy, in this regard, that the court in *Martin* expressly agreed at para. 47 with the recommendation of the Ontario Law Reform Commission in its 1988 *Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ministry of the Attorney General, 1988) at 187, that no degree of fault should be apportioned under s. 1 of the Act to an "absent concurrent wrongdoer". As well, the court in *Martin* stated at para. 48 with reference to s. 1 of the Act:

> It is the only section of the Act which imposes liability, as opposed to apportioning fault. The section is substantive, not procedural. Therefore, when applying the section to any specific action, it is understood that joint and several liability to the plaintiff can and will attach only to a party defendant, *although others who may also have been at fault could potentially have been found jointly and severally liable had they been sued by the plaintiff.* Because procedurally the section only affects defendants, under this section the court is to apportion degrees of fault only to defendants [emphasis added].

52 There is no "absent" tortfeasor in this case. Rather, the Settling Defendants are 'sued persons' in the appellants' action. Accordingly, although the Settling Defendants will not be participants at trial, a trial apportionment of liability against them is consistent with the reasoning in *Martin*.

53 Fifth, the decision in *Martin* is distinguishable on another, critical ground. The interpretive result in *Martin* was driven by important policy considerations that do not apply here. The court was concerned in *Martin* that a finding of a degree of fault in respect of a non-party could have significant consequences for other defendants under s. 1 of the Act. The court stated (at para. 36):

> If the fault is apportioned only among the parties, then if there is a non-party who may also have been at fault and contributed to the damage, a larger percentage of the whole loss may be attributed to each party, so that the entire loss is divided for indemnity purposes, and no gap is left. *But if a portion of the fault were attributed to a non-party, or to a party at fault but with a legal defence such as a limitation defence, the defendants who are liable to the plaintiff would be left with no one from whom they could recover that portion of the claim* [emphasis added].

54 This concern is met by the type of 'Pierringer' settlement agreement employed by the appellants and Settling Defendants. By the terms of the Agreements and their amended pleading, the appellants have acknowledged and agreed that they will hold the Non-Settling Defendants accountable for their *several* liability only. As well, the Settling Defendants have agreed that the trial judge may apportion fault or negligence against them, although they will not take part in the trial.

55 By reason of these concessions, no risk of a 'gap' in liability arises, in the sense described in *Martin*, from the potential apportionment of liability at trial to the Settling Defendants. As I have said, there is no absent or unknown tortfeasor in the case at bar, and the appellants have contractually limited their claims as against *both* the Settling Defendants and the Non-Settling Defendants. As a result, if the Agreements are given effect at trial, any Non-Settling Defendant against whom fault or neglect is found will not be exposed to the risk of an apportionment to them of a larger percentage of the appellants' total loss, based on joint liability with the Settling Defendants, than would otherwise occur, based on their own direct fault.

56 Finally, Kerr advances an additional compelling reason to support a liability apportionment at trial against the Settling Defendants. He asserts that there is a real risk that none of the Non-Settling Defendants, except himself, will have the financial means to satisfy any judgment granted against them. He therefore submits that he may be exposed under the operation of s. 1 of the Act to the risk of paying damages in excess of any several shares of damages that might be apportioned against him, because he will be jointly liable under s. 1 for the several liability of any impecunious Non-Settling Defen-dant. As a result, Kerr wishes to be free to take the position at trial that his exposure to any shortfall in the appellants' recovery of damages occasioned by the insolvency of another Non-Settling Defendant should be reduced by a proportion related to the fault of the Settling Defendants.

57 Assuming, without deciding, that this argument is available under Ontario law, Kerr will be unable to advance this submission at trial if the trial judge lacks the authority to determine the degree in which the Settling Defendants are at fault or negligent, if at all.

58 On the basis of all these factors, it is my view that the purpose of s. 1 of the Act is not undermined by the Agreements and no question of potential unfairness or prejudice to any of the parties will arise from the implementation of the part of the settlements that contemplates the apportionment of fault or neglect at trial to the Settling Defendants.

59 In my view, the reasoning in *Martin* does not mean that persons who have been sued by a plaintiff and who, therefore, are not strangers to the action, invariably cannot be subject to an apportionment of liability at trial under s. 1 of the Act if they become non-parties to the plaintiff's action by reason of a pre-trial settlement. To the contrary, in my opinion, when a named party defendant invokes the jurisdiction of the court by defending claims of negligence brought against it, and thereafter relinquishes its right to pursue its defence of those claims by voluntarily entering into a pre-trial settlement, that party is a "person" against whom an apportionment of liability may properly be made where, as here, no question of unfairness or prejudice will arise. Such an apportionment, in my opinion, comports with the interpretation of the substance of s. 1 of the Act that was articulated by this court in *Martin*. In this case, the absence of unfairness or prejudice is indicated by the fact that the parties active in the litigation consent to, or do not oppose, an apportionment at trial of fault or neglect, if any, to the Settling Defendants.

(ii) Experience in Other Provinces with 'Pierringer' Agreements

60 The parties also argue that the motions judge's decision is contrary to the developed experience in other provinces concerning the implementation of 'Pierringer' settlement agreements. They point out that the implementation of settlement agreements of the 'Pierringer' type has been approved by the appellate courts of Alberta and British Columbia, even in the absence of the consent, or the non-opposition, of all parties: see *Amoco, supra* , and *British Columbia Ferry Corp. v. T & N plc* (1995), 27 C.C.L.T. (2d) 287 (B.C. C.A.). See also, concerning the assessment of fault against non-parties, *Wells v. McBrine* (1988), 33 B.C.L.R. (2d) 86 (B.C. C.A.) and the discussion regarding that case by this court in *Martin* at para. 43.

61 The motions judge correctly concluded that such decisions should be approached with caution by Ontario courts because the statutory regimes governing the appor-tionment of negligence vary from province to province. Simply stated, the impact in another province of a 'Pierringer' settlement agreement on the rights of non-settling parties to a lawsuit may have no relevance in Ontario because the applicable statutory regime and the procedural rules of court that govern the forum in which the lawsuit was commenced may be fundamentally different from those that apply in Ontario.

62 In my view, however, the *Amoco* decision and similar cases are instructive in this respect: they essentially emphasize that the interests of the administration of justice are not facilitated by requiring the involvement at trial of a litigant for purely procedural purposes where this can be avoided without unfairness or prejudice to the parties. I endorse this proposition.

63 As observed by this court in *Martin* at para. 27:

> With litigation becoming more and more expensive and numerous initiatives being taken to reduce the cost of litigation, it would be counterproductive to interpret the *Negligence Act* as requiring the addition of unne-

cessary parties, purely for form, in order to obtain a fair and proper apportionment of fault.

This statement in *Martin* was concerned with the suggestion by the trial judge in that case, a suggestion rejected by this court, that persons for whom a defendant may be found to be vicariously liable must be added as third parties in order to support a finding of vicarious liability against the named defendant. Nonetheless, it underscores the desirability of avoiding the joinder or involvement in litigation, for purely procedural or technical purposes, of persons who are not otherwise necessary parties.

64 The conclusion that I have reached regarding the proper interpretation of s. 1 of the Act and the decision in *Martin* avoids this result. I again underscore, as argued by some of the Settling Defendants in these proceedings, that the "persons" against whom a finding of contributory fault or neglect is sought in this case (the Settling Defendants), are persons who had proper notice of the appellants' allegations and a full opportunity to respond to them. They voluntarily elected to terminate their involvement in the litigation on terms that contemplate that the Non-Settling Defendants will continue to have the right to seek a trial apportionment of the Settling Defendants' degree of contributory responsibility, if any, despite the absence of the Settling Defendants at trial. Moreover, they have agreed to be discovered, should discovery of them be sought by the appellants or Kerr. Thus, there is no suggestion in this case of potential procedural unfairness to the Non-Settling Defendants. Finally, all active parties to this litigation either consent, or do not object, to the apportionment of liability at trial as against the Settling Defendants. These factors obviate any need for the Settling Defendants to remain involved in the litigation as passive or active litigants.

(iii) Public Interest in Promoting Settlement

65 Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice: see for example, *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230, referred to with approval by the Supreme Court of Canada in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.) at para. 48; and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.), at 147. Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation. As observed in *Amoco* at p. 677:

> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

66 The negotiated settlement between the appellants and the Settling Defendants, as recorded in the Agreements and reflected in the appellants' amended pleading, is in the public interest and the interests of all active parties to the litigation. The implementation of the Agreements, which necessitates an apportionment of liability at trial against the Settling Defendants, will result in the participation of fewer parties at trial and will shorten the duration of the trial. This, in turn, will reduce the legal costs of the parties and permit the efficient use of judicial and court resources. As well, and importantly, the implementation of the Agreements is in the interests of all the defendants to the action. The interests of the Settling Defendants are furthered by the release contained in the Agreements and the potential liability of the Non-Settling Defendants is significantly limited under the bargain made by the appellants.

67 I conclude that 'Pierringer' settlement agreements, of the type employed in this case, should be supported in circumstances where, as here, the fairness of the settlement is unchallenged and prejudice arising from the full

implementation of the settlement has not been alleged or shown. Cases of this kind cannot be rendered 'unsettleable', for all practical purposes, without just and substantive cause. Such cause does not arise in the case at bar.

(iv) Other Relevant Factors

68 I wish to comment upon two additional and related considerations arising in these proceedings. Kerr argued before this court that the trial judge in this action would be faced with a most difficult, if not impossible, task if required to determine the Non-Settling Defendants' several share of liability without being in a position to make the same determination concerning the responsibility, if any, of the Settling Defendants for the appellants' losses. Correspondingly, he asserted that the determination of his share of liability without regard to the Settling Defendants' contributory responsibility would be manifestly unfair.

69 I agree with both of these submissions. The appellants' allegations, if proven, will make Kerr, the other Non-Settling Defendants and the Settling Defendants concurrent tortfeasors. The liability of the Non-Settling Defendants, however, will be limited to their several liability, and their joint liability with each other, in accordance with the contractual concessions made by the appellants in the Agreements. In these circumstances, it is difficult to conceive how the several liability of the Non-Settling Defendants could properly and justly be determined by the trial judge without regard to the proportionate fault or neglect of the Settling Defendants.

70 In some ways, this is analogous to the apportionment of vicarious liability addressed in *Martin*. In that case, as I have said, this court held that the hospital's total liability, including its vicarious liability, could not be justly determined without a determination of the degree of fault of the negligent nurse. Similarly, fairness requires that Kerr's several share of fault or neglect not be determined in a vacuum, without consideration of the several liability of all other proven tortfeasors. Were it otherwise, Kerr could be exposed at trial to the potential risk of being required to pay damages to the appellants for part of the Settling Defendants' several shares of liability, claims to which, as Kerr properly points out, have been compromised and released by the appellants under the Agreements.

V. DISPOSITION

71 For the reasons given, I would allow the appeals, set aside the order of the motions judge, and answer the question posed on the special case as follows: the Superior Court has jurisdiction, in the circumstances of this case, to determine whether and to what extent any fault or neglect of the Settling Defendants caused or contributed to the damages alleged by the appellants, although the Settling Defendants will not be parties to the action at trial. As acknowledged by the parties, this is not an appropriate case for an award of costs.

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

I agree.

***Goudge J.A.*:**

I agree.

Appeal allowed.

2004 CarswellOnt 2243, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234, 187 O.A.C. 201, 71 O.R. (3d) 171

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO **FRASER PAPERS INC.**, FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H. LLC

Court File No. CV-09-8241-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

Proceedings commenced at **Toronto**

BOOK OF AUTHORITIES OF THE APPLICANTS (MOTION RETURNABLE ON FEBRUARY 10, 2011)

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