Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC**

Applicants

BOOK OF AUTHORITIES OF
THE M&K RESPONDING LANDLORDS
Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

(Motion to Accept Filing of a Plan and Authorize Creditors' Meeting to Vote on the Plan)
(Returnable December 21 and 22, 2015)

MCLEAN & KERR LLP
Barristers and Solicitors
130 Adelaide Street West, Suite 2800
Toronto, ON M5H 3P5

Linda Galessiere
Law Society No. 34678A
Tel: 416-369-6609
Email: lgalessiere@mcleankerr.com

Gus Camelino
Law Society No. 45607S
Tel: 416-369-6621
Email: gcamelino@mcleankerr.com
Lawyers for Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

TO: **SERVICE LIST**

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC**

Applicants

INDEX

TAB 1

CanLII

Kerr v. Danier Leather Inc., 2005 CanLII 23095 (ON SC)

Date: 2005-06-28
Docket: 98-CV-158675CO
Other citations: 76 OR (3d) 354; [2005] OJ No 2696 (QL)
Citation: Kerr v. Danier Leather Inc., 2005 CanLII 23095 (ON SC), <http://canlii.ca/t/1l389> retrieved on 2015-12-16

Kerr et al. v. Danier Leather Inc. et al.
[Indexed as: Kerr v. Danier Leather Inc.]

76 O.R. (3d) 354
[2005] O.J. No. 2696
Court File No. 98-CV-158675CO

Ontario Superior Court of Justice,
Cumming J.
June 28, 2005

Civil procedure -- Costs -- Plaintiffs being successful in defending summary judgment motion and in later certification motion -- Counsel for plaintiffs neglecting to ask for costs in respect of those motions before orders were finalized -- Rule 59.06(1) permitting amendment of two orders to include award of costs to plaintiffs -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 59.06(1).

The plaintiffs were successful in defending a summary judgment motion and in a later motion to certify the action as a class proceeding. Counsel for the plaintiff did not seek costs in respect of those motions, and neither order made any mention of costs. Three years after the order dealing with the summary judgment motion and two years after the order dealing with the certification motion, the [page355] representative plaintiff moved before the case management judge who heard the summary judgment and certification motions to vary the two orders so as to include an award for costs in each case.

Held, the motion should be granted.

An award of costs in favour of the plaintiffs would have been appropriate if requested before the orders were finalized. Rule 59.06(1) of the Rules of Civil Procedure allows an order that "requires amendment in any particular on which the court did not adjudicate" to be amended

on a motion in the proceedings. There was no adjudication upon the merits of the costs issue in the summary judgment and certification motions. There was no prejudice to the defendants because of the delay in addressing the issue of costs. The rule of functus officio had no application in the circumstances.

MOTION to amend orders to include award of costs.

Cases referred to 374787 B.C. Ltd. v. Dion, [2002] B.C.J. No. 1602, 21 C.P.C. (5th) 86, 2002 BCCA 429 (CanLII), 4 B.C.L.R. (4th) 45 (C.A.); Buschau v. Rogers Communications Inc., [2004] B.C.J. No. 461, 237 D.L.R. (4th) 260, 44 C.P.C. (5th) 223, 2004 BCCA 142 (CanLII), 24 B.C.L.R. (4th) 135,(C.A.), supp. reasons [2004] B.C.J. No. 1577, 2004 BCCA 413 (CanLII), 41 B.C.L.R. (4th) 1 (C.A.), revg [2003] B.C.J. No. 1415, 34 C.P.C. (5th) 368, 2003 BCSC 929 (S.C.) (CanLII); Cini v. Micallef (1987), 1987 CanLII 4418 (ON SC), 60 O.R. (2d) 584, [1987] O.J. No. 795, 20 C.P.C. (2d) 229 (H.C.J.) (sub nom. Super Disposal Services Ltd. v. Cini); Delrina Corp. v. Triolet Systems Inc., 2002 CanLII 45083 (ON CA), [2002] O.J. No. 3729, 22 C.P.R. (4th) 332 (C.A.); Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, 218 N.S.R. (2d) 311, 232 D.L.R. (4th) 577, 312 N.R. 1, 687 A.P.R. 311, 112 C.R.R. (2d) 202, 45 C.P.C. (5th) 1 (sub nom. Nova Scotia (Attorney General) v. Doucet- Boudreau); Kerr v. Danier Leather Inc. , 2001 CanLII 28362 (ON SC), [2001] O.J. No. 950, 13 B.L.R. (3d) 248, 7 C.P.C. (5th) 74 (S.C.J.); Kerr v. Danier Leather Inc., [2001] O.J. No. 4000, 19 B.L.R. (3d) 254, 14 C.P.C. (5th) 293 (S.C.J.); Paper Machinery Ltd. v. Ross Engineering Corp., 1934 CanLII 1 (SCC), [1934] S.C.R. 186, [1934] 2 D.L.R. 239; Payne v. Boose (1979), 10 B.C.L.R. P-9, 1979 CanLII 634 (BC CA), 98 D.L.R. (3d) 658 (C.A.); R. v. Laba, 1994 CanLII 41 (SCC), [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106, 120 D.L.R. (4th) 175, 174 N.R. 321, 25 C.R.R. (2d) 92, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360 (sub nom. R. v. Johnson, R. v. Laba) Statutes referred to Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131(1) Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 12, 34(3) Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20.06(1), 58, 59.06 Authorities referred to Orkin, M., The Law of Costs, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2001)

Peter Jervis, George Glezos and Melanie Schweizer, for plaintiffs.

Benjamin Zarnett, for Jeffrey Wortsman and Bryan Totoff.

Alan Lenczner, Q.C., and Craig Martin, for Danier Leather Inc. [page356]

CUMMING J.:--

The Motion

[1] This motion raises unique issues in respect of the disposition of costs in a class proceeding and the application of rule 59.06 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 ("Rules").

Background

[2] The plaintiffs in this class action were successful in defending a summary judgment motion in Kerr v. Danier Leather Inc., 2001 CanLII 28362 (ON SC), [2001] O.J. No. 950, 7 C.P.C. (5th) 74 (S.C.J.) and in a later motion to obtain certification in Kerr v. Danier Leather Inc., [2001] O.J. No. 4000, 14 C.P.C. (5th) 293 (S.C.J.).

[3] The plaintiffs now seek their costs in respect of these two interlocutory motions. The matter of costs was not argued in respect of either motion. The issue of costs was not adjudicated upon in the Reasons for Decision delivered in respect of each motion. Neither of the two Orders implementing the decisions makes any reference to costs.

The summary judgment motion

[4] A draft order in respect of the summary judgment motion was prepared by counsel for the defendant Danier and circulated to all counsel on April 4, 2001. It was finalized, signed by the Local Registrar and entered April 10, 2001. The Order did not speak to costs.

[5] An Order in respect of the certification motion was approved by all counsel, signed by myself December 3, 2002 and entered. This Order also did not speak to costs.

[6] There was minor success for the defendants on the summary judgment motion in that the alternative claim for rescission of the then putative representative plaintiff, Douglas Kerr, was dismissed. The plaintiffs gained substantial success, in that the claim for damages for misrepresentation was allowed to proceed.

[7] The defendants sought leave to appeal, and the plaintiffs sought leave to cross-appeal (subsequently abandoned). The defendants were unsuccessful in their leave application, with costs fixed at $6,000 and ordered to be paid forthwith.

The certification motion

[8] A motion for certification was successfully brought by the plaintiffs in June 2001, with Reasons for Decision released October 12, 2001. The Order implementing this decision was not signed and entered until December 3, 2002, due to the discussion [page357] and resolution of implementation issues in the intervening period, necessitating two further appearances in chambers.

[9] There was minor success for the defendants on the certification motion inasmuch as only the new, added plaintiff, James Fredrick Durst, was approved as a representative plaintiff. The request that Douglas Kerr and Grace Kerr be representative plaintiffs as well was refused. The plaintiff gained substantial success in that certification was granted; however, the plaintiff's suggested approach to framing the common issues was modified.

The Issue

[10] The representative plaintiff Durst seeks to vary the two Orders so as to include an award for costs in each instance.

The submissions

[11] The defendants correctly point out that the issue of costs was never raised by counsel for the plaintiff until after the two Orders were finalized with the approval of all counsel and

entered in court. (The notice of motion materials filed by the plaintiff in advance of the hearing had contained the standard requests for costs in favour of the plaintiff.)

[12] The plaintiff's counsel apparently never raised the issue of costs in respect of either the summary judgment motion or the certification motion until the summer of 2004, when he sought a determination as to whether the costs should be dealt with by me as the earlier motions judge or by the then trial judge, Lederman J.

[13] The lengthy trial took place before Lederman J. between May 28 and December 22, 2003. Reasons for Judgment were delivered May 7, 2004 (2004 CanLII 8186 (ON SC), [2004] O.J. No. 1916). The Court of Appeal heard an appeal this month, with the decision reserved.

[14] No submissions were made by anyone in respect of costs at the conclusion of the proceedings in respect of each motion before me. This in itself is not unusual. Often in class proceedings the parties raise the issue of costs only after reasons for decision are rendered, sometimes make agreements between themselves as to the disposition of costs outside the interlocutory order to be entered and sometimes agree between themselves to defer the issue of costs until the conclusion of the overall proceeding.

[15] The problem in the instant situation arises entirely because of the negligent oversight or naiveté of plaintiff's counsel in failing to deal with the costs issue at the proper time, that is, before the Orders were finalized. But should the plaintiff (or his counsel) be disadvantaged by losing costs he would otherwise be entitled to but for his counsel's negligence? [page358]

[16] The defendants' first line of argument is that there was divided success and, thus, it was a reasonable inference by defendants' counsel that the plaintiffs did not seek costs and that implicit to the Orders was the court's disposition that no award of costs was appropriate.

[17] Both motions were hard fought at considerable length with no quarter given by either side. I find that the plaintiff gained substantial success in respect of each motion and that costs on a party and party basis (partial indemnity basis after January 1, 2002) in favour of the plaintiff would have been appropriate if requested before the orders were finalized.

[18] I realize I make this present finding when no submissions were made, of course, on the issue of costs before the Orders were finalized. However, the necessary and appropriate submissions were made in the context of the motion at hand on all issues relating to who should properly be awarded costs on the summary judgment and certification motions and, if so, on what scale, if the plaintiff is successful in his present motion to amend the Orders to deal with costs.

[19] The plaintiff seeks costs on a substantial indemnity basis. In my view, the plaintiff would only be entitled to costs on a party and party basis. Rule 20.06(1) provides for costs on a substantial indemnity basis in respect of a summary judgment motion only where the moving party obtains no relief and the court is satisfied that the making of the unsuccessful motion was unreasonable. In the case at hand, the defendants did obtain some relief and in my view, the making of the motion was reasonable given the uniqueness and complexity of the issues.

[20] Defendants' counsel raise various arguments in the motion at hand as to why an appropriate disposition for each Order would have been to not award costs to either side. As I have stated already (and as is apparent from the Reasons for Decision and each Order), while

there was some division of success inasmuch as the defendants were successful on subsidiary, peripheral issues, the plaintiff was the party gaining substantial success. The defendants' position on both motions was to end the proceedings; in both instances the plaintiff's claim proceeded, albeit with minor modification.

[21] The defendants say they are prejudiced in now arguing the costs issues given the delay (three years in respect of the Order dealing with the summary judgment motion, two years in respect of the Order dealing with the certification motion) in the cost issues being considered. At first impression this argument is attractive. There must be a finality to proceedings. [page359]

[22] However, it must be remembered that these were interlocutory motions dealing with complex substantive issues (alleged misrepresentation in respect of the issuance of shares of a public corporation and resulting damages) that continued in the context of the continuing certified class action that proceeded to trial and indeed, to a recent appeal. The history of all events in this class proceeding remains known and clear.

[23] The issues relating to costs in respect of the interlocutory motions are not in themselves complex. Relevant dockets and records are undoubtedly extant to deal with any issue of quantification.

[24] However, that does not end the matter. While costs normally follow the event, defendants' counsel raise other, apparently potent arguments.

[25] First, the defendants say that once an order has been issued and entered, the presiding judge is functus officio:
Cini v. Micallef (1987), 1987 CanLII 4418 (ON SC), 60 O.R. (2d) 584, [1987] O.J. No. 795 (H.C.J.), at p. 587 O.R., p. 4 (QL). Indeed, in the instant situation the plaintiff seeks costs in respect of the orders after the later trial of the common issues, heard by Lederman J.

[26] In the interest of finality to a proceeding, the principle of functus officio holds that a court has no jurisdiction to reopen or amend a final decision or order, except in extremely limited circumstances. See the dissent in Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, at paras. 113-15.

[27] The plaintiff makes three arguments. First, the plaintiff says the court has jurisdiction through s. 131(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA"). I disagree.

[28] That provision gives the judge in a proceeding the authority and power to fix costs in his/her discretion in that proceeding. However, it is implicit that a judge must have proper carriage of the proceeding from a jurisdictional standpoint before s. 131(1) is operative to allow the judge to deal with costs.

[29] The essential underlying issue in the case at hand is, did my jurisdiction in respect of the class proceeding end with the issuance of the Orders or, at least, end prior to the motion at hand being brought? Section 131(1) of the CJA does not resolve this fundamental issue, and hence, whether costs can properly be ordered remains a live issue.

[30] I mention that s. 34(3) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") provides that unless the parties agree otherwise, a judge who hears motions as the class

proceedings case management judge shall not preside at the trial of the common issues. I had no continuing jurisdiction as case management [page360] judge in respect of this class proceeding after the point of commencement of the trial of the common issues. However, I had jurisdiction as motions judge in respect of the two motions in the class proceeding. If there properly remains a live issue as to costs for adjudication in respect of those motions, then I am the judge to deal with such matter.

[31] Second, the plaintiff relies upon s. 12 of the CPA, which provides that the case management judge

> ... may make any order it considers appropriate respecting the conduct of the class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[32] This provision confers a broad authority and power "respecting the conduct of the class proceeding" (emphasis added). It does not confer continuing jurisdiction where the role of the motions judge in the class proceeding has ended and there is a trial judge in place. Section 12 of the CPA is not helpful to the plaintiff.

[33] Third, the plaintiff relies upon rule 59.06, which allows for the amending, setting aside or varying of orders in certain instances. Rule 59.06(1) allows an order that "requires amendment in any particular on which the court did not adjudicate" to be amended on a motion in the proceeding.

[34] Judgments or orders should reflect the true intention of the court and the court retains jurisdiction to amend a judgment or order where it does not reflect the court's intention: Paper Machinery Ltd. v. Ross Engineering Corp., 1934 CanLII 1 (SCC), [1934] S.C.R. 186, [1934] 2 D.L.R. 239, at p. 188 S.C.R., p. 240 D.L.R.; R. v. Laba, 1994 CanLII 41 (SCC), [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106, at p. 980 S.C.R.; Buschau v. Rogers Communications Inc., 2004 BCCA 142 (CanLII), [2004] B.C.J. No. 461, 237 D.L.R. (4th) 260, at para. 12 (C.A.); 374787 B.C. v. Dion, 2002 BCCA 429 (CanLII), [2002] B.C.J. No. 1602, 21 C.P.C. (5th) 86 (C.A.), at paras. 16-17; Payne v. Boose (1979), 10 B.C.L.R. P-9, 1979 CanLII 634 (BC CA), 98 D.L.R. (3d) 658 (C.A.), at p. 12 B.C.L.R. In the situation at hand, I would have dealt with the issue of costs had it been raised by the plaintiff before the Orders were finalized.

Disposition

[35] The defendants say that if an order does not contain an award of costs, "it is as though the court had ordered no costs with respect to the motion": Delrina Corp. v. Triolet Systems Inc., 2002 CanLII 45083 (ON CA), [2002] O.J. No. 3729, 22 C.P.R. (4th) 332 (C.A.), at para. 36, citing M. Orkin, The Law of Costs, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2001) at 1-3. That is, the defendants say there has been an implicit adjudication upon the issue of costs. [page361]

[36] With respect, I think the more precise position would be to say that if an order does not contain an award of costs, the effect of the order is that no costs are awarded. The result is, in effect, an adjudication on the issue of costs; but there has been no actual adjudication upon the merits of the issue as to whether costs are to be awarded to a party.

[37] This brings me back to the rule of functus officio. The situation at hand is not one akin to where the court is asked to reconsider a final order simply "because it has changed its mind or wishes to continue exercising jurisdiction over a matter" or the like, such that there would never be finality to the proceeding and the rule of functus officio would be applicable (Doucet-Boudreau v. Nova Scotia, supra, per LeBel and Deschamps JJ., dissenting at para. 115).

[38] In my view, and I so find, in the instant situation there is no prejudice to the defendants because of the delay in addressing the issue of costs at this point in time rather than before the Orders were finalized.

[39] In my view, rule 59.06(1) allows for an amendment in the instant situation. The court did not adjudicate upon the merits of an award of costs in dealing with the summary judgment and certification motions in the Reasons for Decision delivered and the two Orders entered. I adjudicated upon the substantive issue in respect of each motion. I did not adjudicate upon the ancillary, discrete issue of costs in respect of either motion.

[40] All parties have made submissions as to whether costs should be awarded to the plaintiff, and if so, on what scale, in the context of the motion at hand. The defendants cannot be heard to say that they should now be given a further opportunity to argue whether costs are properly payable to the plaintiff.

[41] Costs are properly payable by the defendants on a party and party scale, on a joint and several basis.

[42] There remains the issue of the quantification of the party and party costs payable to the plaintiff. In my view, given all the circumstances, this is an exceptional situation where it is appropriate that this issue be dealt with by reference to an assessment officer under Rule 58.

[43] An order will issue amending the two previous orders in accordance with these Reasons for Decision.

[44] All parties agree that there are to be no costs awarded to any party in respect of the motion at hand.

Motion granted. [page362]

TAB 2

Robertson v. Robertson et al., 1975 CanLII 615 (ON SC)

Date: 1975-03-03
Other citations: 8 OR (2d) 253; 20 RFL 397
Citation: Robertson v. Robertson et al., 1975 CanLII 615 (ON SC), <http://canlii.ca/t/g17s9> retrieved on 2015-12-16

Robertson v. Robertson et al.

(1975), 8 O.R. (2d) 253

ONTARIO
HIGH COURT OF JUSTICE
WRIGHT, J.
3RD MARCH 1975

Judgments and orders -- Amendment -- Costs awarded in decree nisi not reflecting that proceeding contested -- Mere slip or omission -- No adjudication -- Whether jurisdiction to amend -- Rule 527, 528.

The costs awarded by the decree nisi did not reflect that the proceeding was contested, the reason being that the attention of the Judge was not brought to the tariff provision requiring that this fact be set out. On a motion to amend the decree, held, the Court, notwithstanding that the decree nisi had been signed, entered and made absolute, had jurisdiction pursuant to Rules 527 and 528 to amend it since what had occurred was an accidental slip or omission and therefore there had been no adjudication on the point.

MOTION to correct a decree nisi made absolute.

[Rocke v. Rocke, [1956] O.W.N. 481, apld; Paper Machinery Ltd. et al. v. J.O. Ross Engineering Corp. et al., 1934 CanLII 1 (SCC), [1934] S.C.R. 186, [1934] 2 D.L.R. 239; Re Denmans; City of Kingston v. Metropolitan Toronto, 1955 CanLII 119 (ON SC), [1956] O.R. 23, 1 D.L.R. (2d) 486; Bertouche v. Bertouche and Gilmore (1970), 1 R.F.L. 375; Gambrill et al. v. Law et al., [1954] O.W.N. 573, refd to]

R.B. Freeman, for petitioner, applicant.

H.J. Dickie, for respondent, spouse.

WRIGHT, J.:-- This is a motion to correct or amend a decree, both nisi and absolute, made by me on November 30, 1972. Paragraph 2 of that decree read:

> 2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that costs be payable by the respondents to the petitioner forthwith.

For reasons which do not now concern me, the taxation of costs did not come on before a Taxing Officer until about three weeks ago when it was adjourned to await the outcome of this motion.

The petitioner had then sought to tax costs as those of a contested divorce proceeding. The male respondent had relied on the text of Tariff A under the heading "Solicitors' Fees -- Uncontested Divorce Proceedings" reading in part:

> For the purpose of taxation of costs in divorce proceedings, the hearing of all petitions under the Act shall be considered uncontested except as to those in which the trial judge shall otherwise direct.

Master Saunders as the Taxing Officer would not tax the bill as a contested divorce, as the decree stood.

Although I have no doubt about the matter, I am moved to record any reasons by four circumstances.

The first is that what occurred here is likely to reoccur as the requirement for a direction now lies, unobtrusive, in the presumption stated at the end of a portion of Tariff A under Rule 683 (1), headed "Solicitors' Fees -- Uncontested Divorce Proceedings". This, by definition, is not a place where the artless eye would look for the Court's duty as to costs in contested proceedings.

The second is the conclusive force of an entered decree which I recognize in Bertouche v. Bertouche and Gilmore (1970), 1 R.F.L. 375, and which was applied to a case of costs in Gambrill et al. v. Law et al., [1954] O.W.N. 573 (C.A.), without consideration of Rules 527 and 528.

The third is the fact that the particular position of costs with regard to the correction or amendment of orders or judgments is not dealt with in Orkin's Law of Costs, the only current Canadian text on the subject.

The fourth is the fact that there are divergent lines of decisions and judicial pronouncements which each counsel marshalled to his side.

There can be no doubt in this case that it was contested. It is true that the respondents withdrew their answer and the parties agreed that the relevant terms of the separation agreement of May 21, 1968, should be incorporated in the decree, but they asked that the Court in ordering corollary relief should, in the circumstances, give the Court's meaning to the phrase in the agreement "gross income from all sources". The parties agreed that I should deal with the issues.

The trial proceeded. The petitioner was called, cross- examined and re-examined. The respondent was called and cross-examined. There was argument at length. I gave judgment for oral reasons. The case had started at 10 a.m. and lasted until luncheon.

There can be no doubt that the hearing under the Act had been contested.

I have no doubt that had the question of a direction as to costs been brought to my attention by counsel, I would have then directed that the costs be taxed on the basis of it being a contested divorce. That it was not thus brought to my attention was, in my view, an accidental slip or omission leading to an error in the judgment and subject to correction in Chambers under Rule 527 which reads:

> 527. Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any time be corrected upon an application in chambers.

The substance of this Rule in the English Rules of the Supreme Court, O. 20, r. 11, has been the basis of decision in a number of English cases correcting orders with regard to costs. I refer particularly to Re Inchcape (Earl of), [1942] Ch. 394 (Morton, J.), and the other costs cases cited at p. 343 of the Supreme Court Practice, 1973 (The White Book, 20/11/2).

I am equally clear that, as a result of that slip or omission, I did not adjudicate on whether I should direct that the hearing of the petition should be considered contested for the purpose of taxation of costs. In my opinion the decree should be amended to reflect my present adjudication that the hearing should be considered contested. I exercise this power of amendment in Court under Rule 528 which reads:

> 528. Where a judgment or order requires amendment in any particular on which the court did not adjudicate, it may be amended on motion.

I do this relying on the judgment of the Court of Appeal in Rocke v. Rocke, [1956] O.W.N. 481, and particularly the reasons of Pickup, C.J.O., at p. 483.

It can also be argued that the trial Judge may, by a simple direction to the Taxing Officer, require the proceedings to be considered contested for the purpose of taxation. In my view, this procedure is not open to the trial Judge after the decree is entered.

There is no doubt that this is the underlying rule both in England and Canada: Paper Machinery Ltd. et al. v. J.O. Ross Engineering Corp. et al., 1934 CanLII 1 (SCC), [1934] S.C.R. 186, [1934] 2 D.L.R. 239, which was followed as "the principle of general application" by LeBel, J., in Re Denmans; City of Kingston v. Metropolitan Toronto, 1955 CanLII 119 (ON SC), [1956] O.R. 23 at pp. 26-7, 1 D.L.R. (2d) 486. I point out respectfully, however, that the exact statement and the particular application of the principle in Ontario is different from what it is in England or in the Supreme Court of Canada. In the Ross case it was the procedure of the Supreme Court of Canada itself that was in issue. There was no rule. The Court readily adopted the rule followed in England which was [at p. 188] "that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court". There is in England and in the Rules of the Supreme Court of Canada, no Rule similar to Ontario Rule 528 quoted above. In Ontario it is a third exception and the cases should be read in the light of it. Indeed, were I free to do so and were

it necessary, I would be inclined to agree with the statement of the position in Ontario that appears in Williston & Rolls, Law of Civil Procedure, vol. 2 (1970), at pp. 1059-63.

Under Rule 528 I now grant the order.

Mr. Dickie urged that I should refuse the order because of the delay in application. The position of the parties has not changed and there is no prejudice involved. I adopt the words of A.L. Smith, M.R., in Chessum & Sons v. Gordon, [1901] 1 K.B. 694 at p. 698:

> There can be no doubt that according to the justice of the case the plaintiffs ought to be paid this sum or whatever may be allowed as a proper sum upon taxation. It is satisfactory to know that no technical rule stands in the way of the Court making an order to that effect.

But the delay in application goes to the question of costs as does the oversight making it necessary. The costs of the motion before me will be to the respondent spouse as a contested Court motion in the divorce proceedings.

Motion granted.

TAB 3

14-191

MAY 7 1982

No. 6475/75

MAY 6 1982

IN THE SUPREME COURT OF ONTARIO

(Toronto Motions Court)

B E T W E E N :	)	N.A. Chalmers, Q.C. and Mary Gersht for applicant, Canadian Pacific Limited
IMPERIAL ROADWAYS LIMITED	)	
Plaintiff Defendant by Counterclaim	)	Brendan O'Brien, Q.C. and W.P. Rogers, Q.C. for respondent, Imperial Roadways Limited
-and-	)	
CANADIAN PACIFIC LIMITED	)	
Defendant Plaintiff by Counterclaim	)	Heard: April 26, 1982

82062029

ANDERSON J.:

This is an application by the defendant, plaintiff by counterclaim, (CP) from the judgment dated April 1, 1980, issued following the trial of the action before me, by which the claim of Imperial Roadways Limited (Imperial) was dismissed and judgment given in favour of CP on its counterclaim. The application pertains to the right of CP to post-judgment interest on the amount of

its counterclaim. The interest is substantial. The notice of motion raises, among others, the following matters:

(a) Under Rule 527 to correct any clerical error in the judgment dated April 8, 1980, to show a rate of post-judgment interest if the same was required by Rule 519(2) as it existed at the relevant time.

(b) In the alternative, under Rule 528, to remedy any failure to adjudicate a now apparent claim by the defendant by counterclaim to be relieved from the payment of post-judgment interest on the principal amount of the said judgment if the said claim may still be entertained.

The issue of pre-judgment interest was explicitly raised in argument at the end of the trial and explicitly dealt with. The issue of post-judgment interest was not raised during the argument and was not explicitly dealt with. I endorsed the record in the following terms:

> For reasons given judgment to go on the counterclaim for $951,083.63 with costs. Action dismissed with costs, not including costs of preparation or trial. No judgment for interest on the counterclaim.

This endorsement was made on April 1 following the delivery of oral reasons for judgment. The formal judgment was issued on the 8th of April, 1980. The formal judgment provides in paragraph 3:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the sum of $951,083.63 on the Counterclaim is payable without interest thereon.

An appeal taken by Imperial was dismissed. The sum of $951,083.63 has been paid by Imperial to CP.

After payment of this amount, the parties found themselves at odds with respect to post-judgment interest. On the 23rd of March, 1982, a writ of fieri facias was issued directing the Sheriff to levy the sum of $951,083.63 with interest at 15.75% from April 1, 1980. An application by Imperial to set aside this writ of fieri facias is pending and has been adjourned sine die

to await the outcome of this application before me.

The relevant statutory provision dealing with post-judgment interest is the Judicature Act, R.S.O. 1970, c.228, section 40 (now R.S.O. 1980, c.223, s.37) and is in the following terms:

> 40. (1) A verdict or judgment bears interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, at the prime rate established in the same manner as for the purposes of section 38, notwithstanding that the entry of judgment has been suspended by a proceeding in the action, including an appeal.
>
> (2) The judge may, where he considers it to be just to do so in all the circumstances,
>
> (a) disallow interest under this section;
>
> (b) fix a rate of interest higher or lower than the prime rate;
>
> (c) fix a date other than the date of judgment from which interest is to run,
>
> in respect of the whole or any part of the amount for which judgment is given.

The first and basic position of CP is that, having regard for the terms of the statute, a verdict or judgment bears interest from the time it is rendered or

given, at the rate fixed by the statute, unless the trial judge exercises his discretion to accomplish a different result. It is submitted that no exercise of that discretion was sought by Imperial and that it is now too late to do so.

Sub-rule 2 of Rule 519 in the form in which it existed at the time the judgment was taken out was in the following terms:

> Every judgment providing for the payment of money on which interest is payable shall show on its face the rate of interest thereon.

The judgment issued on the 1st of April, 1980, bore no such note or endorsement.

Each of the parties indicated some reluctance to adopt the position that the formal judgment as issued did not resolve the question of post-judgment interest. However, I think it inherent in the bringing of this application, and in the bases upon which the matter was argued on behalf of the parties, respectively, that they deem it unsatisfactory. I agree that it is. I am further of the view that

each party contributed to that unsatisfactory result.

Had Imperial wished to contend that post-judgment interest should not be payable on the judgment, the matter should have been raised in argument at trial, considering the manner in which section 40 was framed.

CP should have taken care, upon the settlement of the draft judgment between counsel or, if necessary, before the Registrar, to require compliance with sub-rule 2 of Rule 519. Had it done so, the issue now before me would almost certainly have become apparent then, and would have come before me then to be resolved.

Had either Imperial or CP done what was appropriate, the question would have been resolved before the appeal was heard, and the anomalous situation which now exists would not have come about. Any disposition which I made would have been susceptible of appeal, along with other issues raised on the appeal.

The anomaly is that, after the appeal has been concluded, and the time for appeal to the Supreme

Court of Canada has gone by, the formal judgment which was the subject of appeal is found to be unsatisfactory in form, and I am asked to resolve the problem which results. I have considered whether the appropriate disposition was to refer the matter to the Court of Appeal. I have concluded that it is not, although there appears to be a lively possibility that, whatever I do, the matter will end up there.

The primary and basic contention of CP is that since there was no disposition, at the trial, of the issue of post-judgment interest, the effect of the statute is to entitle it to such interest and that there is no judgment or order taking away that entitlement. It is therefore contended that at most Imperial requires that the formal judgment be corrected under Rule 527 to add the note or endorsment pertaining to the rate of interest payable on the judgment. Rule 527 is in the following terms:

> 527. Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any time be corrected on motion.

The position of Imperial is that if I am to

deal with it at all, I should do so as though the matter had come before me in 1980 upon an application to settle the form of the judgment. It is contended further on behalf of Imperial that a number of considerations should at that time have led to an order that there by no post-judgment interest until after disposition of the appeal.

Notwithstanding the logic inherent in the argument on behalf of CP, I am not prepared to give effect to it. I do not consider it a case in which the judgment is to be corrected as for an error arising from accidental slip or omission. Rather, I think resort must be had to the alternative basis raised in the notice of motion, namely to Rule 528. It is in the following terms:

> Where a judgment or order requires amendment in any particular on which the court did not adjudicate, it may be amended on motion.

In my view, the issue of post-judgment interest is one upon which I did not adjudicate. The remedy for that failure is sought after an appeal has been heard and determined. That undoubtedly makes any further dealing on my part with

the judgment anomalous, but I am not persuaded that I am without jurisdiction to deal with the matter now. Had CP done what was appropriate before the formal judgment was issued, the matter would have come before me at a time when my jurisdiction would have been in no doubt. I do not consider it open to CP to question it now.

In dealing with the issue of pre-judgment interest, I had this to say in the course of my reasons for judgment:

> The facts which gave rise to the action and counter-claim were manifestly complicated and the rights of the parties could not be known until certain findings had been made by the Court. It is not, in my view, a case in which it can be said that CP was in any way wrongfully kept out of its money by Imperial and I would not be disposed to exercise my discretion to award interest.
> ...

The findings of fact upon which my judgment in favour of CP were based were arrived at by inference, in some instances upon confusing and conflicting evidence. It was apparent

to me from the outset that, in the circumstances, an appeal was almost inevitable and that the rights of the parties would not be finally known until that appeal had been concluded. Appeal was indicated not for the simple matter of the amount involved but because of inherent difficulties in the case. Those difficulties were not, for the most part, of Imperial's making.

Cory J.A., in delivering the judgment of the Court of Appeal, was inferentially critical concerning the conduct of CP in matters incidental to the investigation of the derailment, which gave rise to the action, and the reluctance of CP to respond to requests on the part of Imperial for information pertaining to the occurrence.

In all of the circumstances, I think it appropriate that CP should have post-judgment interest only from the date of disposition in the Court of Appeal, which was January 29, 1982.

There was discussion in the argument on this application concerning the propriety of the rate of interest to be adopted. No express submissions were made with

respect to the appropriate rate if the interest were to run from January 29, 1982. I should imagine that this is susceptible of settlement between counsel. If not, I may be spoken to.

An order will go amending the judgment to add the following endorsement:

> This judgment shall bear interest at the rate of _____% from the 29th day of January, 1982.

Since both parties contributed to the creation of the problem which made this motion necessary, there will be no order as to costs.

Released: April 29, 1982.

*kbh

IN THE SUPREME COURT OF ONTARIO

(Toronto Motions Court)

B E T W E E N :

IMPERIAL ROADWAYS LIMITED

Plaintiff
Defendant by
Counterclaim

-and-

CANADIAN PACIFIC LIMITED

Defendant
Plaintiff by
Counterclaim

REASONS FOR JUDGMENT

ANDERSON J.

Released: April 29, 1982.

*kbh

TAB 4

Moyer v. Moyer, 1980 CanLII 1653 (ON SC)

Date: 1980-10-27
Other citations: 30 OR (2d) 698; 117 DLR (3d) 661; 17 CPC 225
Citation: Moyer v. Moyer, 1980 CanLII 1653 (ON SC), <http://canlii.ca/t/g1gbs> retrieved on 2015-12-16

Moyer v. Moyer

30 O.R. (2d) 698
117 D.L.R. (3d) 661

ONTARIO
SURROGATE COURT
COUNTY OF BRANT
FANJOY CO. CT. J.
27TH OCTOBER 1980.

Judgments and orders -- Interest -- Consent judgment -- No provision as to interest -- Judgment amended to provide for interest at prime rate as of date action commenced.

APPLICATION for an order to amend a judgment.

[Re Wright, [1949] O.W.N. 113, apld; Chester v. Chester et al. (1977), 2 C.P.C. 121; Robertson v. Robertson (1975), 1975 CanLII 615 (ON SC), 8 O.R. (2d) 253, 20 R.F.L. 397; National Trust Co. et al. v. Speakman (1978), 8 C.P.C. 44, 3 E.T.R. 193, refd to]

R. J. Lefebvre, for plaintiff.

M. J. Morrison, for defendant.

FANJOY SURR. CT. J.:-- This is an application for an order to amend a judgment by adding a provision that the moneys payable under the judgment shall bear interest pursuant to ss. 38 [rep. & sub. 1977, c. 51, s. 3(1)] and 40 [rep. & sub. 1979, c. 65, s. 4(1)] of the Judicature Act, R.S.O. 1970, c. 228, and to Rule 519(2) [enacted O. Reg. 850/79, s. 1] of the Rules of Practice.

The action is one brought by a widow beneficiary against the executor of her deceased husband's estate. Minutes of settlement were executed on February 1, 1980, and judgment based on the minutes of settlement and approved by the parties, dated February 7, 1980, was signed and entered on April 10, 1980.

The judgment provided for payment by the defendant to the plaintiff of the sum of $58,000 on or before March 1, 1980, and $3,000 costs forthwith. The judgment also dealt with other issues with respect to chattels, real estate and rentals including an order that the plaintiff deliver vacant possession of certain premises on May 1, 1980.

The judgment made no provision for and was silent with respect to the payment of interest and this application is only with respect to post-judgment interest on the sums of money payable on the judgment.

The material before me is confined to affidavits together with documentary exhibits thereto. Both parties made submissions based on equitable considerations. These submissions arise from difficulties between the parties subsequent to the judgment such as the failure of the applicant to vacate the matrimonial home in accordance with the order, which failure appears to have arisen at least partially, from the defendant's failure to pay all of the moneys payable under the judgment. I am of the view that I cannot consider problems between the parties which have arisen subsequent to the judgment on this application.

Prior to the recent amendments to the Judicature Act and the Rules of Practice, there was no requirement that there be any reference on the face of a judgment to interest in order for moneys payable pursuant to a judgment to bear interest. Prima facie every judgment bore interest at the rate of 5% per annum.

It is unnecessary for me to examine the reasons for these amendments, but it is readily apparent that one of the reasons was to make some practical provision for current high and volatile interest rates. Rule 519(2) reads as follows:

> 519(2) Every judgment providing for the payment of money on which interest is payable shall show on its face the rate of interest thereon.

Without setting out the recently-enacted ss. 38 and 40 of the Judicature Act, I would point out that these sections provide, inter alia, for the determination of the rate of interest which a monetary judgment will prima facie bear with the provision that a Judge "where he considers it just to do so under the circumstances" may disallow interest, fix a rate above or below the prime rate or vary the date from which interest shall run.

In the first instance I have no difficulty in answering the question whether there is jurisdiction to amend a judgment. With respect to a judgment after trial there are numerous reported cases in which a judgment has been amended because the Court had failed to adjudicate on a particular issue, for example, in Chester v. Chester et al. (1977), 2 C.P.C. 121, FitzGerald L.J.S.C. amended a decree nisi even after a decree absolute had been entered by deleting reference to the action "being contested". In doing so, he followed the decision of Robertson v. Robertson (1975), 1975 CanLII 615 (ON SC), 8 O.R. (2d) 253, 20 R.F.L. 397, where Mr. Justice Wright held that the Court had failed to adjudicate on the question of whether the costs in the action should be taxed as a contested proceedings or pursuant to the uncontested tariff. He found that the matter of costs had not been brought to his attention by counsel. He found

that this was an accidental slip and that he could correct the judgment pursuant to Rule 527 [since am. O. Reg. 520/78, s. 32]. He stated on p. 255 as follows:

> I am equally clear that, as a result of that slip or omission, I did not adjudicate on whether I should direct that the hearing of the petition should be considered contested for the purpose of taxation of costs. In my opinion the decree should be amended to reflect my present adjudication that the hearing should be considered contested. I exercise this power of amendment in Court under Rule 528 ...

The judgment before me, however, is not a judgment after trial, but is a consent judgment. The decision in National Trust Co. et al. v. Speakman (1978), 8 C.P.C. 44, 3 E.T.R. 193, a judgment of Lerner J. in the High Court of Justice has been referred to me by counsel. The [C.P.C.] headnote reads as follows:

> If two parties to a law suit arrive at a settlement which is subsequently reduced to a consent judgment and moneys are due and owing under the terms of that judgment, interest is due and owing to the plaintiff from the date that the judgment is issued and entered. If there is any question which needs to be resolved, the defendant can always pay the funds into court.

The headnote appears to accurately reflect the decision. However, this was an action prior to the amendments to the Judicature Act and the Rules of Practice, to which I have referred. It is therefore of limited guidance.

In Re Wright, [1949] O.W.N. 113, Mr. Justice LeBel reviews the authorities and on p. 115 says:

> The power of the Court to amend a judgment or order which has been drawn up and entered is strictly limited, and rightly so. Generally speaking, there is no such power except in two cases, viz., (1) where there has been a slip in drawing it up, and (2) where there has been an error in expressing the manifest intention of the Court: see Paper Machinery Limited et al. v. J. O. Ross Engineering Corporation et al., 1934 CanLII 1 (SCC), [1934] S.C.R. 186 at 188, [1934] 2 D.L.R. 239, and cases therein cited. Also, in cases of fraud the Court will always interfere.
>
> But where a judgment or order has issued on consent, the Court, in my opinion, has a further power to amend or to vary, since in such case the impeached judgment or order is based upon the contract of the parties. This has been so stated by Middleton J., as he then was, in Lewis v. Chatham Gas Co. (1918), 42 O.L.R. 102 at 103-4, where that learned judge is reported to have said:
>
> "If the consent judgment is regarded as a judgment, it is final and binding, and it is in accordance with what was intended at the time. There is jurisdiction to alter a judgment once entered only when it does not express the real intention of the Court or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attached.
>
> "This is emphatically so when the judgment is a consent judgment. The judgment then is based upon the contract of the parties. In Attorney-General v. Tomline (1877), 7 Ch. D. 388, Fry J., said: 'When a consent order has been drawn up, passed, and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement.' "

I therefore conclude that I have jurisdiction to amend the judgment under the existing circumstances and notwithstanding that it is a consent judgment.

I am of the view notwithstanding the change in the statute and the Rules that it is implied that the amount due under the judgment will bear interest after it is due. I have this view notwithstanding the fact that under s. 40(2) of the Judicature Act the Court has jurisdiction with respect to varying the rate of interest. The purpose of Rule 519(2), in my opinion, is to indicate on the face of the judgment clearly the particular rate of interest which the judgment bears, since the rate will be a variable one. Without such a requirement as to form it would be necessary to look behind each judgment to determine the rate of interest. To put it mildly this would be impractical.

Prior to the amendments this was not necessary as the rate of interest was universally 5% per annum. I am therefore of the opinion that it was an implied term of the judgment that the moneys payable would bear interest. An examination of s. 38 of the Judicature Act leads one to the conclusion that prima facie a judgment will still bear interest; the rate of interest will be determined by the prime rate existing for the month preceding the month on which the action was commenced. Prior to the amendments Courts had discretion with respect to interest, such discretion to be exercised judicially in accordance with well-defined principles.

I am strengthened in my view by the following: The plaintiff, as soon as the money was due and payable and was not paid, had the right to commence proceedings by specially endorsed writ for the amount owing, together with interest. The cause of action in this case would have arisen on March 2, 1980, and the interest rate would have been the prime rate as of February, 1980, namely, 15% per annum. It would be extremely wasteful to require the plaintiff to take such proceedings.

I have, accordingly, come to the conclusion that the applicant's position must be sustained and that the sum of $58,000 as provided for in para. 1 shall bear interest from March 1, 1980, to the date of payment and that the costs of $3,000 which were to be payable forthwith as set out in para. 7 shall bear interest from February 4, 1980. The rate of interest, however, shall be 8.25% per annum, which was the prime rate existing in February, 1978, the month before the action was commenced.

Because of the fact that both parties had it in their power to avoid this application and because it would appear that it was a slip on the part of both parties, there will be no costs of the application.

Application allowed.

TAB 5

309:0982

88-06
88305001

FILE NO. 22/87

COURT OF APPEAL FOR ONTARIO

RE: MONARCH CONSTRUCTION LIMITED v. BUILDEVCO LIMITED and THE BANK OF MONTREAL

BEFORE: HOULDEN, MORDEN AND ROBINS JJ.A.

COUNSEL: W.I.C. BINNIE, Q.C. and THOMAS CURRY FOR THE APPELLANT

W.V. SASSO and A.D. GRIFFIN FOR THE RESPONDENT

HEARD: MARCH 29, 1988

"ORALLY"

E N D O R S E M E N T

The offer to sell was made pursuant to s. 8(b) of the joint venture agreement. It was initiated by the respondent Monarch Construction Limited ("Monarch"), a large land development company. It was Monarch's obligation to draw the agreement properly. The appellant Buildevco Limited ("Buildevco") had no power under the agreement to make any alteration in the offer. Unfortunately, Monarch made an error in calculating the amount owing by Buildevco pursuant to the joint venture agreement.

The offer to sell was embodied in a consent judgment of the court which was obtained on Monarch's motion. When Monarch discovered its error, it moved to amend the consent order. The local judge who heard the motion, was of the opinion that the deemed counter-offer was to sell Buildevco's interest for what Buildevco owed Monarch. With respect, we

do not agree. The agreement specifically provided that Buildevco would on closing pay to Monarch all amounts, if any, owing by Buildevco to Monarch; thus, it contemplated that there would be an accounting by Monarch of the amount alleged to be owing by Buildevco. The accounts were prepared by Monarch and forwarded to Buildevco's auditors to be checked. Regrettably, the auditors did not report to Buildevco until after the consent order had been entered. The parties, as the local judge noted, are still not ad idem as to the amount owing. Rescission is no longer possible because Monarch forced the transfer of the property to it pursuant to the consent judgment.

A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the local judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.

In the result, the appeal will be allowed, the order below set aside, and in its place there will be an order dismissing the motion to amend the judgment. The appellant will be entitled to its costs here and below.

L. W. McFarlane J.A.
F.W. Moreau J.A.
P.L. Rosinski J.A.

MAR 3 1 1988

TAB 6

Hall v. Powers et al.

[Indexed as: Hall v. Powers]

80 O.R. (3d) 462

Ontario Superior Court of Justice,
Shaughnessy R.S.J.
June 28, 2005*

* This judgment was recently brought to the attention of the editors.

Injunctions -- Interlocutory injunctions -- Setting aside -- Plaintiff obtaining interlocutory injunction restraining defendants from preventing him from attending high school prom with his boyfriend -- Injunction being granted in expectation that matter would proceed to trial -- Plaintiff subsequently seeking to discontinue action -- Defendants seeking to set aside injunction under rule 59.06(2) on basis of "newly discovered fact" that plaintiff did not intend to proceed to trial -- Rule 59.06(2) not applying -- Court not having jurisdiction to set aside interlocutory injunction in circumstances of this case -- Plaintiff being granted leave to discontinue action -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 59.06(2). [page463]

The plaintiff obtained an interlocutory injunction restraining the defendants from preventing him from attending his high school prom with his boyfriend. The plaintiff subsequently sought to discontinue the action without costs. The defendants opposed the request and instead moved to set aside the injunction, which they say was issued on the basis that there would be a later trial at which the legal issues would be finally determined. The defendants relied on rules 23.01(6) and 59.06(2) of the Rules of Civil Procedure. The

defendants submitted that the use of a lower standard for the interlocutory injunction had an impact on the decision, which was now a precedent of sorts, and that the plaintiff's present intention not to proceed to trial was a "newly discovered fact".

Held, the defendants' motion should be dismissed; the plaintiff's motion should be granted.

Rule 59.06(2) was not applicable. That rule applies to newly discovered evidence. It does not come into play where the plaintiff has a change in position or change in circumstances. The court did not have jurisdiction to set aside an interim injunction in the circumstances of this case.

Cases referred to

Becker Milk Co. Ltd. v. Consumers' Gas Co. (1974), 2 O.R. (2d) 554, 43 D.L.R. (3d) 498 (C.A.); Govan Local School Board v. Last Mountain School Division No. 29, [1991] S.J. No. 635, 3 C.P.C. (3d) 143, 88 D.L.R. (4th) 658, 100 Sask. R. 1, [1992] 2 W.W.R. 481 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 15(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 23.01, 59.06(2)

MOTION by the plaintiff for leave to discontinue an action without costs; MOTION by the defendants to set aside an interlocutory injunction.

Andrew M. Pinto, for plaintiff.

Peter Lauwers, for defendants.

Fay Faraday and Sheilagh Turkington, for intervenor The Ontario English Catholic Teachers' Association.

Cheryl Milne and Kathy Murphy, for intervenor Canadian Foundation for Children, Youth and the Law.

R. Douglas Elliot and Gabriel Fahel, for intervenor The Coalition in Support of Marc Hall.

Brad Elberg, for intervenor The Ontario Catholic School Trustees' Association.

[1] Amended endorsement of SHAUGHNESSY J.:-- This proceeding is on the trial list and is set to be heard on October 11, 2005 at Whitby, Ontario. The trial of this action engages the issue of whether a publicly funded school board can establish [page464] and implement policies of general application that are subject to the Canadian Charter of Rights and Freedoms. The policy in this case relates to a student wishing to bring a same-sex date to a school prom and whether the School Board's decision violates s. 15(1) of the Charter, which prohibits discrimination on the basis of sexual orientation and age.

[2] An interlocutory injunction was granted in this proceeding by Mr. Justice Robert MacKinnon, restraining the defendants and their agents from preventing or impeding Marc Hall from attending his high school prom with his boyfriend on May 10, 2002 ((2002), 59 O.R. (3d) 423, [2002] O.J. No. 1803 (S.C.J.)).

[3] On June 7 and June 27, 2005, counsel for the parties attended before me. The plaintiff has requested permission to discontinue this action without costs. The defendants oppose this request, not on the basis, however, that they will be denied the customary order for costs thrown away if the request is granted, but because they want to have the issue tried. The

defendants point out that the injunction was issued on May 10, 2002 by Justice R. MacKinnon on the basis that there would be a later trial at which the legal issues would be finally determined. Justice MacKinnon made the following comment at para. 13 of his decision:

> There is Ontario authority for a proposition that a plaintiff bears a higher onus in cases where the granting of the injunction in effect gives him the ultimate relief which is sought. This is not the case at bar. It is true that Mr. Hall's immediate interest is in being permitted to attend this Friday's prom with his boyfriend. However, the substantive thrust of his claims for trial, as pleaded, are for trial court declarations that his Charter rights have been violated. Included among the matters in issue for an eventual trial, if pursued, will be the question of whether the School Board's decision falls within its power to make decisions with respect to denominational matters and thus is protected under s. 93(1) of the Constitution Act, 1867 and whether the Board's decision violates individual human rights protected under the Canadian Charter of Rights and Freedoms, including the right to be free of discrimination on the basis of sexual orientation and age.

(Emphasis added)

[4] Further, Justice MacKinnon stated that in his view, the School Board could have its rights protected at trial, noting at paras. 54 and 56:

> This third branch of the injunctive test considers relative hardship between the parties. My decision will finally determine whether in fact Mr. Hall goes to the prom but will not, as a matter of law, finally determine either whether he is entitled to trial declaratory relief under the Charter or whether the defendants are entitled to continue to permit same-sex couples to attend only selected school social events in the future . . . [page465]
>
> . . .[I]f the order is not granted, then until trial it will be acceptable for the defendant school to restrict gay and

lesbian students from selected school activities on the basis of their demonstrated sexual orientation . . . The Board can always seek to have its ongoing rights thoroughly protected at trial . . .

(Emphasis added)

[5] The defendants submit that the use of a lower standard for the interlocutory injunction had an impact on the decision, which is now a precedent of sorts. In this regard, I would note that injunction reasons are not often accorded great weight, as they are written on an urgent basis based on limited material and the legal issues, out of necessity, are dealt with in a cursory and preliminary manner.

[6] It was the expectation of Justice MacKinnon and the parties, that this matter would proceed to trial and the defendants have expended a considerable amount of money in trial preparation.

[7] The defendants are sympathetic to the plaintiff's stated desire to focus on his university studies. Further, they have graciously agreed not to seek costs from the plaintiff, to which they would ordinarily be entitled on the filing of a Notice of Discontinuance. The defendants are to be commended for their position. It is further regrettable that the defendants will be deprived of the opportunity to advance their legal arguments with the benefit of a more complete evidentiary record that would be available to the trial judge. Their ability to assemble such evidence in the context of the original injunction, was necessarily constrained by the short time frame within which that motion had to proceed. On the basis of that evidence, a trial judge might have reached the conclusion that the defendants' legal position is correct. Accordingly, Justice MacKinnon's Reasons should be read in light of these developments.

[8] The defendants do not allege that there has been any bad faith on the part of the plaintiff, or his counsel, but note that the interlocutory injunction was obtained with an advantage created by the expectation that the matter would

proceed to trial.

[9] It is the defendants' position that in the unusual circumstances of this proceeding, the interlocutory injunction of Justice MacKinnon dated May 10, 2002 should be quashed. The defendants state that I have jurisdiction to make such an Order, both as a term of the granting of leave to the plaintiff to discontinue (rule 23.01(b) [of the Rules of civil Procedure, R.R.O. 1990, Reg. 194]) and pursuant to rule 59.06(2), which allows the court to set aside an order "on the ground . . . of facts arising or discovered after it was made". It is submitted that the material fact arising or discovered is that the plaintiff no longer intends to [page466] proceed to trial, which then results in the legal issues not receiving a full consideration as contemplated in the Reasons of Justice MacKinnon.

[10] The plaintiff's position is that he attended his high school prom on May 10, 2002, which is more than three years ago. The plaintiff, a university student, wishes to discontinue this proceeding and focus on his studies. It is submitted that even if I have jurisdiction to quash this injunction, no useful purpose would be served by doing so.

[11] Counsel for the intervenors, the Canadian Foundation for Children, Youth and the Law and the Coalition in Support of Marc Hall, support the plaintiff's position.

Analysis

[12] Rule 59.06(2) on its face, relates to setting aside or varying an Order based on newly discovered evidence or facts. The test for setting aside, or varying an Order is found in Becker Milk Co. Ltd. v. Consumers' Gas Co. (1974), 2 O.R. (2d) 554, 43 D.L.R. (3d) 498 (C.A.), at p. 557 O.R. as follows:

(1) That the evidence "might" probably have altered the judgment and,

(2) That the evidence "could not with reasonable diligence have been discovered sooner".

[13] I find that rule 59.06(2) is not applicable as it applies to newly discovered evidence. In my opinion, this rule does not come into play where, as in the present case, the plaintiff has a change in position, or change in circumstances.

[14] I have not been provided with any Canadian authority for the proposition that I have the jurisdiction to set aside an interim injunction in the circumstances of the present case. I am not the trial judge and I do not have a sufficient evidentiary record to satisfy me that the interim injunction is based on a wrong interpretation of the law. The issue of the right to determine a point of law "empowering" a judge to set aside an injunction where there was no final determination of the whole action, was raised, but not decided in Govan Local School Board v. Last Mountain School Division No. 29, [1991] S.J. No. 635, 88 D.L.R. (4th) 658 (C.A.).

[15] Accordingly, I find that since there was no determination of the whole action, it is not appropriate for me on this application, to set aside the injunctive relief granted by Justice MacKinnon. Even if I am wrong on the jurisdictional issue, it [page467] appears to me that no useful purpose would be served by doing so, particularly in the present case where the interim injunction has no continuing effect.

[16] Therefore, I decline the defendants' request to set aside the interlocutory injunction and I grant leave to the plaintiff to discontinue this proceeding without costs.

Plaintiff's motion granted; defendants' motion dismissed.

TAB 7

CanLII

Muscletech Research and Development Inc., Re, 2006 CanLII 1020 (ON SC)

Date: 2006-01-18
Docket: 06-CL-6241
Other citation: 19 CBR (5th) 54
Citation: Muscletech Research and Development Inc., Re, 2006 CanLII 1020 (ON SC), <http://canlii.ca/t/1md2x> retrieved on 2015-12-16

COURT FILE NO.: 06-CL-6241
DATE: 20060118

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

BEFORE: FARLEY J.

COUNSEL: *Jay Carfagnini*, for MuscleTech Research and Development Inc. et al.

Derrick Tay, for Paul Gardiner and Lovate Health Sciences Inc.

Natasha MacParland, for RSM Richter Inc., proposed Monitor

HEARD: January 18, 2006

ENDORSEMENT

[1] This is a short endorsement which may be elaborated upon.

[2] I am satisfied that the applicants are insolvent given their imbalance of assets to debt (both determined and contingent liability as to product liability suits) and that the debt of the applicant group is over the $5 million threshold as to the CCAA test.

[3] The product liability situation 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: see *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Re T. Eaton Co.* (1997), 1997 CanLII 12405 (ON SC), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Campeau v. Olympia & York Development Ltd.* (1993), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). It is understood that this stay will likely facilitate the entering into of overall *bona fide* resolution meetings/discussions which would form the foundation of a plan of reorganization and compromise.

[4] I further understand that the applicants, all of which are Canadian companies registered in Ontario and with the substantial connections to this jurisdiction as set out a paragraph 67 of the applicants' factum:

> 67. In addition to the location of each Applicant's registered office, it is respectfully submitted that the following factors further support a finding that each Applicant's COMI is Ontario, Canada:
>
> (a) each of the Applicants was incorporated in Ontario;
>
> (b) each Applicant's mailing address is an Ontario address;
>
> (c) the principals, directors and officers of the Applicants are residents of Ontario;
>
> (d) all decision-making and control in respect of the Applicants, including product development, takes place at the Applicants' premises located in Ontario;
>
> (e) the Applicants' principal banking arrangements have been conducted in Ontario through the Canadian Imperial Bank of Commerce; and
>
> (f) all administrative functions associated with the Applicants and all of the employees that perform such functions, including general accounting, financial reporting, budgeting and cash management, are conducted and situated in Ontario.

will be making an application later today in the Southern District of New York U.S. Bankruptcy Court for recognition, pursuant to Chapter 15 of the US Bankruptcy Code, of the Initial Order which I am granting. In that respect, I would observe that as I discussed in *Re Babcock & Wilcox Ltd.* (2000), 2000 CanLII 22482 (ON SC), 18 C.B.R. (4th) 157 (Ont. S.C.J.), the courts of Canada and of the US have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency.

[5] As this order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In that respect, notwithstanding any order having previously been given, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and

previously granted. Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question. This endorsement is to be provided to the creditors and others receiving notice.

[6] Order to issue as per my fiat.

J.M. Farley

DATE: January 18, 2006

TAB 8

CanLII

York (Municipality) v. Thornhill Green Co-Operative Homes Inc., 2009 CanLII 37907 (ON SC)

Date: 2009-07-16
Docket: 07-CL-7044
Other citation: 55 CBR (5th) 181
Citation: York (Municipality) v. Thornhill Green Co-Operative Homes Inc., 2009 CanLII 37907 (ON SC), <http://canlii.ca/t/24nst> retrieved on 2015-12-16

COURT FILE NO.: 07-CL-7044
DATE: 20090716

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION UNDER SECTION 116(1)6 OF THE *SOCIAL HOUSING REFORM ACT*, 2000, S.O. 2000, c. 27

RE: **THE REGIONAL MUNICIPALITY OF YORK (Applicant) – and – THORNHILL GREEN CO-OPERATIVE HOMES INC. (Respondent)**

BEFORE: **MORAWETZ J.**

COUNSEL: **Roger Jaipargas, Douglas O. Smith, and Brendan Y. B. Wong, for the Applicant, The Regional Municipality of York**

Frank Bennett, Murray Klippenstein and Basil Alexander, for the Respondent, Thornill Green Co-Operative Homes Inc. and the Co-operative Housing Federation of Canada

Mervyn D. Abramowitz and L. Viet Nguyen for the Receiver, Mintz and Partners Ltd.

Daniel Kuzmyk, for Housing York, Inc.

HEARD: **OCTOBER 23 AND NOVEMBER 5, 2008**

Reasons of the Divisional Court Released: February 11, 2009

Written Submissions Arising as a Result of Decision of Divisional Court Received: March-April, 2009

Endorsement of the Court of Appeal dismissing Application for Leave to Appeal the decision of the Divisional Court Released: June 19, 2009

ENDORSEMENT

[1] This endorsement addresses the long-outstanding motion brought by Mintz and Partners Ltd. ("MPL"), in its capacity as court-appointed receiver (the "Receiver") of Thornhill Green Co-operative Homes Inc. ("Thornhill Green" or the "Co-op") for an order approving the transaction of purchase and sale (the "Transaction") contemplated by an Agreement of Purchase and Sale (the "Purchase Agreement") between the Receiver and Housing York Inc. ("HYI") and authorizing the Receiver to take such steps as are necessary to complete the Transaction. The Receiver also requests a Vesting Order relating to the Purchase Agreement as well as the approval of the forms of lease agreements as set out in the Motion Record.

[2] The Receiver also seeks a declaration that, upon the filing of a Certificate by the Receiver, all occupancy agreements for the property located at 51 - 95 Inverlochy Blvd., Markham, Ontario (the "Property") would be deemed to be terminated and replaced by the leases approved by the court and that any lease agreements remaining to be executed between the tenants at the Property and HYI would be deemed to be executed, valid and in full force and effect and further that the housing units at the Property would be no longer part of any housing co-operative.

[3] The motion was opposed by Thornhill Green and by the Co-operative Housing Federation of Canada ("CHFC"). (CHFC was added as a respondent at the opening of argument.)

[4] This endorsement also addresses the cross-motion brought by Thornhill Green to vary the order of Pepall J. dated June 26, 2007 (the "Appointment Order"), to the extent necessary to remove the power of the Receiver to sell or apply to sell any of the Property except in the ordinary course of business.

[5] Thornhill Green also brought a motion to discharge MPL as Receiver but this motion was withdrawn at the opening of argument on October 23, 2008.

[6] The background facts have been canvassed in two decisions and need not be repeated. The first is my endorsement of August 29, 2008, reported at [2008] O.J. No. 3343. The second is the decision of the Divisional Court dated February 11, 2009, reported at (2009) CanLII 7081. (An application for leave to appeal the decision of the Divisional Court on the Judicial Review was dismissed by the Court of Appeal for Ontario on June 19, 2009.)

[7] Although this endorsement addresses the two motions noted above, it is necessary to also take into account the ramifications of the Divisional Court ruling.

[8] The Divisional Court addressed the judicial review application brought by Thornhill Green and CHFC to quash the decisions and actions of the Regional Municipality of York (the "Region" or the "Service Manager") with respect to the proposed sale of Thornhill Green to HYI, the Region's social housing arm.

[9] The conclusions of the Divisional Court are set out in the decision at paragraphs [93] – [99]:

> [93] As we have concluded that the actions of the Region are reviewable by way of judicial review either as a statutory power of decision or pursuant to the common law, all prerogative remedies are available. We were not asked to review the rights and obligations of the Receiver and we make no comment on whether the Receiver owed a duty to the Co-op. We do conclude, though, that the Region owed a duty of procedural fairness to the Co-op, despite the receivership.
>
> [94] The applicants seek an Order quashing and setting aside the decisions and actions of the Region which resulted in the Region attempting to acquire the assets of the Co-op. They also wish to be given a meaningful opportunity to preserve the future of Thornhill Green as a co-op and to ensure that control of the Co-op is returned to the members.
>
> [95] The request to quash the decisions and actions of the Region, pursuant to s. 95 of the SHRA, which would result in the Region having to reconsider the issue of its consent, is not realistic given the urgent need to complete the costly necessary repairs, and the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver in the first place. The Co-op has ample opportunity to address all issues fully and fairly in the proceedings pending before Morawetz J.
>
> [96] We, therefore, dismiss the motion to quash the Region's consent to the sale of the Co-op under s. 95 of the SHRA.
>
> [97] Is there an alternative remedy which is appropriate, given the novel facts and circumstances of this case? In its submissions, the Co-op made it clear that it wishes to have the opportunity to solve the outstanding problems and to continue to function as a co-op. This is not an issue that we can determined in this application for judicial review.
>
> [98] However, as noted above there is an outstanding motion before the Commercial List requesting the sale of the Co-op. That motion was brought by the Receiver and has the support of the Region. Because of the novel circumstances of this case, while we make no order, it would have been preferable for the Receiver to have sought directions from the Court before the Region took steps to obtain the statutory consents. Again, while we make no order, we express the view that, having regard to the present circumstances, it

> would be desirable for the Commercial List to determine all issues raised, or to be raised, between the parties, as directed by the judicial team leader. All matters can then be decided in one forum.
>
> [99] For the above reasons, the application to quash the s. 95 consent is dismissed. The issues the Co-op wishes to raise with respect to the future viability of the Co-op, we suggest, should be heard by the Commercial List where the Co-op will have ample opportunity to fully and fairly address all issues.

[10] In accordance with the decision of the Divisional Court, the parties provided further written submissions in respect of these outstanding motions. Submissions were received from counsel on behalf of Thornhill Green and CHFC on March 27, 2009. Responding submissions were received from the Region dated April 8, 2009 and from the Receiver also dated April 8, 2009. Reply submissions were then received from Thornhill Green and CHFC dated April 17, 2009.

[11] Counsel to Thornhill Green and CHFC referenced, at paragraph 27 of their Reply submission that the submissions of the Receiver and the Region both emphasized that the respondents (Thornhill Green and CHFC) "have not proffered any new solutions" and that "there is no evidence of any new measures proposed by Thornhill Green to address the problems with the Co-op and its future viability".

[12] Counsel to Thornhill Green and CHFC submitted that the elements of a going-forward solution for preserving Thornhill Green have been in evidence before the court for some time. Their Reply submission goes on to identify certain elements of the solution at paragraph 29. However, a review of the references indicates that the evidence referred to was on the record prior to the original return date of the Receiver's motion in July 2008. In particular, numerous references are made to the affidavit of Nicholas Gazzard affirmed June 11, 2008.

[13] Therefore, in considering the Receiver's motion, the record remains that which was before the court in October and November 2008. The additional submissions, received in March and April 2009, have been considered as part of the argument relating to the October and November 2008 hearings.

[14] Prior to considering the motion of the Receiver, it is necessary to address the cross-motion of Thornhill Green.

[15] The cross-motion raises two issues:

(a) whether the court should vary the Appointment Order by removing the Receiver's power of sale (including the removal of paragraph 7(l)); or

(b) in the alternative, whether the Receiver has sufficiently shown the need to exercise the power of sale.

[16] On July 16, 2006, the Region appointed the Receiver pursuant to s. 116(1) 5 of the *Social Housing Reform Act* (SHRA"). On June 26, 2007, the Region obtained the

Appointment Order appointing the Receiver pursuant s. 116 (1) 6 of the SHRA and s. 101 of the *Courts of Justice Act* ("CJA").

[17] There has been no appeal of the Appointment Order.

[18] On May 15, 2008, the Receiver brought the motion for approval to sell the Property to HYI in exchange for the HYI's assumption of the existing mortgages registered against the Property. HYI is a wholly-owned subsidiary of the Region that is dedicated to administering the Region's social housing projects.

[19] This motion to vary the Appointment Order was served on October 21, 2008, two days before the scheduled hearing of the Receiver's motion to approve the Transaction.

[20] This cross-motion is brought pursuant to the provisions of paragraph 33 of the Appointment Order which provides that any interested party may apply to the court to vary or amend this order on not less than seven days' notice to the Receiver.

[21] Thornhill Green and CHFC submit that the remedy of sale is inappropriate in the context of a social housing complex and that the power of sale should not have been included in the Appointment Order.

[22] I agree with the submission of the Region that this is language of appeal – not a comeback motion. Further, a motion to vary is not a substitute for an appeal. See: *Textron Financial Canada Ltd. v. Beta Brands Limited*, [2007] O.J. No. 2998 and *Canadian Commercial Bank v. Pilum Investments Ltd.* [1987] O.J. No. 29. I also agree with the submission of counsel to the Receiver to the effect that the jurisdiction to vary an order must be exercised sparingly and comeback provisions are intended to apply in situations where parties impacted by an order are not provided with notice of the hearing giving rise to the order.

[23] This motion to vary the Appointment Order was not brought promptly. Thornhill Green and CHFC accepted the provisions of the Appointment Order. Further, neither the Co-op nor CHFC point to any error in the Appointment Order nor do they allege any fraud, nor do they allege the discovery of any new facts or evidence. Under Rule 59, the court has discretion to vary or set aside an order based on error, fraud or new evidence. Thornhill Green and CHFC do not rely on any evidence of error, fraud or new facts discovered. The test under Rule 59 has not, in my view, been met.

[24] It is also noted that in a Chambers appointment before Campbell J. on June 13, 2008, it was ordered, in part, that any additional motions for relief regarding the Receiver were to be served by June 27, 2008. There does not appear to be any explanation for why the motion was not brought in compliance with the endorsement of Campbell J.

[25] Thornhill Green was involved prior to the granting of the Initial Order and, in my view, any utilization of the comeback clause should have been made immediately or shortly after the granting of the Appointment Order. In my view, the motion by Thornhill Green and CHFC is nothing but a late attempt to appeal the decision of Pepall J.

[26] No reason has been given for the delay. Thornhill Green, even though they did not attend in court on the application for the Appointment Order (despite being served)

have known about the order since June, 2007 and only gave notice that they sought to rely on the comeback provision to vary the Appointment Order in a very fundamental and significant way, two days prior to the motion for sale. I do not believe this to be an appropriate use of the comeback provision.

[27] The power to sell the assets found at paragraph 7(l) of the Appointment Order is language which is included in the Model Receivership Order and I agree with the submission of counsel to the Region that a power of sale is essential and a fundamental power granted in court-appointed receiverships.

[28] In addition, the power of sale is included in one of the legislated powers of a receiver appointed privately under s. 116(1) 5 of the SHRA and which power was then included in the Appointment Order.

[29] It is acknowledged that the circumstances surrounding a potential remedy of sale in the context of a social housing complex, is arguably quite different than a remedy of sale in respect of an operating business, but that does not alter the fact that Ontario Regulation 368/01 under the SHRA, Section 18(4) provides for broad and various powers of a receiver appointed under s. 116(1) of the SHRA. Section 18(4)(3) provides the receiver with the power to, "sell, lease, give as security or otherwise dispose of the housing project assets of the housing provider". The Appointment Order at paragraph 7 (w) further empowers the Receiver to exercise any powers listed at Section 18(4) of Ontario Regulation 368/01, under the SHRA.

[30] I also agree with counsel to the Receiver that the Region is a secured creditor of Thornhill Green and the Appointment Order makes it clear that the Receiver was not only appointed pursuant to the provisions of the SHRA, but also pursuant to s. 101 of the CJA. The powers provided to the Receiver in the Appointment Order are consistent with the powers routinely granted to receivers appointed under the CJA.

[31] In my view, the Receiver properly has the power to sell. The main motion addresses the exercise of such a power.

[32] For the foregoing reasons, I conclude that the cross-motion of Thornhill Green and CHFC has no merit. It follows that the cross-motion is dismissed.

[33] I now turn to the motion of the Receiver to approve the Transaction.

[34] The Receiver, Thornhill Green and the Region each filed a Factum and the Receiver filed a Supplementary Factum. In addition, further written argument was provided by all parties subsequent to the release of the decision of the Divisional Court.

[35] In addition to seeking approval of the Transaction, the Receiver requests an Approval and Vesting Order transferring the Purchased Assets, as defined in the Purchase Agreement, to HYI.

[36] The Receiver also seeks approval for the forms of lease agreements, as attached schedules to the draft Approval and Vesting Order, as well as a declaration that, upon the filing of a Certificate, (i) all occupancy agreements for the Property would be deemed to be terminated and replaced by the leases approved by the court; (ii) any lease agreements

remaining to be executed between the tenants of the Property and HYI would be deemed to be executed, valid and in full force and effect; and (iii) the housing units (the "Units") at the Property would be no longer part of any housing co-operative.

[37] The Receiver also requests approval of its First Report.

[38] It is clear that certain of the issues involved in this receivership are unique to the fact that this matter involves a rental housing project that is part of the social housing network in the Region.

[39] The Region initially appointed the Receiver pursuant to s. 116(1) 5 of the SHRA to take control of the Property following a determination by the Region that the Board of Directors of Thornhill Green (the "Board") had not fulfilled its responsibilities in respect of the Property. The Region appointed the Receiver after the Board had failed to adequately respond to several concerns raised by the Region, including financial management issues and problems with the operation of the Property. In late 2005, the Board identified the need for certain capital work and repairs to the Property and approached the Region for additional funds. The Region confirmed through an independent consultant that $2.1 million was required for immediate capital work and repairs to the Property. The Receiver was directed by the Region to stabilize the finances of Thornhill Green and oversee capital works in excess of $2 million and repairs (the "Work") at the Property.

[40] The Receiver was subsequently appointed by the Court to continue its mandate of stabilizing the finances of Thornhill Green and to continue with the Work.

[41] The Region subsequently advised the Receiver that, due to past problems with the financial management and operation of the Property by the Board, the Region would not provide additional funds to the Board to complete the Work. The Region further advised that it would only provide funding to complete the Work, if the Property was transferred to HYI.

[42] The Receiver states that transferring the assets of Thornhill Green to HYI is the only viable option to ensure the rehabilitation of Thornhill Green and the Property. The Receiver further states that the Property requires funding, which funding, will only come if the Property is transferred to HYI and without proper funding, the Property will not be rehabilitated and will deteriorate further. The Receiver is also of the view that the transfer to HYI will be of benefit to all of the residents of Thornhill Green as it would result in Thornhill Green being properly funded and managed going forward as part of the Region's social housing stock.

[43] The Divisional Court concluded that the actions of the Region were reviewable and, further, that the Region owed a duty of procedural fairness to Thornhill Green, despite the receivership. However, the Divisional Court dismissed the motion to quash the Receiver's consent to the sale of Thornhill Green under s. 95 of the SHRA. The Divisional Court determined that the request to quash the decisions and actions of the Region, which would result in the Region in having to reconsider the issues of its consent, was not realistic given the urgent need to complete the costly necessary repairs, and the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver in the first place.

[44] I place special importance on the comments of the Divisional Court relating to the unresolved underlying financial problems of the Co-op that precipitated the appointment of the Receiver.

[45] These underlying financial problems lead to my conclusion that the proposed sale by the Receiver to HYI has to be approved. The *status quo* is not an acceptable alternative and the only viable alternative to the *status quo* is the proposed sale to HYI. I have reached this conclusion for a number a reasons.

[46] Thornhill Green's financial statements show an operating deficit. Although the deficit has been reduced and is projected to be paid off within five years dating from the implementation of the deficit reduction plan in 2007, it does not alter the fact that Thornhill Green is in a deficit position.

[47] Prior to the appointment of the Receiver, the Board had depleted the Capital Reserve Fund to pay the operating costs of the Property such that by June 30, 2006 there were minimal funds in the Capital Reserve Fund. The Receiver corrected this situation so that as at March 31, 2008, the Capital Reserve Fund had increased to approximately $91,000. However, this is a far cry from the amount required to address the Work.

[48] The Region recognized that the Work was required and indicated that it was prepared to fund the repairs via a loan to Thornhill Green. However, because the Region was of the view that it was the Board's mismanagement that resulted in the need for these repairs and the lack of funds to address them, the Region only agreed to fund the Work if a receiver was placed in control of Thornhill Green. The Receiver has indicated that some of the Work has been completed but it is unable to move forward to complete remaining Work without additional funding from the Region.

[49] The Receiver identified three options available to ensure that the Work was completed and that the Property preserved and managed properly going forward:

(a) return governance and responsibility for Thornhill Green to its members, either to the existing Board or a new board composed of different members;

(b) continue the receivership indefinitely until such time as the Work is completed; or

(c) transfer the Property to a new entity capable of completing the Work and managing the Property as social housing going forward.

[50] The Receiver, having consulted with the Region, concluded that the only viable option for Thornhill Green and its stakeholders, and in particular its residents, was to transfer the Property to the Purchaser, as:

(a) a newly elected board would still require additional financing as Thornhill Green does not have sufficient funds to pay for Phase III Work;

(b) the Region advised that it will not provide funding to a new board for the completion of the Work, as it does not have confidence in the Board or the members of Thornhill Green;

(c) the Region has similarly advised that it will not approve the taking on of any additional debt by Thornhill Green;

(d) the Region opposes the return of the Property to the Board, based on the Board's past failure to properly manage the finances of Thornhill Green and the Property;

(e) the Board does not have specialized knowledge with construction;

(f) HYI has technical expertise in respect of operating social housing projects such as Thornhill Green and the Region is prepared to provide funding to HYI; and

(g) continuing the receivership is not as cost effective or beneficial for the residents in the long run.

[51] In order to facilitate the transfer of the Property to HYI:

(a) the Regional Council for the Region has approved the transfer of the Property to the HYI;

(b) the Region has the additional funding of $600,000 to complete the Phase III Work and a further $135,000 to cover the cost of any land transfer taxes;

(c) on April 11, 2008, the Ministry provided its consent to the proposed Transaction, such consent being required under the provisions of the SHRA. One of the conditions for the Ministry providing its consent is that the Property be maintained as part of the Region's social housing stock and operated in accordance with the SHRA;

(d) HYI has advised the Region and the Receiver that it has agreed to acquire the Property and maintain the Property as part of the Region's social housing stock and, as the Receiver notes, the interests of all stakeholders, including the Region, the Ministry, the members and the Purchaser would thus be satisfied and protected.

[52] The Receiver does recognize that if HYI acquires the Property, the Property will no longer be operated under co-operative governance. Governance will be provided by the HYI's board of directors and management.

[53] It is also recognized that the Transaction will affect the rights of the members of Thornhill Green. HYI requires that all of its tenants sign a lease agreement prior to the tenants being provided with access to the units. In this case, the members are already in possession of their units and will remain so. HYI, therefore, requires that the existing occupancy agreements be terminated and all of the residents at Thornhill Green enter into lease agreements with the Purchaser.

[54] The Receiver advises that the proposed form of lease agreements are similar in form to the lease agreements used by the Purchaser in its other properties and include express provisions for the calculation of subsidized rent, where applicable, and specific references to the SHRA. The Receiver stresses that the residents of Thornhill Green will

continue to occupy the same units as they currently do and that they will continue to pay rent, only this time to HYI.

[55] Even with the passage of time from the hearing of this motion, the view of the Receiver has not altered its views as can be seen from paragraphs 24 – 27 of its submissions filed on April 8, 2009:

> 24. The respondents have opposed the Receiver's motion, launched a new proceeding for judicial review of the Region's decisions, brought several new motions of their own, appealed to an appellate court when they lost one of those motions, and have now sought leave to appeal the decision of the Divisional Court – the very decision they argue supports their own positions. Yet, in all this, they have failed to address the basic problem facing this co-operative, namely, that it was unable to properly manage Thornhill Green and its financial affairs. Further, they have failed to come up with any solution to the fact that there is a great deal of capital work remaining to be done to ensure that the Property does not deteriorate further, and the co-operative has no funds with which to do the work.
>
> 25. The respondents postulate that, given further time, the parties may be able to work out a solution together. However, to date, they have not come forward with any solutions. Further, given the amount of time that has already passed, it is not clear when the respondents believe that they will be able to come up with such a solution, and nothing has been provided to the Receiver in that regards.
>
> 26. Further, the Receiver has brought a motion to this Honourable Court. The Receiver has requested a decision from this Honourable Court. The Divisional Court has referred the issue of the sale of the Property back to this Honourable Court. A dismissal of the Receiver's motion will only prolong the problems at Thornhill Green, leading to further difficulties for its residents. The receivership must be brought to an end to bring stability to the housing project and its residents, but there needs to be a sustainable long-term solution in place before this can occur.
>
> 27. The Written Argument of the respondents fails to raise any new arguments or propose any new solutions to the problems identified by the Receiver in its several reports to this Honourable Court, and acknowledged by the Divisional Court in its recent decision. The reports and the recommendations of the Receiver are consistent and clear. In the Receiver's view, the only viable solution to the ongoing and longstanding problems of Thornhill Green remains the transfer of the housing assets to HYI.

[56] Thornhill Green and CHFC object to the proposed sale for several reasons, including that:

(a) Thornhill Green is financially and organizationally viable on a going forward basis;

(b) the proposed sale is not in accordance with various principles and requirements for such sales (including the Region and its wholly-owned subsidiary obtaining a "windfall" of Thornhill Green's substantial equity of at least $5.6 million since the subsidiary would obtain Thornhill Green by simply assuming its liabilities);

(c) the Region's conduct raises serious questions about the proposed sale;

(d) the Receiver's conduct raises serious questions about the proposed sale;

(e) the proposed sale would have a substantially negative impact upon statutory Co-op rights.

[57] I address these objections in the order in which they were presented.

[58] In their materials, Thornhill Green and CHFC argued that:

(a) the Property has a "market value" of $14.5 million and would be "very valuable on the open market because of its location and surroundings and other features;

(b) the Property's liabilities are approximately $8.9 million;

(c) there is net equity of $5.6 million;

(d) to permit the transfer to the Purchaser would be to let the Purchaser obtain the Property at a bargain price or a "windfall price".

[59] In my view, these arguments are ill conceived. The submissions ignore the legal context in which Thornhill Green holds the Property. First, the Property cannot be sold on the open market. Pursuant to s. 95 of the SHRA, Thornhill Green is unable to "transfer, lease or otherwise dispose of or offer, list, advertise or hold out for transfer, lease or other disposal" the Property without the consent of the Minister.

[60] Secondly, the approach advocated by Thornhill Green fails to take into account that Thornhill Green has provided certain covenants to the Region in respect of the credit facilities made available by the Region such that Thornhill Green cannot encumber or dispose of any part of the Property without the consent of the Region. Further, there is no requirement that the Region be compelled to advance further credit facilities to Thornhill Green.

[61] Thirdly, HYI proposes to obtain the Property for the value of the secured loans and has also agreed to upgrade and fund long-term capital and maintenance needs. The Receiver's submissions makes it clear that these costs are quite substantial due to the age of the buildings on the Property.

[62] Fourthly, even if the Property were sold on the open market, Thornhill Green would be required to distribute any remaining surplus to a charitable organization or another non-profit housing co-operative pursuant to the CCA and its own articles of incorporation.

[63] Fifthly, the submission as outlined in paragraph 88 of the first Gazzard affidavit that Thornhill Green "is in a good position to access [funds for capital repairs] due to its substantial level of equity" is misguided. Pursuant to s. 95(3) of the SHRA, Thornhill Green cannot encumber the Property unless it obtains the consent of the Ministry.

[64] Consequently, the submission that net equity of $5.6 million exists in relation to the Property is, in my view, without merit. Due to the relevant statutory framework, this equity is "phantom" equity and is not comparable to equity held by a business corporation.

[65] Thornhill Green submits that the proposed sale is not in accordance with various principles and requirements for such sales and the motion should accordingly be denied. In support of its position, counsel to Thornhill Green references *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), 1991 CanLII 2727 (C.A.). The Court of Appeal has set forth the factors to be considered on a proposed sale by a court-appointed receiver:

(a) whether the receiver has a made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[66] In this case, the Receiver has identified that Work is required and requested additional funding from the Region to complete this Work. The Region has indicated that it will not provide the necessary funding unless the Property is transferred to HYI.

[67] The Receiver also considered that the Property is part of the Region's social housing stock and that the Ministry has required that it be operated as social housing going forward. Consequently, the Receiver was not in a position to offer up the assets of Thornhill Green through a traditional commercial sale process. The Receiver was accordingly limited in its options but has negotiated a Transaction where the Property can be sold to an experienced social housing provider. In this respect, I am satisfied that the Receiver has considered the views of all stakeholders, including Thornhill Green. The Receiver has taken into account the specialized circumstances of the social housing context. The proposed Transaction satisfies the Region's requirement for the advance of further funding and preserves the Property as social housing. The Transaction also protects the interests of secured creditors as the Purchaser has agreed to assume the secured indebtedness of Thornhill Green. The residents also benefit as a result of a transfer of the assets to an experienced social housing provider that has the knowledge and expertise to improve Thornhill Green's financial situation and to manage the Property properly.

[68] With respect to the submission of Thornhill Green and CHFC that, due in part to the Region's conduct, the Receiver was unable to exercise its duty to act "reasonably, prudently and fairly and not arbitrarily" in selling the assets of Thornhill Green, I am not prepared to give effect to this submission. The Region is not required to extend

additional funding or credit to the Thornhill Green. After reviewing the matter, the Region took steps to appoint the Receiver. Although, the Divisional Court found fault in the manner in which the Region initially proceeded, it nevertheless declined to grant an order quashing and setting aside the decisions and actions of the Region which resulted in the Region attempting to acquire the assets of Thornhill Green. In its conclusion, the Divisional Court chose to focus on the practical realities facing Thornhill Green, namely, that the unresolved underlying financial problems of Thornhill Green required attention. It was not the actions of the Region that caused the financial problems of the Co-op. The Region took steps to address the issue which resulted in the appointment of the Receiver.

[69] With respect to the Receiver's conduct, Thornhill Green submits that the Receiver has substantially violated the fiduciary duties it owes to all interested parties, including Thornhill Green and its members.

[70] I do not give effect to this submission. The Receiver has been in place for a considerable period of time. I have dismissed the cross-motion to vary the powers of the Receiver and the motion to discharge the Receiver has been withdrawn. I am satisfied that the Receiver has acted within its mandate and has reported to court and has proposed a Transaction which, in the circumstances, I find to be fair and reasonable. In my view, the Receiver has carefully considered the available options. In arriving at its recommendation that the Transaction be approved, I find that the Receiver has taken into account the interests of the members of Thornhill Green and has proposed a resolution that substantially protects the interests of the residents. The Receiver has also proposed a transaction which reflects the commercial realities of the situation and addresses in a comprehensive manner the financial problems currently facing Thornhill Green.

[71] I am satisfied that the Receiver has acted fairly and diligently in carrying out its activities during its appointment and, in particular, the sales process. In my view, the Receiver has acted in accordance with the *Soundair* principles set out above.

[72] It is recognized that currently each member of Thornhill Green is the beneficiary of protected housing rights, including occupancy rights and the right to participate in management, confirmed in the CCA and that a sale to HYI will eliminate occupancy rights of members and replace them with tenancy rights.

[73] However, the provisions of the SHRA, including those provisions dealing with the Receiver's powers to sell the assets of a housing provider, apply despite any act or regulation to the contrary. Further, pursuant to s. 156 of the SHRA, where there is a conflict between any act or regulation and the SHRA, it is the SHRA that prevails.

[74] The inescapable conclusion is that the co-operative governance model of Thornhill Green has not worked as envisioned. In my view, an operational change is necessary.

[75] The proposed Transaction, although it does result in a change of status, does preserve the ability of the members to live in their same units with the same or similar rental obligations. HYI has similar objectives to those of Thornhill Green – to provide social housing in an effective and efficient manner. Residents will have rights as tenants of the Property and will also benefit HYI completing the Work and operating the Property in a proper manner. The tenants' rights will be governed by the *Residential*

Tenancies Act whose purpose includes the protection of residential tenants and to balance the rights and responsibilities of residential landlords and tenants. The tenants will be able to raise or address any concerns or issues regarding their units and their property to the management of HYI, just as they have been able to do with the Board.

[76] I accept the Receiver's submission that the change from the co-operative governance to the units being owned and managed by the Purchaser will ensure that the Property is managed for the express purpose of providing social housing.

[77] In order for the Transaction to be implemented, it is necessary that the occupancy agreements be terminated and replaced by lease agreements. The proposed lease agreements contain similar terms to the occupancy agreements for the units, including terms regarding the calculation of rent, the services provided to the units and the rights of the landlord and the tenant. These agreements are approved.

[78] Although there will be an impact in the change in status on the residents, it must be recognized that the *status quo* has not worked and change is necessary. The proposed change is, in these circumstances, fair, reasonable and equitable.

[79] In the result, the motion of the Receiver is granted. The Transaction is approved as is the form of Vesting Order. The declaration in respect of the Certificate relating to the occupancy agreements is also granted. The Reports of the Receiver filed in connection with this motion are also approved.

[80] The Region and the Receiver are entitled to their costs as against Thornhill Green and CHFC relating to the cross-motion. Costs outlines have been filed by the Region and the Receiver. If the parties are unable to agree on quantum, a brief written submission may be filed by Thornhill Green and CHFC within 30 days.

[81] The Divisional Court awarded "the costs in respect of this Application in the cause, being the cause pending before Morawetz J. on the Commercial List". Costs were fixed at $20,000.00 inclusive of all fees, disbursements and GST. The respondents have been successful and are accordingly entitled to these costs.

MORAWETZ J.

DATE: July 16, 2009

TAB 9

TRANSCRIPTION OF THE ENDORSEMENT OF THE HONOURABLE MADAM JUSTICE HOY ON SEPTEMBER 23 & 24, 2009

Mr. Graff and Ian Aversa for the Applicants
Mr. Rappos for the Monitor
Ms. Galessiere for various landlords

September 23, 2009 and September 24, 2009

The Applicants, which are in CCAA, c.o.b. as franchisors (or landlord of franchisees) of a dollar store concept: "Buck or 2". They have secured a $750,000 financing commitment for a plan of compromise and arrangement (the "Plan") from a group comprised of existing shareholders, some of who are also secured creditors, and some of who have made available a yet undrawn DIP facility. A significant operational restructuring has been completed resulting, *inter alia*, in the disclaimer of about 40 leases.

At this juncture, the Applicants seek an extension of the stay to permit presentation of the Plan to affected creditors, approval of the Monitor's 4th report, its fees and disbursements, approval of a claims bar process and claims bar date, approval of materials to be distributed to creditors affected by the Plan and a procedure for calling and holding the creditors meeting and voting on the Plan, approval of the method they propose to calculate the amount of landlords' claims, for both voting and distribution purposes, and setting a date for a sanction hearing.

In the interests of cost, it is proposed that the claims bar materials and plan and meeting materials be sent to affected creditors at the same time, and not sequentially.

The Applicants have incorporated several changes to the materials, at my request. I will not comment on all of them.

With respect to the calculation of landlords claims for both voting and distribution purposes, the Applicants propose the formula in 65.2 of the BIA. The Applicants advise that not all landlords were served in respect of today's attendance. Ms. Galessiere advises that landlords are generally happy to have the formula in 65.2 of the BIA apply: it provides certainty to all, and avoids lengthy wrangles as to the extent to which the duty to mitigate should affect the calculation of damages. Because not all landlords have been served, the Claims Process and Bar and Creditors' Meeting Orders have been revised to provide that it is open to a landlord which disputes the use of such formula to calculate its claims for voting and distribution purposes to bring a motion, seeking an order for determination of the actual damages sustained as a result of the resiliation. I am told that the landlords collectively represent between 75-85% of the roughly $10M of claims proposed to be compromised by the Plan, and that by number, they account for about 40 of the 400 affected creditors.

The Proof of Claim which is part of the Claims Bar Process requires creditors to make a 'Distribution Election' – ie. if the Plan is approved, to elect an immediate pro rata share of $750,000 (less certain amounts) or a pro rata share of $600,000 now and a pro rata share of $300,000 in one year. The documents to be distributed to creditors are 'dense'. They will be sent before the Monitor's report. I have requested the Applicants and the Monitor to make clear

that payment is subject to approval of the Plan and that the $300,000 is not set aside, and will be available only to the extent the Applicant has such funds at the time.

The Monitor has, at my request, prepared a covering letter, which addresses the foregoing and will hopefully make the package of materials provided to creditors more understandable.

The requested orders shall issue in the forms signed by me.

"Justice Hoy"

5807629.1

23 Sept 2009

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 EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

Court File No. CV-09-8084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

MOTION RECORD
(returnable September 23, 2009)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

Steven L. Graff (LSUC # 31871V)
Ian E. Aversa (LSUC # 55449N)

Tel: 416.863.1500
Fax: 416.863.1515

Solicitors for the Applicants

and Ian Aversa
Mr Graff for the Applicants.
Mr. Rappos for the monitor
Ms. Galessiere for various landlords.

September 23. 2009 and September 24. 2009

The Applicants, which are ~~[illegible]~~ C.C.A.A. c.c.6. as franchisors (or landlord of franchisees) of a dollar store concept: "Buck or 2". They have secured a $750,000 financing commitment for a plan of compromise & arrangement ("the Plan") from a group comprised of existing shareholders, some of who are also secured creditors, & some of who have made available & yet undrawn DIP facility. A significant operational restructuring has been completed resulting, inter alia, in the disclaimer of about 40 leases.

At this juncture, the applicants seek an extension of the stay to permit presentation of the Plan to affected creditors,

approval of the monitor's 4th report & disbursements, approval of a claims bar for claims bar date, approval of materials disseminated to creditors affected by the Plan and a procedure for calling & holding the creditors meeting & voting on the Plan, approval of the method they propose to calculate the amount of landlords' claims for both voting & distribution purposes, & setting a date for a sanction hearing.

In the interests of cost, it is proposed that the claims bar materials & plan & meeting materials be sent to affected creditors at the same time & not sequentially.

The Applicants have incorporated several changes to the materials, at my request. I will not comment on all of them.

With respect to the calculation of landlords claims for both voting & distribution of purposes, the Applicants propose the formula in 65.2 of the BIA. The Applicants advise that not all landlords were served in respect of today's attendance. Ms. Galessiere advises that landlords are generally happy to have the formula in 65.2 of the BIA apply: it provides certainty to all, & avoids lengthy

wrangles as to the extent to which the duty to mitigate should affect the calculation of damages. Because not all landlords have been served, the Creditors' Meeting Claims Process and Bar and Orders have been revised to provide that it is open to a landlord which disputes the use of such formula to calculate its claims for voting & distribution purposes to bring a motion, seeking an order for determination of the actual damages sustained as a result of the resiliation. I am told that the landlords collectively represent between 75-85% of the roughly $10M of claims proposed to be compromised by the Plan, and that, they account for about 40-50% of the 400 affected creditors.

The Proof of Claim which is part of the Claims Bar Process requires creditors to make a 'Distribution Election' – ie – if the Plan is approved, to elect an immediate pro rata share of $750,000 (less certain amounts) or a pro rata share of $600,000 now & a pro rata share of $300,000 in one year. The documents to be distributed to creditors are 'dense'. They will be sent before the Monitor's report. I have requested the applicants & the Monitor to make (re the Distribution Election) clear that the $300,000 is not set aside, & will be available

payment is subject to approval of the Plan & that

only to the extent the applicant has such funds @ the time.

The Monitor has, at my request, prepared a covering letter, which, as I hope fully addresses the foregoing & make the package of materials provided to creditors more understandable.

The requested orders shall issue in the forms signed by me.

Alan Alexander Bono
(HOY)

Court File No. CV-09-8084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAM	)	~~MONDA~~WEDNESDAY (JSN), THE 23RD DAY
	)	
JUSTICE HOY	)	OF SEPTEMBER, 2009

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 EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE
JUSTITIA

CREDITORS' MEETING ORDER

THIS MOTION, made by Extreme Retail (Canada) Inc. and Extreme Properties Inc. (collectively, the "**Applicants**"), for an order substantially in the form appended to the Applicants' Notice of Motion was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Ted Agnew sworn September 15, 2009, and the fourth report of the Monitor dated September 15, 2009 (the "**Fourth Report**"), and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for Cadillac Fairview Corporation and counsel for Ivanhoe Cambridge I Inc. (on behalf of Les Galeries de Hull Limitee), Morguard Investments Ltd., 20VIC Management Inc. (on behalf of OPB Realty Inc. and Capital City Shopping Centres Limited) and Retrocom Mid-Market REIT, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Susy Moniz sworn September 15, 2009, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record be and is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Consolidated Plan of Compromise and Arrangement of the Applicants dated September 15, 2009 (as it may be restated, supplemented or amended from time to time), which is attached as **Schedule "A"** to this Order (the "**Plan**").

FILING OF THE PLAN

3. **THIS COURT ORDERS** that the Applicants be and are hereby authorized and directed to file the Plan, to present the Plan to the Unsecured Creditors for their consideration in accordance with the terms of this Order and to seek approval of the Plan in the manner set forth herein.

4. **THIS COURT ORDERS** that the Applicants be and are hereby authorized to vary, amend, modify or supplement the Plan by way of a supplementary or amended and restated plan or plans of compromise or arrangement or both, at any time or from time to time prior to and during the Creditors' Meeting, provided that notice of any such variation, amendment, modification or supplement is given to all Eligible Voting Creditors prior to the vote being taken at the Creditors' Meeting (or any adjournments thereof), in which case any such supplementary or amended and restated plan or plans of compromise or arrangement or both shall, for all purposes, be and are deemed to be part of and incorporated into the Plan.

5. **THIS COURT ORDERS** that the Applicants be and are hereby authorized to vary, amend, modify or supplement the Plan at any time and from time to time after the Creditors' Meeting (both prior to and subsequent to the Sanction Order, if granted), without obtaining a further Order of this Court and without notice to any Unsecured Creditors, if the Applicants and the Monitor, acting reasonably and in good faith, determine that such variation, amendment, modification or supplement is of a technical or administrative nature that would

not be materially prejudicial to the interests of any of the Unsecured Creditors under the Plan and is necessary in order to give effect to the substance of the Plan or the Sanction Order.

NOTICE OF CREDITORS' MEETING AND INFORMATION PACKAGE

6. **THIS COURT ORDERS** that the Notice of Creditors' Meeting and the form of Proxy, in substantially the forms attached to this Order as **Schedules "B"** and **"C"**, respectively, be and are hereby approved.

7. **THIS COURT ORDERS** that the Applicants or the Monitor shall send the following documents (collectively hereinafter referred to as the "**Information Package**") by no later than five (5) Business Days after the issuance of this Order to each Unsecured Creditor that the Applicants and/or the Monitor is/are aware has an Unsecured Claim, including, without limitation, all of the parties listed in paragraph 3 of the Claims Process and Bar Order, by ordinary mail or courier at the address appearing on such Creditor's Proof of Claim or Lease Terms Form filed with the Monitor or such other address subsequently provided to the Monitor by such Creditor in accordance with the Claims Process and Bar Order, or at such Creditor's last known address as recorded on the books and records of the Applicants if such Creditor has not specified an address in its Proof of Claim or Lease Terms Form filed with the Monitor:

(a) the Notice of Creditors' Meeting, in substantially the form attached hereto as **Schedule "B"**;

(b) the form of Proxy, in substantially the form attached hereto as **Schedule "C"**; and

(c) this Creditors' Meeting Order.

8. **THIS COURT ORDERS** that notwithstanding paragraph 7 of this Order, the Monitor may from time to time, subject to paragraph 4 of this Order, make minor changes to the Information Package as the Applicants and the Monitor consider necessary or desirable to conform the content thereof to the terms of the Plan or this Order or to describe the Plan.

9. **THIS COURT ORDERS** that the Monitor shall cause a copy of the Information Package, this Order, including all Schedules, and the Monitor's Fourth Report to be posted on

the Monitor's website (www.kpmg.ca/extremeretail) as soon as practicable after the granting of this Order.

10. **THIS COURT ORDERS** that the Monitor shall dispatch by ordinary mail or courier, as soon as practicable following a request therefor, a copy of the Information Package to any Person who, no later than five (5) Business Days prior to the Creditors' Meeting (or any adjournment thereof), makes a written request for it.

PUBLICATION OF NEWSPAPER NOTICE

11. **THIS COURT ORDERS** that as soon as practicable and, in any event, by no later than five (5) Business Days prior to the Creditors' Meeting, a notice of the Creditors' Meeting, in substantially the form attached as **Schedule "D"** hereto (the "**Newspaper Notice**"), shall be published once by the Monitor in the Globe and Mail (National Edition).

12. **THIS COURT ORDERS** that the Newspaper Notice be and is hereby approved.

NOTICE SUFFICIENT

13. **THIS COURT ORDERS** that the publication of the Newspaper Notice, the sending of a copy of the Information Package to each Unsecured Creditor that the Applicants and/or the Monitor is/are aware has an Unsecured Claim, including, without limitation, all of the parties listed in paragraph 3 of the Claims Process and Bar Order and the posting of the Information Package on the Monitor's website, in the manner set out in paragraphs 7, 9 and 11 of this Order, shall constitute good and sufficient service of this Order, the Plan and the Notice of Creditors' Meeting on all Persons who may be entitled to receive notice thereof or of these proceedings, or who may wish to be present in person or by Proxy at the Creditors' Meeting or in these proceedings, and no other form of notice or service need be made on such Persons and no other document or material need be served on such Person in respect of these proceedings. Service shall be effective, in the case of mailing, three (3) Business Days after the date of mailing, in the case of service by courier, on the day after the courier package was sent, and in the case of service by fax or e-mail, on the day after the fax or e-mail was transmitted, unless such day is not a Business Day, or the fax or e-mail transmission was made after 5:00 p.m. (Toronto time), in which case, on the next Business Day.

CREDITORS' MEETING

14. **THIS COURT ORDERS** that a representative of the Monitor shall preside as the chair of the Creditors' Meeting (the "**Chair**") and shall decide all matters relating to the rules and procedures at and the conduct of the Creditors' Meeting in accordance with the terms of the Plan, this Order and further Orders of this Court. The Chair may adjourn a Creditors' Meeting at his/her discretion.

15. **THIS COURT ORDERS** that the Applicants shall call, hold and conduct a meeting on Friday, November 6, 2009 at the office of the Monitor, Commerce Court West, 199 Bay Street, Suite 3300, Toronto, Ontario at 10:00 a.m. (Toronto time) for the Unsecured Creditors, or as adjourned to such place and time as the Chair may determine, for the purposes of considering and voting on the Plan and transacting such other business as may be properly brought before the Creditors' Meeting.

ATTENDANCE AT CREDITORS' MEETING

16. **THIS COURT ORDERS** that the only Persons entitled to notice of, attend or speak at the Creditors' Meeting are the Eligible Voting Creditors and their respective proxy holders, representatives of the Applicants and the Monitor, the legal counsel and financial advisors of any of the foregoing, the Chair, the Scrutineers and the Secretary (as defined below). Any other Person may be admitted to the Creditors' Meeting only on invitation of the Applicants or the Chair.

17. **THIS COURT ORDERS** that an Eligible Voting Creditor that is not an individual may only attend and vote at the Creditors' Meeting if it has appointed a proxyholder to attend and act on its behalf at such Creditors' Meeting.

DISPUTED CLAIMS

18. **THIS COURT ORDERS** that if the amount of a Disputed Claim has not been resolved for voting purposes at least three (3) Business Days prior to the date of the Creditors' Meeting, the holder thereof shall be entitled to vote the amount of the Disputed Claim in accordance with the provisions of this Order, without prejudice to the rights of the Applicants, the Monitor or the Unsecured Creditor with respect to the final determination of the Disputed Claim for

distribution purposes and such vote shall be separately tabulated by the Monitor in accordance with paragraph 35 of this Order.

19. **THIS COURT ORDERS** that allowing an Eligible Voting Creditor to vote at a Creditors' Meeting shall not be construed as an admission that its Claim is a Proven Distribution Claim for distribution or any other purposes.

VOTING AT THE CREDITORS' MEETING

20. **THIS COURT ORDERS** that unless otherwise ordered by the Court or agreed to by the Applicants and the Monitor in writing, every Unsecured Creditor that has not submitted a Proof of Claim or a Lease Terms Form, as the case may be, in accordance with the procedure set out in the Claims Process and Bar Order prior to the Claims Bar Date, will not be entitled to vote on this Plan at the Creditors' Meeting in respect of its Unsecured Claim.

21. **THIS COURT ORDERS** that the only Persons entitled to vote at any Creditors' Meeting in person or by Proxy, subject to paragraphs 18 and 35 of this Order or as otherwise may be determined in connection with this Order, are the Creditors with Proven Voting Claims.

22. **THIS COURT ORDERS** that, subject to paragraphs 18 and 35 of this Order, each Unsecured Creditor shall have one (1) vote on the Plan, which vote shall have the cumulative value of all Unsecured Claims that are Proven Voting Claims as determined in accordance with the Claims Process and Bar Order or this Order.

23. **THIS COURT ORDERS** that a Landlord Repudiation Claim shall be calculated by the Monitor for voting and distribution purposes under this Plan based on the Proven Lease Terms for each Lease in respect of Repudiated Leased Premises, as the amount equal to the lesser of:

(a) the aggregate of:

(i) the Rent for the first year of such Lease following the date on which the repudiation and/or abandonment became effective; and

(ii) fifteen percent (15%) of the Rent for the remainder of the term of such Lease after that year; and

(b) the Rent for three (3) years of such Lease following the date on which the repudiation and/or abandonment became effective;

(hereinafter referred to as the "**Landlord Repudiation Claim Formula**").

24. **THIS COURT ORDERS** that the Landlord Repudiation Claim Formula to calculate a Landlord Repudiation Claim for voting and/or distribution purposes be and is hereby approved and the Monitor be and is hereby authorized and directed to calculate the Landlord Repudiation Claims in accordance with the Landlord Repudiation Claim Formula.

25. **THIS COURT ORDERS** that any Landlord may apply to this Court to object to the use of the Landlord Repudiation Claim Formula within ten (10) days of service of this Order on seven (7) days' notice to the Applicants and the Monitor.

26. **THIS COURT ORDERS** that subject to paragraph 39(h) of this Order, the Chair be and is hereby authorized to accept and rely upon Proxies, in substantially the form attached as **Schedule "C"** hereto.

27. **THIS COURT ORDERS** that no Person shall be entitled to vote on the Plan in respect of a Proof of Claim or Lease Terms Form filed by any Person in respect of an Unaffected Obligation.

28. **THIS COURT ORDERS** that the quorum required at a Creditors' Meeting shall be two (2) Eligible Voting Creditors present in person or by Proxy at the Creditors' Meeting.

29. **THIS COURT ORDERS** that if:

(a) the requisite quorum is not present at the Creditors' Meeting;

(b) the Creditors' Meeting is postponed by a vote of the majority in value of the Proven Voting Claims present in person or by Proxy; or

(c) the Chair otherwise decides to adjourn the Creditors' Meeting,

then the Creditors' Meeting shall be adjourned to such date, time and place as may be designated by the Chair. The announcement of the adjournment by the Chair or the posting of notice at a Creditors' Meeting of such adjournment shall constitute sufficient notice of the adjournment and the Applicants, the Monitor and the Chair shall have no obligation to give further notice to any Person of the adjourned Creditors' Meeting.

30. **THIS COURT ORDERS** that every question submitted to the Creditors' Meeting, except to approve the Plan resolution or an adjournment of the Creditors' Meeting, will be decided by a majority of votes given on a show of hands or, if at the discretion of the Chair a poll is conducted, by a majority in value of the Proven Voting Claims.

31. **THIS COURT ORDERS** that the Chair shall direct a vote by the Eligible Voting Creditors by way of written ballot on the resolution, in substantially the form attached as **Schedule "E"** to this Order, to approve the Plan.

32. **THIS COURT ORDERS** that the Monitor may appoint scrutineers (the "**Scrutineers**") for the supervision and tabulation of the attendance, quorum, and votes cast at the Creditors' Meeting. A Person designated by the Monitor shall act as secretary (the "**Secretary**") at the Creditors' Meeting and shall tabulate all Proven Voting Claims (and, if applicable, Disputed Claims) voted at the Creditors' Meeting.

33. **THIS COURT ORDERS** that following the vote at the Creditors' Meeting, the Monitor shall determine whether the Plan has been approved by the Required Majority of Creditors.

34. **THIS COURT ORDERS** that, upon the issuance of the Sanction Order, the votes cast by Eligible Voting Creditors at the Creditors' Meeting shall be binding upon all Unsecured Creditors, whether or not any such Creditor was present or voted at the Creditors' Meeting.

35. **THIS COURT ORDERS** that for voting purposes, the Monitor shall keep a separate record and tabulation of any votes cast in respect of Proven Voting Claims and Disputed Claims. The Chair shall file its report to this Court by no later than three (3) Business Days after the date of the Creditors' Meeting with respect to the results of the votes cast, including whether:

(a) the Plan has been accepted by the Required Majority of Creditors; and

(b) the votes cast by Unsecured Creditors with Disputed Claims for or against the Plan, if any, would affect the result of the vote.

36. **THIS COURT ORDERS** that if the vote on the approval or rejection of the Plan by Unsecured Creditors is decided by the votes in respect of the Disputed Claims, the Monitor shall report the result to the Court as soon as possible with a request to the Court regarding an expedited determination of any material Disputed Claims and an appropriate deferral of the application for the Sanction Order and any other applicable dates in the Plan.

VOTING BY PROXIES

37. **THIS COURT ORDERS** that all Proxies submitted in respect of a Creditors' Meeting (or any adjournment thereof) must be in substantially the form attached to this Order as **Schedule "C"**, or in such other form acceptable to the Monitor or the Chair.

38. **THIS COURT ORDERS** that an Eligible Voting Creditor wishing to appoint a proxy to represent such Eligible Voting Creditor at the Creditors' Meeting (or any adjournment thereof) may do so by inserting such Person's name in the blank space provided on the form of Proxy, and sending or delivering the completed Proxy to the Monitor at:

KPMG Inc.,
in its capacity as Monitor of
Extreme Retail (Canada) Inc. and Extreme Properties Inc.
Commerce Court West
199 Bay Street, Suite 3300
Toronto, Ontario M5L 1B2
Attention: Michael G. Creber and R. Michael Craig
Fax: (416) 777-3364
E-mail: mcreber@kpmg.ca / michaelcraig@kpmg.ca

A Proxy must be received by the Monitor by 1:00 p.m. (Toronto time) on the last Business Day preceding the date set for the Creditors' Meeting or any adjournment thereof, or deposited with the Chair prior to the commencement of the Creditors' Meeting. After commencement of the Creditors' Meeting, no Proxies can be accepted by the Monitor.

39. **THIS COURT ORDERS** that the following shall govern the submission of Proxies and any deficiencies in respect of the form or substance of Proxies filed with the Monitor:

(a) an Eligible Voting Creditor who has given a Proxy may revoke it unless it has agreed otherwise (as to any matter on which a vote has not already been cast pursuant to its authority) by an instrument in writing executed by such Eligible Voting Creditor or by its attorney, duly authorized in writing or, if an Eligible Voting Creditor is not an individual, by an officer or attorney thereof duly authorized, and deposited either with the Monitor as provided in paragraph 38 above on or before 1:00 p.m. (Toronto time) on the last Business Day preceding the date of the Creditors' Meeting or any adjournment thereof, or with the Monitor at the Creditors' Meeting prior to the time of commencement of the Creditors' Meeting, or any adjournment thereof;

(b) if no name has been inserted in the space provided to designate the proxyholder on the Proxy, the Eligible Voting Creditor shall be deemed to have appointed Michael G. Creber of the Monitor as the Eligible Voting Creditor's proxyholder;

(c) if the Proxy is not dated in the space provided, it shall be deemed to be dated on the date it is received by the Monitor;

(d) a Proxy submitted by an Eligible Voting Creditor that bears or is deemed to bear a later date than an earlier Proxy submitted by such Eligible Voting Creditor shall be deemed to revoke the earlier Proxy;

(e) if more than one valid Proxy for the same Eligible Voting Creditor and bearing or deemed to bear the same date are received by the Monitor with conflicting instructions, such Proxies shall be treated as a disputed Proxy and shall not be counted for the purposes of the vote;

(f) the Person named in the Proxy shall vote the Claim of the Eligible Voting Creditor in accordance with the direction of the Eligible Voting Creditor appointing them on any ballot that may be called for. In the absence of any such direction, such Claim shall be voted as an Affirmative Vote;

(g) a Proxy confers a discretionary authority upon the Persons named therein with respect to amendments or variations to the matters identified in the notices of the Creditors' Meeting and in the Plan and with respect to other matters that may properly come before the Creditors' Meeting; and

(h) the Applicants and the Monitor are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any Proxy is completed and executed, and may waive strict compliance with the requirements in connection with the deadlines imposed in connection therewith.

TRANSFERS OR ASSIGNMENTS OF CLAIMS

40. **THIS COURT ORDERS** that if any Creditor transferred or transfers or assigned or assigns all or part of its Unsecured Claim, the Creditor must provide a notice of transfer or assignment executed by the Creditor and the transferee or assignee, together with such other evidence of such transfer or assignment as may be reasonably required by the Monitor and/or the Applicants (collectively, the "**Proof of Assignment**"), to the Monitor and the Applicants no later than five (5) Business Days prior to the date of the Creditors' Meeting, if such transferee or assignee is to be included on the list of Eligible Voting Creditors entitled to vote at the Creditors' Meeting in respect of any Unsecured Claim of the Creditor, and such transferee or assignee shall be entitled to attend and vote the transferred or assigned portion of such Unsecured Claim at the Creditors' Meeting if and to the extent such Unsecured Claim may otherwise be voted at the Creditors' Meeting; provided, however, that for the purposes of determining whether this Plan has been approved by Affirmative Votes exceeding more than fifty percent (50%) of the Votes Cast, only the vote of the transferor or the transferee, whichever holds the highest dollar value of such Unsecured Claim, will be counted, and, if such value shall be equal, only the vote of the transferee will be counted. If an Unsecured Claim has been transferred to more than one transferee, for the purposes of determining whether this Plan has been approved by Affirmative Votes exceeding more than fifty percent (50%) of the Votes Cast, only the vote of the transferee with the highest value of such Unsecured Claim will be counted unless all of the transferees of such Unsecured Claim deliver a notice to the Applicants and the Monitor at least five (5) Business Days prior to the date of

the Creditors' Meeting and designate therein the name of the transferee whose vote is to be counted, in which case the vote of such designated transferee will be counted.

HEARING FOR SANCTION OF THE PLAN

41. **THIS COURT ORDERS** that if the Plan is approved by the Required Majority of Creditors at the Creditors' Meeting, the Applicants shall seek Court approval of the Plan at a motion for the Sanction Order, which motion shall be returnable before this Court at 10:00 a.m. (Toronto time) on November 16, 2009, or as soon after that date as the matter can be heard (the "**Sanction Hearing**").

42. **THIS COURT ORDERS** that service of the Notice of Creditors' Meeting and this Order pursuant to paragraphs 7, 11 and 14 of this Order shall constitute good and sufficient service of the notice of the Sanction Hearing on all Persons who may be entitled to receive notice of the Sanction Hearing, and no other form of notice or service need be made on such Persons, and no such other document or materials need be served on such Persons in respect of the Sanction Hearing unless they have filed and served a Notice of Appearance.

43. **THIS COURT ORDERS** that any Person (other than the Applicants and the Monitor) wishing to receive materials and appear at the Sanction Hearing shall have served upon the solicitors for the Applicants and the Monitor, and filed with this Court, a Notice of Appearance by no later than 5:00 p.m. (Toronto time) on November 9, 2009.

44. **THIS COURT ORDERS** that any party who wishes to oppose the motion for final sanctioning of the Plan shall have served upon the solicitors for both the Applicants and the Monitor, and upon all other parties who have filed a Notice of Appearance, by not later than 5:00 p.m. (Toronto time) on November 4, 2009, a Notice of Appearance and a copy of the materials to be used to oppose the motion for approval of the Plan, setting out the basis for such opposition.

45. **THIS COURT ORDERS** that, if the Sanction Hearing is adjourned, only those Persons who have served and filed a Notice of Appearance shall be served with notice of the adjourned date.

GENERAL

46. **THIS COURT ORDERS** that the Applicants and the Monitor may, in their discretion, generally or in individual circumstances, waive in writing the time limits imposed on any Creditor under this Order if the Applicants and the Monitor deem it advisable to do so (without prejudice to the requirement that all other Creditors comply with this Order), and, in so doing, may extend any related time period applicable to the Monitor or the Applicants by the same period of time.

47. **THIS COURT ORDERS** that, notwithstanding the terms of this Order, the Applicants may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement or replace this Order.

48. **THIS COURT ORDERS** that any of the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

EFFECT, RECOGNITION AND ASSISTANCE OF OTHER COURTS

49. **THIS COURT ORDERS** that this Order and any other Order in this proceeding shall have full force and effect in all provinces and territories in Canada and abroad and as against all Persons against whom they may otherwise be enforceable.

50. **THIS COURT HEREBY REQUESTS** the aid and recognition (including assistance pursuant to section 17 of the CCAA, as applicable) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

51. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO..

SEP 2 4 2009

PER / PAR:

Joanne Nicoara
Registrar, Superior Court of Justice

SCHEDULE "A"

CONSOLIDATED PLAN OF COMPROMISE AND ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

See attached.

Court File No. CV-09-8084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

CONSOLIDATED PLAN OF COMPROMISE AND ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

September 15, 2009

CONSOLIDATED PLAN OF COMPROMISE AND ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC. PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* (CANADA) DATED FOR REFERENCE SEPTEMBER 15, 2009

ARTICLE 1
DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Plan (including the Schedule hereto), unless otherwise stated or the subject matter or context should otherwise require, the following capitalized terms and phrases used but not defined herein have the following meanings:

"Administration Charge" has the meaning given to it in paragraph 32 of the CCAA Initial Order;

"Affirmative Votes" means the votes of the Eligible Voting Creditors with Proven Voting Claims, who have voted in favour of the Plan at the Creditors' Meeting, and **"Affirmative Vote"** shall mean any one of them;

"Applicable Law" means, at any time, in respect of any Person, property, transaction, event or other matter, as applicable, all laws, rules, statutes, regulations, treaties, orders, judgements and decrees, and all official requests, directives, rules, guidelines, orders, policies, practices and other requirements of any Authorized Authority;

"Applicants" means Extreme Retail (Canada) Inc. and Extreme Properties Inc., and **"Applicant"** shall mean any one of them;

"Assets" means all of the property, assets, business and undertaking of the Applicants;

"Authorized Authority" means, in relation to any Person, transaction or event, any:

(a) federal, provincial, state, municipal or local governmental body (whether administrative, legislative, executive or otherwise), both domestic and foreign;

(b) agency, authority, commission, instrumentality, regulatory body, court, or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government, including any Taxing Authority;

(c) court, arbitrator, commission or body exercising judicial, quasi-judicial, administrative or similar functions; or

(d) other body or entity created under the authority of or otherwise subject to the jurisdiction of any of the foregoing, including any stock or other securities exchange, in each case having jurisdiction over such Person, transaction or event;

"BIA" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

"Business Day" means any day, other than a Saturday, Sunday or statutory holiday, on which banks are generally open for business in Toronto, Ontario;

"Canadian Dollars", **"CDN $"** or **"$"** means dollars denominated in lawful currency of Canada;

"CCAA" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"CCAA Filing Date" means March 20, 2009, being the date of the CCAA Initial Order;

"CCAA Initial Order" means the Order granted by the Court in the CCAA Proceedings on March 20, 2009, as amended, restated, varied or extended from time to time by subsequent Orders of the Court;

"CCAA Proceedings" means the proceedings commenced by the Applicants under the CCAA on March 20, 2009 in the Court under Court File No. 09-CL-8084;

"Charges" has the meaning given to it in paragraph 40 of the CCAA Initial Order;

"Claim" means any right or claim of any Person that may be asserted or made in whole or in part against the Applicants, or either of them, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including, without limitation, by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or Assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including, without limitation, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, and **"Claims"** means all of them;

"Claims Bar Date" means 5:00 p.m. (Toronto time) on October 23, 2009, as set out in the Claims Process and Bar Order, as such date may be extended in respect of any particular Claim by agreement of the Monitor and the Applicants and/or by Order of the Court;

"Claims Process and Bar Order" means the Order of the Court dated September 23, 2009, as amended, restated or varied from time to time by subsequent Order of the Court;

"Contract Repudiation Claim" means any Claim arising from the restructuring, repudiation, resiliation or termination of any contract or other arrangements or agreements of any nature whatsoever, whether written or oral, pursuant to a Notice of Repudiation or Termination received by any Person prior to the Repudiation Deadline, but excludes any Landlord Repudiation Claim and Employee Restructuring Claim;

"Court" means the Ontario Superior Court of Justice (Commercial List);

"Creditor" means any Person having a Pre-Filing Claim or Restructuring Claim, together with his, her or its heirs, executors, administrators, legal representatives, successors and assigns, and where the context requires and subject to the Claims Process and Bar Order and Section 6.7 of the Plan, includes the assignee or transferee of such Claim, a successor in interest to such Claim, or a trustee, receiver, interim receiver, receiver and manager, liquidator or other Person acting on behalf of such Person, and, for greater certainty, includes a Landlord, and **"Creditors"** means all of them;

"Creditors' Meeting" means the meeting of Unsecured Creditors called for the purposes of considering and/or voting in respect of the Plan, which has been set by the Creditors' Meeting Order to take place at 10:00 a.m. (Toronto time) on November 6, 2009, and any postponements, adjournments or amendments thereof;

"Creditors' Meeting Order" means the Order of the Court dated September 23, 2009, as amended, restated or varied from time to time by subsequent Order of the Court;

"Crown" means Her Majesty the Queen in right of Canada or any province thereof;

"DIP Lender" means Invar (Buck or Two) Limited, in its capacity as DIP lender to the Applicants;

"DIP Lender's Charge" has the meaning given to it in paragraph 36 of the CCAA Initial Order;

"Directors' Charge" has the meaning given to it in paragraph 22 of the CCAA Initial Order;

"Disallowed Claim" means a Disputed Claim or any portion thereof which has been finally disallowed in accordance with the Claims Process and Bar Order;

"Dispute Notice" means the dispute notice, in substantially the form attached as **Schedule "F"** to the Claims Process and Bar Order, delivered by an Unsecured Creditor to the Monitor who has received a Notice of Revision or Disallowance and who intends to dispute such Notice of Revision or Disallowance pursuant to the Claims Process and Bar Order or the Plan;

"Disputed Claim" means, as applicable: (a) that portion of an Unsecured Claim which has not been allowed or accepted as proven by the Monitor for distribution purposes, which is the subject of a Dispute Notice, and which has not been resolved by the Monitor, by agreement or by further Order of the Court; or (b) in respect of any Lease Terms

which have not been allowed or accepted as proven by the Monitor for distribution purposes, which are the subject of a Dispute Notice, and which have not been resolved by the Monitor, by agreement or by further Order of the Court, the amount which is the difference between the calculation of the distribution to a Landlord: (i) based on the Lease Terms accepted by the Monitor; and (ii) based on the Lease Terms asserted by a Landlord in a Dispute Notice, and **"Disputed Claims"** means all of them;

"Disputed Claims Reserve" means the reserve, if any, established and maintained by the Monitor, in which the Monitor shall deposit the amounts which would be distributed to Holders of Disputed Claims if such Disputed Claims were to become Proven Distribution Claims for their entire amount after the Interim Distribution Date, pending the final determination or resolution of such Disputed Claims for distribution purposes under the Plan;

"Document Package" means a document package which shall include a copy of the appropriate Instruction Letter, the Proof of Claim or the Lease Terms Form, as applicable, the Claims Process and Bar Order, the Creditors' Meeting Order, and such other materials as the Monitor may consider appropriate or desirable;

"Eligible Voting Creditor" means a Creditor who holds a Proven Voting Claim or a Disputed Claim, and **"Eligible Voting Creditors"** means all of them;

"Employee Restructuring Claim" means any Claim that is, arises from, or is in any way related to the restructuring or termination of the employment of an employee of the Applicants pursuant to a Notice of Repudiation or Termination which is effective prior to the Plan Implementation Date, which, for greater certainty, are Unaffected Obligations under Section 3.2 of the Plan, and **"Employee Restructuring Claims"** means all of them;

"Final Distribution Date" means a date to be chosen by the Monitor, in consultation with the Applicants, which shall be a date which is within thirty (30) days of the date on which the Monitor certifies to the Court that the last Disputed Claim has been finally determined or settled;

"GST" means goods and services tax under the *Excise Tax Act* (Canada), R.S.C. 1985, c. E-15, as amended;

"Holder(s)" means the Unsecured Creditor who has filed a Proof of Claim or Lease Terms Form, as applicable, with the Monitor in accordance with the Claims Process and Bar Order, or, subject to Section 6.7 of the Plan, any assignee or transferee thereof;

"ITA" means the *Income Tax Act* (Canada), R.S.C. 1985, c. 1 (5th Supp.), as amended;

"Interim Distribution Date" means a date chosen by the Monitor, in its discretion, occurring as soon as practicable after the Plan Implementation Date and, in any event, no later than thirty (30) days after the Plan Implementation Date;

"Landlord" means:

(a) a landlord, head landlord or owner of real property, whether or not in direct privity with the Applicants, who has a Pre-Filing Claim or Restructuring Claim in respect of any premises leased or otherwise occupied by the Applicants pursuant to a Lease to which such landlord, head landlord or owner is a party or by which such landlord, head landlord or owner is bound or otherwise enjoys or may enjoy the benefit of, and includes:

(i) any mortgagee of such premises who has taken possession of such premises or is collecting Rent in respect of such premises; and

(ii) any Person who has taken an assignment of rents or assignment of Lease in respect of such premises, whether as security or otherwise;

(b) any Person whose Pre-Filing Claim or Restructuring Claim would be duplicative of or derivative from the Pre-Filing Claim or Restructuring Claim of such landlord, head landlord or owner; and

(c) any Person who has a Pre-Filing Claim or Restructuring Claim in such Person's capacity as co-owner, partner, shareholder or trust beneficiary of a Person which is the landlord, head landlord or owner of any premises leased or otherwise occupied by the Applicants and includes:

(i) any holder of a Lien against such ownership, partnership, shareholder or beneficial interest who is entitled to receive any dividends or distribution thereon;

(ii) any Person who has taken an assignment of such ownership, partnership, shareholder or beneficial interest; and

(iii) any Person whose Pre-Filing Claim or Restructuring Claim would be duplicative of or derivative from the Pre-Filing Claim or Restructuring Claim of such first named Person,

and **"Landlords"** means all of them;

"Landlord Repudiation Claim" means any Claim of any Landlord: (a) with respect to the waiver or reduction of any benefits to the Landlord, financial or otherwise, arising out of, or by virtue of, the granting of or entering into an agreement providing amendments to a Lease on or after the CCAA Filing Date, and prior to the Repudiation Deadline; or (b) arising from or in any way related to the abandonment by the Applicants of any Repudiated Leased Premises or the restructuring, repudiation, resiliation or termination of any Lease on or after the CCAA Filing Date by the Applicants pursuant to a Notice of Repudiation or Termination, including, without limitation, any damages or losses of any kind, direct or indirect, consequential or otherwise, incurred or suffered by such Landlord in respect of any such abandonment of Repudiated Leased Premises or any such restructuring, repudiation, resiliation or termination of any Lease, and including any

physical damage caused by the Applicants or any of its agents in abandoning Repudiated Leased Premises and in removing any signage or other equipment from such Repudiated Leased Premises, but excludes: (i) any Claim of a Landlord existing before the CCAA Filing Date; (ii) any Contract Repudiation Claim; and (iii) any Unaffected Obligation, and **"Landlord Repudiation Claims"** means all of them;

"Landlord Repudiation Claim Formula" shall be used by the Monitor to calculate a Landlord Repudiation Claim for voting and/or distribution purposes under the Plan based on the Proven Lease Terms for each Lease in respect of Repudiated Leased Premises, and equals the lesser of:

(a) the aggregate of:

  (i) the Rent for the first year of such Lease following the date on which the repudiation and/or abandonment became effective; and

  (ii) fifteen percent (15%) of the Rent for the remainder of the term of such Lease after that year; and

(b) the Rent for three (3) years of such Lease following the date on which the repudiation and/or abandonment became effective;

"Lease" means any lease, sublease, licence, sublease, agreement to lease, offer to lease or other agreement or arrangement, whether written, oral or otherwise pursuant to which the Applicants have or had a right to occupy premises, and includes all amendments and supplements thereto and all ancillary documents relating thereto existing as at the CCAA Filing Date, and for greater certainty, excludes any lease of personal property;

"Lease Terms" means the information pertaining to a Lease that has been submitted to the Monitor by a Landlord pursuant to a Lease Terms Form, which information reflects, *inter alia*, only those terms of the Lease that were in effect as of the CCAA Filing Date;

"Lease Terms Form" means the lease terms form, in substantially the form attached as Schedule "D" to the Claims Process and Bar Order, which is required to be submitted to the Monitor by any Landlord who has an Unsecured Claim by the Claims Bar Date in accordance with the Claims Process and Bar Order;

"Lien" means any mortgage, charge, pledge, assignment by way of security, lien, hypothec, security interest or other encumbrance granted or arising pursuant to a written agreement or statute or otherwise created by law which has been duly and properly registered or perfected in accordance with applicable legislation on the CCAA Filing Date or otherwise in accordance with the CCAA Initial Order;

"Monitor" means KPMG Inc., in its capacity as Court-appointed monitor of the Applicants in the CCAA Proceedings, and not in its corporate or personal capacity;

"Monitor's Certificate" has the meaning given to it in Section 8.3 of the Plan;

"Negative Votes" means the votes of the Eligible Voting Creditors with Proven Voting Claims, who have voted against the Plan at the Creditors' Meeting, and **"Negative Vote"** shall mean any one of them;

"Notice of Repudiation or Termination" means a written notice in any form issued on or after the CCAA Filing Date and prior to the Repudiation Deadline by the Applicants advising a Person of the restructuring, repudiation, resiliation or termination of any contract, Lease, employment agreement, or other arrangements or agreements of any nature whatsoever, whether written or oral, and any agreements related thereto, including, without limitation, the repudiation of any obligations under a Lease required to be performed by the Applicants before, on or concurrent with the surrender or vacating of the leased premises on the expiry of the term of the Lease prior to the Plan Implementation Date;

"Notice of Revision or Disallowance" means a notice of revision or disallowance, in substantially the form attached as Schedule "E" to the Claims Process and Bar Order, as submitted to the Monitor by a Creditor in accordance with the Claims Process and Bar Order;

"Order" means any order of the Court in the CCAA Proceedings, and **"Orders"** means all of them;

"Person" shall be broadly interpreted and includes an individual, firm, partnership, joint venture, venture capital fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, instrumentality or department of such government or political subdivision, or any other entity, howsoever designated or constituted, including any Taxing Authority, and the trustees, executors, administrators, or other legal representatives of an individual, and for greater certainty includes any Authorized Authority;

"Plan" means this Consolidated Plan of Compromise and Arrangement, as it may be restated, supplemented or amended from time to time in accordance with the provisions the Plan, the Claims Process and Bar Order and the Creditors' Meeting Order;

"Plan Distribution Fund" has the meaning given to it in Subsection 3.7 of the Plan;

"Plan Implementation Date" means the Business Day immediately following the Business Day on which all conditions to implementation of the Plan as set out in Section 8.2 of the Plan have been satisfied, fulfilled or waived, and the Monitor has filed the Monitor's Certificate with the Court confirming the foregoing;

"Pre-Filing Claim" means any Claim which is based in whole or in part on facts which existed prior to the CCAA Filing Date, together with any other rights or Claims of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the BIA had the Applicants become bankrupt prior to the CCAA Filing Date, together with any other rights or Claims, whether or not asserted, made after the CCAA Filing Date in

any way, directly or indirectly related to any action taken or power exercised prior to the CCAA Filing Date, and which for greater certainty, includes any Tax Claim;

"Pro Rata Share" of an Unsecured Creditor means the amount determined by the following formula:

Pro Rata Share = (A/B)

A = the amount of such Unsecured Creditor's Proven Distribution Claim excluding any Claim for which such Unsecured Creditor elected to be paid in accordance with Subsection 4.2(c) of the Plan;

B = the aggregate amount of all Unsecured Claims that are or can become Proven Distribution Claims excluding all Claims which are elected to be paid in accordance with Subsection 4.2(c) of the Plan;

"Proof of Assignment" means a notice of transfer or assignment of a Claim executed by the Creditor and the transferee or assignee, together with such other evidence of such transfer or assignment as may be reasonably required by the Monitor and/or the Applicants;

"Proof of Claim" means a proof of claim, in substantially the form attached as Schedule "B" to the Claims Process and Bar Order, which is required to be submitted to the Monitor by any Creditor, except a Landlord, who has an Unsecured Claim by the Claims Bar Date in accordance with the Claims Process and Bar Order, and **"Proofs of Claim"** means all of them;

"Proven Lease Terms" means the Lease Terms of a Landlord for voting and/or distribution purposes, as the case may be, which have become finally determined or allowed in accordance with the Claims Process and Bar Order, the Creditors' Meeting Order, and/or the Plan, as applicable;

"Proven Distribution Claim" means the amount of an Unsecured Claim as finally determined or allowed for distribution purposes in accordance with the provisions of the Claims Process and Bar Order, the Creditors' Meeting Order, and/or the Plan, as applicable, and **"Proven Distribution Claims"** means all of them;

"Proven Voting Claim" means the amount of an Unsecured Claim as finally determined or allowed for voting purposes in accordance with the provisions of the Claims Process and Bar Order, the Creditors' Meeting Order and/or the Plan, as applicable, and **"Proven Voting Claims"** means all of them;

"Proxy" means a proxy, in substantially the form attached as Schedule "C" to the Creditors' Meeting Order, or such other form acceptable to the Monitor or chair of the Creditors' Meeting, and **"Proxies"** means all of them;

"Rent" means solely for the purposes of calculating a Landlord Voting Amount and a Landlord Repudiation Claim, the amount set out in the corresponding Proven Lease

Terms, expressed on a monthly basis, that is in respect of the minimum, basic, net, or base rent, together with such additional rent as set out in the corresponding Proven Lease Terms, and where rent or additional rent is expressed in the Proven Lease Terms for a period of time and other than monthly, it shall be converted *pro rata* to a monthly basis;

"Repudiated Leased Premises" means any premises leased or otherwise occupied by the Applicants pursuant to a Lease in which the Applicants have delivered to the applicable Landlord a Notice of Repudiation or Termination, but shall not include: (a) any premises in respect of which the Applicants have expressly withdrawn, with the written consent of the Landlord, a previously delivered Notice of Repudiation or Termination; or (b) any premises surrendered or vacated by the Applicants on the expiry of the term of the Lease;

"Repudiation Deadline" means 5:00 p.m. (Toronto time) on September 25, 2009;

"Required Majority of Creditors" means: (a) the number of Affirmative Votes exceeds fifty percent (50%) of the Votes Cast; and (b) the value of Proven Voting Claims attributable to the Affirmative Votes equals or exceeds sixty-six and two-thirds percent (66-2/3%) of the value of Proven Voting Claims attributable to the Votes Cast;

"Restructuring Claim" means any: (a) Landlord Repudiation Claim; and (b), Contract Repudiation Claim, and **"Restructuring Claims"** means all of them;

"Sanction Order" means an Order sanctioning the Plan and giving all necessary directions regarding its implementation, which shall contain the provisions set forth in Section 8.1 of the Plan;

"Second Distribution Date" means a date to be chosen by the Monitor, in consultation with the Applicants, which shall be a date which is within thirty (30) days of the one (1) year anniversary of the Plan Implementation Date;

"Secured Claims" means all Claims secured by a Lien, provided that no Landlord Repudiation Claims arising under a Lease shall be treated under the Plan as Secured Claims, and **"Secured Claim"** means any one of them;

"Secured Creditors" means Creditors with Claims that are Secured Claims, and **"Secured Creditor"** means any one of them;

"Special Crown Claims" means Claims of the Crown, for all amounts that were outstanding at the CCAA Filing Date and are of a kind that could be subject to a demand under:

(a) subsection 224(1.2) of the ITA;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the ITA and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium,

or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the ITA, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum:

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the ITA; or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection;

"Stay Period" has the meaning given to it in the CCAA Initial Order;

"Tax" or **"Taxes"** means any and all amounts subject to a withholding or remitting obligation and any and all taxes, duties, fees, and other governmental charges, duties, impositions and liabilities of any kind whatsoever whether or not assessed by the Taxing Authorities (including any Claims by any of the Taxing Authorities), including all interest, penalties, fines, fees, other charges and additions with respect to such amount;

"Tax Claim" means any Claim against the Applicants for any Taxes in respect of any taxation year or period ending on or prior to the CCAA Filing Date, and in any case where a taxation year or period commences on or prior to the CCAA Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to the CCAA Filing Date and up to and including the CCAA Filing Date. For greater certainty, a Tax Claim shall include, without limitation, any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto;

"Taxing Authorities" means Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, and any Canadian or foreign governmental authority, and **"Taxing Authority"** means any one of the Taxing Authorities;

"Unaffected Obligations" has the meaning given to such term in Section 3.2 of the Plan, and **"Unaffected Obligation"** means any one of such Unaffected Claims;

"Unsecured Claims" means all Pre-Filing Claims and Restructuring Claims, but excludes any Unaffected Obligations, and **"Unsecured Claim"** means any one of them;

"Unsecured Creditors" means Creditors with Claims that are Unsecured Claims, and **"Unsecured Creditor"** means any one of them;

"Vacation Pay Claims" means Claims of employees, former and current, of the Applicants for accrued and unpaid vacation pay whether in respect of a period prior to or after the CCAA Filing Date, and **"Vacation Pay Claim"** means any one of them; and

"Votes Cast" means the sum of the Affirmative Votes and the Negative Votes of the Eligible Voting Creditors with Proven Voting Claims present at the Creditors' Meeting in person or by Proxy.

1.2 Article and Section Reference

The terms **"this Plan"**, **"hereof"**, **"hereunder"**, **"herein"**, and similar expressions refer to this Plan, and not to any particular article, section, subsection, paragraph or clause of this Plan and include any variations, amendments, modifications or supplements hereto. In this Plan, a reference to an article, section, subsection, clause or paragraph shall, unless otherwise stated, refer to an article, section, subsection, paragraph or clause of this Plan.

1.3 Extended Meanings

In this Plan, where the context so requires, any word importing the singular number shall include the plural and vice versa, and any word or words importing gender shall include all genders.

1.4 Interpretation Not Affected by Headings

The division of this Plan into articles, sections, subsections, paragraphs and clauses and the insertion of a table of contents and headings are for convenience of reference and shall not affect the construction or interpretation of this Plan.

1.5 Date of Any Action

In the event that any date on which any action is required to be taken hereunder by any Person is not a Business Day, such action shall be required to be taken on the next succeeding day that is a Business Day.

1.6 Currency

Unless otherwise stated herein, all references to currency in this Plan are to lawful money of Canada. For the purposes of voting or distribution, any Claim or Lease Terms shall be denominated in Canadian Dollars and all distributions under this Plan shall be paid in Canadian Dollars. Any Claim or Lease Terms in a currency other than Canadian Dollars must be converted to Canadian Dollars, and such amount shall be regarded as having been converted at the spot rate of exchange quoted by the Bank of Canada for exchanging such currency to Canadian Dollars as at noon on the CCAA Filing Date, which rate for greater certainty for the conversion of US Dollars to Canadian Dollars is 0.8083 or CDN $0.8083:US $1.00.

1.7 Statutory References

Any reference in this Plan to a statute includes all regulations made thereunder, all amendments to such statute or regulations in force from time to time to the date of this Plan and any statute or regulation that supplements or supersedes such statute or regulation to the date of this Plan.

1.8 Successors and Assigns

This Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns, as the case may be, of any Person named or referred to in or bound by this Plan.

1.9 Governing Law

This Plan and each of the documents contemplated or delivered under or in connection with this Plan, shall be governed by, and are to be construed and interpreted in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of this Plan and all proceedings taken in connection with this Plan and its revisions shall be subject to the exclusive jurisdiction of the Court.

1.10 Inclusive Meaning

As used in this Plan, the words **"include"**, **"includes"**, **"including"** or any other derivation thereof means, in any case, those words as modified by the words "without limitation".

1.11 Severability

If any provision of this Plan is or becomes illegal, invalid or unenforceable on or following the Plan Implementation Date in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect the legality, validity or enforceability of the remaining provisions of this Plan, or the legality, validity or enforceability of that provision in any other jurisdiction.

1.12 Timing Generally

Unless otherwise specified, all references to time herein, and in any document issued pursuant hereto, shall mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. (Toronto time) on such Business Day.

1.13 Time of Payments and Other Actions

Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the payment to the next succeeding Business Day if the last day of the period is not a Business Day. Wherever any

payment to be made or action to be taken under this Plan is required to be made or to be taken on a day other than a Business Day, such payment shall be made or action taken on the next succeeding Business Day.

1.14 Interpretation of Accounting Terms

All accounting terms not otherwise defined herein shall have the meanings ascribed to them, from time to time, in accordance with Canadian generally accepted accounting principles as now in effect, including those prescribed by the Canadian Institute of Chartered Accountants.

1.15 Schedule

The following is a Schedule to this Plan, which is incorporated by reference into this Plan and forms an integral part hereof:

Schedule "A" - Form of Monitor's Certificate

ARTICLE 2
PURPOSE OF PLAN

2.1 Purpose

The purpose of this Plan is to effect a compromise and arrangement of all Unsecured Claims against the Applicants, in order to enable the business of the Applicants to continue, in the expectation that a greater benefit will be derived from the continued operation of the business of the Applicants than would result from the bankruptcy, the immediate sale or forced liquidation of the Applicants' Assets.

ARTICLE 3
CLAIMS

3.1 Affected Persons

On the Plan Implementation Date, this Plan shall be binding upon the Applicants and the Unsecured Creditors and their respective heirs, executors, administrators, legal representatives, successors and assigns, but, for greater certainty, shall not affect any Unaffected Obligations.

3.2 Claims Unaffected by the Plan

This Plan shall not compromise the following Claims and rights that arise in respect thereof (collectively, the **"Unaffected Obligations"**):

(a) Claims of Secured Creditors;

(b) Claims arising in the ordinary course of business for utilities, goods, materials or services provided to and received by the Applicants at the request of the Applicants from and after the CCAA Filing Date, which Claims shall be paid by

the Applicants in accordance with terms previously agreed upon by the Applicants with suppliers of such utilities, goods, materials and services;

(c) Claims for unpaid Rent (as such term is defined in the CCAA Initial Order) of any Landlord against the Applicants payable pursuant to the terms of the CCAA Initial Order for the period from and after the CCAA Filing Date;

(d) subject to any agreement with a Landlord, Claims of a Landlord arising after the CCAA Filing Date pursuant to or in respect of a Lease which is: (i) not subject to a Notice of Repudiation or Termination; and (ii) which is otherwise continuing in full force and effect as of the Plan Implementation Date with or without modification, amendment or variation with the consent of the Landlord after the CCAA Filing Date, but excluding any Claims that arose under any such Lease prior to the CCAA Filing Date or any Claims with respect to the waiver or reduction of any benefits to the Landlord, financial or otherwise, arising out of, or by virtue of the granting of or entering into an agreement providing amendments to a Lease;

(e) subject to any agreement with a Landlord, Claims of a Landlord arising from the non-performance of any obligations of the Applicants to be performed by the Applicants under the CCAA Initial Order or any other Orders made in the CCAA Proceedings in respect of any Lease which is subject to a Notice of Repudiation or Termination, for which notice of such Claim is given to the Applicants in writing no later than five (5) Business Days prior to the hearing of the Sanction Order;

(f) Claims secured by the DIP Lender's Charge;

(g) Claims secured by the Administration Charge;

(h) Special Crown Claims;

(i) that portion of a Claim arising from a cause of action for which the Applicants are covered by insurance, only to the extent of such coverage;

(j) Claims of employees of the Applicants who have not received a Notice of Repudiation or Termination on or before the Repudiation Deadline for accrued wages, accrued salary, accrued bonuses, accrued commissions, benefits and reimbursement of expenses of the Applicants;

(k) Employee Restructuring Claims;

(l) Vacation Pay Claims; and

(m) Claims of the Monitor, and all legal, real estate, accounting, tax, financial or other advisers to and consultants of the Applicants and the Monitor incurred by the Applicants and the Monitor in connection with the CCAA Proceedings and the restructuring of the Applicants, including the development and implementation of this Plan.

3.3 No Vote or Distribution in Respect of Unaffected Obligations

No holder of an Unaffected Obligation shall be entitled to vote on or receive any distributions under this Plan in respect of such Unaffected Obligation.

3.4 Claims Filed By Holders of Unaffected Obligations

Where a Proof of Claim or Lease Terms Form has been filed with the Applicants or the Monitor by any Person in respect of an Unaffected Obligation, whether pursuant to the Claims Process and Bar Order or otherwise, such Proof of Claim or Lease Terms Form will be deemed to be disallowed for voting and distribution purposes with no further action required by the Applicants or the Monitor and neither the Applicants nor the Monitor shall have any further obligation in respect of such Proof of Claim or Lease Terms Form.

3.5 Set-Off

Except as otherwise contractually agreed, the law of set-off applies to all Claims made against the Applicants and to all actions instituted by it for the recovery of debts due to the Applicants in the same manner and to the same extent as if the Applicants were plaintiffs or defendants, as the case may be.

3.6 Special Crown Claims

All Special Crown Claims in respect of all amounts that were outstanding at the CCAA Filing Date or related to the period ending on the CCAA Filing Date shall be paid in full to the Crown within six (6) months of the Sanction Order as required by subsection 18.2(1) of the CCAA.

3.7 Funding of Cash Distributions under the Plan

On the Plan Implementation Date, the Applicants shall provide the amount of CDN $750,000.00 to the Monitor to fund the cash distributions pursuant to Section 4.2 of this Plan (the **"Plan Distribution Fund"**). The Plan Distribution Fund shall be distributed to Unsecured Creditors with Proven Distribution Claims pursuant to Section 4.2 of this Plan. Any money remaining in the Plan Distribution Fund after the Interim Distribution Date shall, subject to Section 6.8 of this Plan, be returned to the Applicants. If necessary, the Applicants shall provide an additional amount to the Monitor to fund the cash distributions pursuant to Section 4.2 of this Plan five (5) Business Days prior to the Second Distribution Date.

ARTICLE 4
TREATMENT OF UNSECURED CREDITORS

4.1 Voting for Creditors

Each Unsecured Creditor with one or more Unsecured Claims shall be entitled to vote on this Plan at the Creditors' Meeting, to the extent of the amount of its Proven Voting Claim, notwithstanding the election such Unsecured Creditor has made regarding its choice of distribution on its Proof of Claim or Lease Terms Form.

4.2 Distribution to Unsecured Creditors

Commencing on the Plan Implementation Date, the Monitor shall distribute to each Unsecured Creditor with a Proven Distribution Claim, in full and final satisfaction, compromise, settlement, release and discharge of each such Proven Distribution Claim, either:

(a) such Creditor's Pro Rata Share of $750,000.00 minus the aggregate amount of the distributions that will be made in accordance with Subsection 4.2(c) of this Plan for immediate distribution;

(b) such Creditor's Pro Rata Share of $600,000.00 minus the aggregate amount of the distributions that will be made in accordance with Subsection 4.2(c) of this Plan for immediate distribution and such Creditor's Pro Rata Share of $300,000.00 for distribution in one (1) year; or

(c) the lesser of $500.00 and such Creditor's Proven Distribution Claim for immediate distribution,

to each Unsecured Creditor, pursuant to its choice of distribution on its Proof of Claim or Lease Terms Form, as the case may be.

An Unsecured Creditor's election regarding such Creditor's choice of distribution between (a), (b) and (c) above shall be clearly indicated on such Creditor's Proof of Claim or Lease Terms Form, as the case may be, and no Creditor shall be entitled to change said election after the Claims Bar Date.

4.3 Unsecured Creditors with Separate Claims against both of the Applicants

For greater certainty, Unsecured Creditors who have separate Unsecured Claims against each of the Applicants shall file a Proof of Claim or Lease Terms Form, as the case may be, in respect of each of the Applicants and make separate elections regarding its choice of distribution in respect of its Proven Distribution Claim pursuant to Section 4.2 of this Plan. However, such Unsecured Creditor shall have the right to one (1) vote on the Plan, which vote shall have the cumulative value of all Unsecured Claims that are Proven Voting Claims as determined in accordance with the Claims Process and Bar Order or the Creditors Meeting Order.

ARTICLE 5
OTHER ARRANGEMENTS

5.1 Additional Arrangements

On or immediately after the Plan Implementation Date, the Applicants shall file articles of arrangement, articles of amalgamation or articles of reorganization pursuant to which the Applicants will be amalgamated under the provisions of the *Business Corporations Act* (Ontario) and form one (1) emerging entity, the effect of which will be, among other things, that all the Unaffected Obligations (including, without limitation, all Secured Claims), as well as all the remaining distributions under this Plan will continue against and be assumed by such emerging entity.

ARTICLE 6
PROVISIONS GOVERNING DISTRIBUTIONS

6.1 Loss of Right to Receive Distributions

Unless otherwise ordered by the Court or agreed to by the Applicants and the Monitor in writing, any Unsecured Creditor that has not submitted a Proof of Claim or Lease Terms Form, as the case may be, in accordance with the procedure set out in the Claims Process and Bar Order prior to the Claims Bar Date will not be entitled to receive any distributions under this Plan in respect of its Unsecured Claim.

6.2 Distributions on the Interim Distribution Date

Except as otherwise provided herein or as ordered by the Court, distributions to be made on account of Proven Distribution Claims to Unsecured Creditors for "immediate distribution" pursuant to Section 4.2 of this Plan, as at the Plan Implementation Date, shall be made on the Interim Distribution Date.

If there are Disputed Claims which remain unresolved on the Plan Implementation Date, the Monitor will make a partial distribution to Unsecured Creditors with Proven Distribution Claims for "immediate distribution" pursuant to Section 4.2 of this Plan, calculating the partial distribution based on the assumption that all remaining Disputed Claims, will be allowed in full. Unsecured Creditors holding a Disputed Claim will not receive a distribution under this Plan in respect of such Disputed Claim until the Disputed Claim is finally determined or settled under the Claims Process and Bar Order, the Creditors' Meeting Order, this Plan or further Order of the Court and shall be made by the Monitor as soon as practicable after such Disputed Claim becomes a Proven Distribution Claim.

Distributions for "immediate distribution" pursuant to Section 4.2 of this Plan to be made on account of Disputed Claims determined to be Proven Distribution Claims after the Plan Implementation Date shall be made pursuant to Section 6.8 of this Plan.

6.3 Distributions on the Second Distribution Date

Except as otherwise provided herein or as ordered by the Court, distributions to be made on account of Proven Distribution Claims to Unsecured Creditors for "distribution in one (1) year" pursuant to Section 4.2 of this Plan shall be made on the Second Distribution Date.

If there are Disputed Claims which remain unresolved on the Second Distribution Date, the Monitor will make a partial distribution to Unsecured Creditors with Proven Distribution Claims for "distribution in one (1) year" pursuant to Section 4.2 of this Plan, calculating the partial distribution based on the assumption that all remaining Disputed Claims, will be allowed in full. Unsecured Creditors holding a Disputed Claim will not receive a distribution under this Plan in respect of such Disputed Claim until the Disputed Claim is finally determined or settled under the Claims Process and Bar Order, the Creditors' Meeting Order, this Plan or further Order of the Court and shall be made by the Monitor as soon as practicable after such Disputed Claim becomes a Proven Distribution Claim.

Distributions for "distribution in one (1) year" pursuant to Section 4.2 of this Plan to be made on account of Disputed Claims determined to be Proven Distribution Claims after the Second Distribution Date shall be made pursuant to Section 6.8 of this Plan.

6.4 Distributions by the Monitor

(a) All cash distributions to be made under this Plan to an Unsecured Creditor shall be made by the Monitor by cheque and will be sent, via regular mail, to such Unsecured Creditor at the address set out on the Unsecured Creditor's Proof of Claim or Lease Terms Form, as the case may be, or such other address as provided to the Monitor by such Unsecured Creditor in accordance with Section 11.6 of this Plan, provided, however, that notwithstanding any other provision of this Plan, the Monitor shall be entitled to delegate the responsibility for making any distributions under this Plan to the Applicants.

(b) Distribution of amounts held in the Disputed Claims Reserve in respect of the Disputed Claims which become Disallowed Claims after the Interim Distribution Date or the Second Distribution Date, as the case may be, shall be made by the Monitor in accordance with Section 6.8 of this Plan.

6.5 Interest on Unsecured Claims

Unless otherwise specifically provided for in this Plan or in the Sanction Order, no interest or penalties shall accrue or be paid on an Unsecured Claim or a Proven Distribution Claim from and after or in respect of the period following the CCAA Filing Date and no Holder of an Unsecured Claim or Proven Distribution Claim will be entitled to any interest in respect of such Unsecured Claim or Proven Distribution Claim accruing on or after or in respect of the period following the CCAA Filing Date. All interest accruing on any Unsecured Claim or Proven Distribution Claim after or in respect of the period following the CCAA Filing Date shall be forever extinguished and released under this Plan.

6.6 Interest on Plan Distribution Fund

Forthwith upon receipt, the Monitor shall deposit the Plan Distribution Fund into a segregated interest-bearing account. Interest earned on any monies in the Plan Distribution Fund, including any monies in the segregated account for unclaimed distributions referred to in Section 6.9 of this Plan, shall be the property of the Applicants and may be released to the Applicants by the Monitor from such account or accounts at any time and from time to time upon written request from the Applicants.

6.7 Distributions in respect of Transferred or Assigned Claims

With respect to distributions to Unsecured Creditors under this Plan, the Monitor shall not be obligated to deliver any distributions under this Plan to any transferee or assignee of an Unsecured Claim as the Creditor in respect of or Holder of such Unsecured Claim unless a Proof of Assignment is delivered to the Monitor and the Applicants no later than five (5) Business Days prior to the Interim Distribution Date, the Second Distribution Date, any subsequent interim distribution date(s) or Final Distribution Date, as applicable.

6.8 Disputed Claims

(a) The fact that a Proof of Claim or Lease Terms Form is allowed for voting purposes shall not preclude the Monitor from disputing such Proof of Claim or Lease Terms Form for distribution purposes. Distributions in relation to any Disputed Claim in existence at the Plan Implementation Date will be held in escrow by the Monitor pending settlement or final determination of the Disputed Claim in accordance with the Claims Process and Bar Order or this Plan.

(b) On the Interim Distribution Date, the Monitor shall establish the Disputed Claims Reserve by withholding on account of Disputed Claims, that amount of the Plan Distribution Fund which would be distributed to Holders of Disputed Claims if such Disputed Claims were to become Proven Distribution Claims, for their entire amount on the Interim Distribution Date. Such Disputed Claims Reserve shall be held in escrow by the Monitor until a final determination or settlement has been made in respect of the Disputed Claims, at which time any surplus funds arising from any Disallowed Claims, after releasing for distribution all amounts in respect of Disputed Claims that have become Proven Distribution Claims, shall be released by the Monitor from the Disputed Claims Reserve and distributed to Unsecured Creditors with Proven Distribution Claims on a *pro rata* basis in accordance with their entitlements under this Plan, provided, however, that any such further distributions to Unsecured Creditors with Proven Distribution Claims need only be made by the Monitor when the aggregate amount available for distribution in respect of such Disallowed Claims, together with the aggregate amount of undeliverable or unclaimed distributions determined in accordance with Section 6.9 of this Plan, is not less than CDN $1,500.00. If on the Final Distribution Date, the aggregate amount available for distribution in respect of the aforesaid Disallowed Claims, together with the aggregate amount of undeliverable or unclaimed distributions determined in accordance with Section 6.9 of this Plan, is less than CDN $1,500.00, the distribution amount in respect of such Disallowed Claims and undeliverable and unclaimed distributions, shall be released by the Monitor to the Applicants, free and clear of any Claims of the Holders in respect thereof, any other Unsecured Creditors and their respective successors and assigns.

6.9 Undeliverable and Unclaimed Distributions

(a) If any Unsecured Creditor entitled to a cash distribution pursuant to this Plan cannot be located on any distribution date, or if any delivery or distribution to be made pursuant to Section 4.2 of this Plan is returned as undeliverable, such cash shall be set aside by the Monitor and deposited in a segregated, interest-bearing account to be maintained by the Monitor.

(b) If such Unsecured Creditor is located within six (6) months after such distribution date, such cash (less the allocable portion of taxes, if any, paid by the Applicants on account of such Creditor), shall be distributed to such Creditor.

(c) If such Unsecured Creditor cannot be located or if any delivery or distribution to be made pursuant to Section 4.2 of this Plan is returned as undeliverable, or in the case of any distribution made by cheque, the cheque remains uncashed, for a period of more than six (6) months after the distribution date, or the date of delivery or mailing of the cheque, whichever is later, the Claim of such Creditor with respect to such undelivered or unclaimed distribution shall be discharged and forever barred, notwithstanding any federal or provincial laws to the contrary and any such cash allocable to the undeliverable or unclaimed distribution, shall be distributed to Unsecured Creditors with Proven Distribution Claims on a *pro rated* basis in accordance with this Plan, free and clear of and from any claim to such monies by or on behalf of such Creditor who shall be deemed to have released such Claim, provided, however, that any such further distributions to Unsecured Creditors with Proven Distribution Claims need only be made when the aggregate amount available for distribution, together with the aggregate amount available for distribution on account of Disputed Claims which have become Disallowed Claims after the Plan Implementation Date in accordance with Subsection 6.8(b) of this Plan, is not less than CDN $1,500.00. If on the Final Distribution Date, the aggregate amount of undeliverable or unclaimed distributions, together with the aggregate amount available for distribution on account of the aforesaid Disallowed Claims, are less than CDN $1,500.00, the amount of such undeliverable or unclaimed distributions and the amount available for distribution in respect of the aforesaid Disallowed Claims shall be released by the Monitor to the Applicants, free and clear of any Claims of the Holders in respect thereof, any other Unsecured Creditors and their respective successors and assigns. Nothing contained in this Plan shall require the Applicants and/or the Monitor to attempt to locate any Holder of any undeliverable or unclaimed distributions.

6.10 Tax Matters

(a) **Allocation of Distributions**. All distributions made pursuant to this Plan in respect of an Unsecured Claim shall be applied first in consideration for the outstanding principal amount of such Claim and secondly, in consideration for accrued and unpaid interest and penalties, if any, which form part of such Claim. Notwithstanding any other provision of this Plan, including Subsection 6.8(b) of this Plan, each Unsecured Creditor that is to receive a distribution or payment pursuant to this Plan shall have sole and exclusive responsibility for the satisfaction and payment of any Tax obligations imposed by any Authorized Authority on account of such distribution.

(b) **Withholding Rights**. All distributions hereunder shall be subject to any withholding and reporting requirements imposed by any Applicable Law or any Taxing Authority and the Monitor, on behalf of the Applicants, shall be entitled to deduct and withhold from any distributions hereunder payable to an Unsecured Creditor or to any Person on behalf of any Unsecured Creditor, such amounts as the Monitor, on behalf of the Applicants, is: (i) required to deduct and withhold with respect to such payment under the ITA or any provision of federal,

provincial, territorial, state, local or foreign tax law, in each case, as amended or succeeded; or (ii) entitled to withhold under Section 116 of the ITA or any corresponding provisions of provincial law. To the extent that amounts are so withheld, such withheld amounts shall be treated for all purposes as having been paid to the Unsecured Creditor in respect of which such deduction and withholding was made, provided that such withheld amounts are actually remitted to the appropriate Taxing Authority.

ARTICLE 7
CREDITORS' MEETING

7.1 Creditors' Meeting and Conduct

The Creditors' Meeting to consider and vote on this Plan shall be held and conducted by the Applicants and the Monitor in accordance with the terms of the Creditors' Meeting Order.

7.2 Acceptance of Plan

If the Required Majority of Creditors is obtained at the Creditors' Meeting, this Plan shall be approved and shall be deemed to have been agreed to, accepted and approved by the Unsecured Creditors and shall be binding upon all Unsecured Creditors.

ARTICLE 8
CONDITIONS OF PLAN IMPLEMENTATION

8.1 Sanction Order

In the event that this Plan is approved by the Required Majority of Creditors at the Creditors' Meeting, the Applicants shall promptly apply to the Court for the Sanction Order effective on the Plan Implementation Date or such other date as specified therein and having, *inter alia*, substantially the effect that:

(a) (i) this Plan has been approved by the Required Majority of Creditors in conformity with the CCAA; (ii) the Applicants have complied with the provisions of the CCAA and the Orders made in the CCAA Proceedings in all respects; (iii) the Court is satisfied that the Applicants have not done nor purported to do anything that is not authorized by the CCAA; and (iv) this Plan and the transactions contemplated by it are fair and reasonable;

(b) this Plan (including the compromises, arrangements and releases set out herein) shall be sanctioned and approved pursuant to Section 6 of the CCAA and will be binding and effective as set out herein on the Applicants, all Creditors and all other Persons as provided for in this Plan or in the Sanction Order;

(c) subject to the performance by the Applicants of their obligations under this Plan, and except to the extent expressly contemplated by this Plan or the Sanction Order, all obligations or agreements (including Leases) to which the Applicants are a party, other than agreements (including Leases) which were terminated or

repudiated by the Applicants prior to the Plan Implementation Date in accordance with the CCAA Initial Order, will be and remain in full force and effect as at the Plan Implementation Date, unamended except as they may have been amended by agreement of the parties subsequent to the CCAA Filing Date, and no Person who is a party to any such obligations or agreements shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, option, dilution or other remedy) or make any demand under or in respect of any such obligation or agreement, by reason of:

(i) any defaults or events of default arising as a result of the insolvency of the Applicants prior to the Plan Implementation Date;

(ii) the fact that the Applicants have sought or obtained relief under the CCAA or that this Plan has been implemented by the Applicants;

(iii) the effect on the Applicants of the completion of any of the transactions contemplated by this Plan;

(iv) any compromises or arrangements effected pursuant to this Plan; or

(v) any other event(s) which occurred on or prior to the Plan Implementation Date which would have entitled any Person thereto to enforce those rights and remedies, subject to any express provisions to the contrary in any agreements entered into with the Applicants after the CCAA Filing Date in respect of any Leases. For greater certainty, nothing in this paragraph shall waive any obligations of the Applicants in respect of any Unaffected Obligation;

(d) the commencement or prosecution, whether directly, indirectly, derivatively or otherwise, of any demands, claims, actions, counterclaims, suits, judgement, or other remedy or recovery with respect to any Claim released, discharged or terminated pursuant to this Plan shall be permanently enjoined;

(e) the releases referred to in Section 10.5 of this Plan shall be confirmed and all steps or proceedings, including, without limitation, administrative orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any or all past, present and future directors and officers of the Applicants in respect of any Claim are permanently enjoined;

(f) all Charges established by the CCAA Initial Order (other than the Administrative Charge and the DIP Lender's Charge) or any other Order of the Court, shall be terminated, released and discharged effective on the Plan Implementation Date;

(g) the Stay Period shall have been extended until at least November 20, 2009;

(h) the activities of the Monitor in conducting and administering the Creditors' Meeting are approved; and

(i) the Monitor is discharged upon the filing of a certificate of the Monitor confirming, *inter alia*, resolution of all Disputed Claims and the making of the final distributions under the Plan.

8.2 Conditions of Plan Implementation

This Plan is subject to the following conditions for the benefit of the Applicants:

(a) all approvals, orders, determinations or consents required pursuant to Applicable Law shall have been obtained on terms and conditions satisfactory to the Applicants, acting reasonably, and shall remain in full force and effect on the Plan Implementation Date;

(b) all necessary corporate action and proceedings of the Applicants shall have been taken to approve this Plan and to enable the Applicants to execute, deliver and perform their obligations under the agreements, documents and other instructions to be executed and delivered by it pursuant to this Plan;

(c) all agreements, resolutions, documents and other instruments, which are necessary to be executed and delivered by the Applicants in order to implement this Plan and perform their obligations under this Plan shall have been executed and delivered;

(d) this Plan shall have been approved by the Required Majority of Creditors;

(e) the Sanction Order, in form and substance satisfactory to the Applicants, acting reasonably, and which shall contain the matters set out in Section 8.1 of this Plan, shall have been granted by the Court on or before November 16, 2009 or such other date as may be consented to by the Monitor or approved by the Court, and such Sanction Order as at the Plan Implementation Date shall be in full force and effect, not stayed or amended (unless with the consent of the Applicants, acting reasonably);

(f) all applicable appeal periods in respect of the Sanction Order shall have expired and in the event of an appeal or application for leave to appeal, final determination shall have been made by the applicable appellate court;

(g) the Plan Implementation Date shall have occurred on or before November 18, 2009 or such later date as may be consented to by the Monitor or approved by the Court; and

(h) the CCAA Initial Order shall be in full force and effect, not stayed or amended after the date hereof (except with the consent of the Applicants, acting reasonably).

Each of the conditions set out in this Section 8.2 (except subsections (d) and (e) above) may be waived by the Applicants, in whole or in part, in their sole discretion by written notice to the Monitor. If a condition set out above has not been satisfied as at the date specified for its fulfillment or waived in accordance with this Section 8.2, this Plan shall automatically terminate, in which case the Applicants shall not be under any further obligation to implement this Plan.

8.3 Monitor's Certificate

Upon written notice from the Applicants to the Monitor that the conditions set out in Section 8.2 of this Plan have been satisfied or waived, the Monitor shall, as soon as possible following receipt of such written notice, file with the Court a certificate which states that all conditions precedent set out in Section 8.2 of this Plan have been satisfied or waived, in substantially the form as the certificate attached as **Schedule "A"** to this Plan (the **"Monitor's Certificate"**).

ARTICLE 9
AMENDMENTS TO THE PLAN

9.1 Amendments to Plan Prior to Approval

The Applicants reserve the right to file any variation or modification of, or amendment or supplement to, this Plan by way of a supplementary or amended and restated plan or plans of compromise or arrangement or both filed with the Court at any time or from time to time prior to the conclusion of the Creditors' Meeting, in which case any such supplementary or amended and restated plan or plans of compromise or arrangement or both shall, for all purposes, be and are deemed to be a part of and incorporated into this Plan. The Applicants shall give notice in writing by publication or otherwise to all Unsecured Creditors of the details of any variations, modifications, amendments or supplements prior to the vote being taken to approve this Plan, as varied, modified, amended or supplemented. For greater certainty, the Applicants may propose a modification of or amendment or supplement to this Plan at the Creditors' Meeting.

9.2 Amendments to Plan Following Approval

After such Creditors' Meeting (and both prior to and subsequent to the obtaining of the Sanction Order), the Applicants may at any time and from time to time vary, amend, modify or supplement this Plan without the need for obtaining an Order of the Court or providing notice to the Unsecured Creditors, if the Applicants and the Monitor, acting reasonably and in good faith, determine that such variation, amendment, modification or supplement is of a technical or administrative nature that would not be materially prejudicial to the interests of any of the Unsecured Creditors under this Plan and is necessary in order to give effect to the substance of this Plan or the Sanction Order.

ARTICLE 10
PLAN IMPLEMENTATION AND EFFECT OF THE PLAN

10.1 Implementation

On the Plan Implementation Date, subject to the satisfaction or waiver of the conditions contained in Section 8.2 of this Plan, this Plan shall be implemented by the Applicants and shall be binding upon all Unsecured Creditors in accordance with the terms of this Plan and the Sanction Order.

10.2 Effect of the Plan Generally

The payment, compromise or satisfaction of any Unsecured Claims under this Plan, if sanctioned and approved by the Court, shall be binding upon each Unsecured Creditor, his, her or its heirs, executors, administrators, legal personal representatives, successors and assigns, as the case may be, for all purposes and this Plan will constitute: (a) full, final and absolute settlement of all rights of the Creditors against the Applicants in respect of the Unsecured Claims; and (b) an absolute release and discharge of all indebtedness, liabilities and obligations of or in respect of the Unsecured Claims against the Applicants, including any interest or costs accruing thereon (whether before or after the CCAA Filing Date).

10.3 Compromise Effective for All Purposes

No Person who has a Unsecured Claim as a guarantor, surety, indemnitor or similar covenant in respect of any Unsecured Claim which is compromised under this Plan or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of an Unsecured Claim which is compromised under this Plan shall be entitled to any greater rights than the Creditor whose Unsecured Claim was compromised under this Plan. Accordingly, the payment, compromise or other satisfaction of any Unsecured Claim under this Plan, if sanctioned and approved by the Court shall, be binding upon such Unsecured Creditor, its heirs, executors, administrators, successors and assigns for all purposes and, to such extent, shall also be effective to relieve any third party directly or indirectly liable for such indebtedness, whether as guarantor, surety, indemnitor, director, joint covenantor, principal or otherwise.

10.4 Consents and Leases

As of the Plan Implementation Date, each executory contract and Lease to which the Applicants, or either of them, are a party as at the CCAA Filing Date, as it may have been modified, amended or varied after the CCAA Filing Date with the consent of the Landlord, remains in full force and effect as at the Plan Implementation Date (other than in respect of Unsecured Claims arising from such contract or Lease which are affected by this Plan) unless such contract or Lease: (a) is the subject of a Notice of Repudiation or Termination; or (b) has expired or terminated pursuant to its own terms.

10.5 Plan Releases

Effective on the Interim Distribution Date:

(a) the Applicants shall be forever released from all Unsecured Claims; and

(b) each Unsecured Creditor in consideration of the distributions made under this Plan and in consideration of those continuing Leases after the Interim Distribution Date, will be deemed to have forever released and discharged: (i) the Applicants; (ii) the Monitor and its directors, officers, employees, agents, affiliates, professional advisors (including legal counsel) and associates; (iii) subject to subsection 5.1(2) of the CCAA in respect of directors, each and every past and present director, officer, employee, agent, affiliate, professional advisor (including legal counsel) and associate of the Applicants; and (iv) any person who may claim contribution or indemnification against or from the Applicants, or either of them, from any and all demands, Claims, including Claims of any past and present officers, directors or employees for contribution and indemnity, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, charges and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, including, without limitation, any and all Tax Claims, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Interim Distribution Date relating to, arising out of or in connection with the Applicants, the Assets, business or affairs of the Applicants, whenever and however conducted, this Plan or the CCAA Proceedings, other than Unaffected Obligations and the right to enforce the Applicants' obligations under this Plan.

10.6 Waiver of Defaults

From and after the Plan Implementation Date, and subject to any express provisions to the contrary in any amending agreement (including in respect of any Leases) entered into with the Applicants, or either of them, after the CCAA Filing Date, all Persons shall be deemed to have waived any and all defaults of the Applicants, or either of them, then existing or previously committed by the Applicants, or either of them, or caused by the Applicants, or either of them, or any of the provisions hereof or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in every contract, agreement, mortgage, security agreement, indenture, trust indenture, loan agreement, commitment letter, agreement for sale, Lease, personal property lease or other agreement, written or oral, any amendments or supplements thereto, existing between such Person and the Applicants, or any of them. Any and all notices of default, acceleration of payments and demands for payments under any instrument, or other notices, including without limitation, any notices of intention to proceed to enforce security, arising from any of such aforesaid defaults shall be deemed to have been rescinded and withdrawn. For greater certainty, nothing in this paragraph shall waive any obligations of the Applicants in respect of any Unaffected Obligation.

10.7 Consents and Releases

From and after the Plan Implementation Date, all Creditors shall be deemed to have consented and to have agreed to all of the provisions of this Plan as an entirety. In particular, each Creditor shall be deemed to have executed and delivered to the Applicants all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan in its entirety.

10.8 Deeming Provisions

In this Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

ARTICLE 11
GENERAL PROVISIONS

11.1 Different Capacities

Unsecured Creditors whose Claims are affected by this Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, each such Creditor shall be entitled to participate hereunder in each such capacity. Any action taken by an Unsecured Creditor in any one capacity shall not affect the Creditor in any other capacity, unless expressly agreed by the Creditor in writing or unless the Claims overlap or are otherwise duplicative.

11.2 Further Assurances

Notwithstanding that the transactions and events set out in this Plan may be deemed to occur without any additional act or formality other than as may be expressly set out herein, each of the Persons affected hereby shall make, do, and execute or cause to be made, done or executed all such further acts, deeds, agreements, assignments, transfers, conveyances, discharges, assurances, instruments, documents, elections, consents or filings as may be reasonably required by the Applicants in order to implement this Plan.

11.3 Paramountcy

Without limiting any other provision hereof, from and after the Plan Implementation Date, in the event of any conflict between this Plan and the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed, or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan agreement, commitment letter, agreement for sale, Lease, personal property lease or other agreement, written or oral and any and all amendments or supplements thereto existing between the Applicants, or either of them, and any other Person affected by this Plan, the terms, conditions and provisions of this Plan shall govern and shall take precedence and priority.

11.4 Revocation, Withdrawal, or Non-Consummation

The Applicants reserve the right to revoke or withdraw this Plan at any time prior to the Plan Implementation Date and to file subsequent plans of compromises or arrangement. If the

Applicants revoke or withdraw this Plan, or if the Sanction Order is not issued: (a) this Plan shall be null and void in all respects; (b) any Unsecured Claim, any settlement or compromise embodied in this Plan (including the fixing or limiting of any Unsecured Claim to an amount certain), assumption or termination, repudiation of contracts or Leases effected by this Plan, any document or agreement executed pursuant to this Plan shall be deemed null and void; and (c) nothing contained in this Plan, and no action taken in preparation for consummation of this Plan, shall: (i) constitute or be deemed to constitute a waiver or release of any Unsecured Claims by or against the Applicants or any Person; (ii) prejudice in any manner the rights of the Applicants or any Person in any further proceedings involving the Applicants; or (iii) constitute an admission of any sort by any of the Applicants or any Person.

11.5 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceedings with respect to the Applicants and will not be responsible or liable for any obligations of the Applicants. The Monitor will have the powers granted to it by this Plan, by the CCAA and by any Order, including the CCAA Initial Order.

11.6 Notices

Any notice or communication to be delivered hereunder will be in writing and will reference this Plan and may, subject to as hereinafter provided, be made or given by mail, personal delivery or by facsimile or email transmission addressed to the respective parties as follows:

(a) if to the Applicants:

Extreme Retail (Canada) Inc. / Extreme Properties Inc.
8200 Jane Street
Concord, Ontario L4K 5A7

Attention: Ted Agnew / Brian Worts
Telephone: (905) 738-3180
Fax: (905) 738-0680
E-mail: tagnew@extremeretail.ca / bworts@extremeretail.ca

with a copy to:

Aird & Berlis LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Attention: Steven L. Graff / Ian E. Aversa
Fax: (416) 863-1500
Telephone: (416) 863-1515
E-mail: sgraff@airdberlis.com / iaversa@airdberlis.com

(b) if to a Creditor:

to the last known address (including fax number or email address) for such Creditor specified in the Proof of Claim or Lease Terms Form, as the case may be, filed by such Creditor or, in the absence of such Proof of Claim or Lease Terms Form, to the last known address for such Creditor set out in the books and records of the Applicants or such other address as the Creditor may from time to time notify the Monitor in accordance with this Section.

(c) if to the Monitor:

KPMG Inc.,
in its capacity as Monitor of
Extreme Retail (Canada) Inc. and Extreme Properties Inc.
Commerce Court West
199 Bay Street, Suite 3300
Toronto, Ontario M5L 1B2

Attention: Michael G. Creber / R. Michael Craig
Telephone: (416) 777-3825 / (416) 777-8822
Fax: (416) 777-3364
E-mail: mcreber@kpmg.ca / michaelcraig@kpmg.ca

with a copy to:

Borden Ladner Gervais LLP
Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3Y4

Attention: Michael J. MacNaughton / Sam P. Rappos
Tel: (416) 367-6646 / (416) 367-6033
Fax: (416) 682-2837 / (416) 361-7306
Email: mmacnaughton@blgcanada.com / srappos@blgcanada.com

or to such other address as any party may from time to time notify the others in accordance with this Section. All such notices and communications which are delivered will be deemed to have been received on the date of delivery. All such notices and communications which are faxed or emailed will be deemed to be received on the date faxed or emailed if sent before 5:00 p.m. (Toronto time) on a Business Day and otherwise will be deemed to be received on the Business Day next following the day upon which such fax or email was sent. Any notice or

other communication sent by mail will be deemed to have been received on the third (3rd) Business Day after the date of mailing.

Dated at Toronto, Ontario this 15th day of September, 2009.

SCHEDULE "A" – FORM OF MONITOR'S CERTIFICATE

Court File No. CV-09-8084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to the order of this Honourable Court dated March 20, 2009 (the "**CCAA Initial Order**"), Extreme Retail (Canada) Inc. and Extreme Properties Inc. (the "**Applicants**") filed for and obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

B. Pursuant to the CCAA Initial Order, KPMG Inc. was appointed the Monitor of the Applicants (the "**Monitor**") with the powers, duties and obligations set out in the CCAA Initial Order;

C. The Applicants have filed a Consolidated Plan of Compromise and Arrangement under the CCAA dated September 15, 2009, as it may be restated, supplemented or amended from time to time (the "**Plan**"), which Plan has been approved by the Required Majority of Creditors and the Court;

D. The Applicants have advised the Monitor that, to the best of their knowledge, the conditions precedent set out in Section 8.2 of the Plan have been satisfied or waived in accordance with the Plan; and

E. Unless otherwise indicated herein, initially capitalized terms used herein have the meaning set out in the Plan.

THE MONITOR HEREBY CERTIFIES that the conditions precedent set out in Section 8.2 of the Plan have been satisfied or waived in accordance with the Plan on the ____ day of _____, 2009 and that accordingly, the Plan Implementation Date is the ____ day of _____, 2009.

DATED at Toronto, Ontario, this ____ day of _____, 2009.

KPMG INC., in its capacity as Court-appointed Monitor of Extreme Retail (Canada) Inc. and Extreme Properties Inc., and not in its personal or corporate capacity

By: _____
Name: Michael G. Creber
Title: President

5515737.11

SCHEDULE "B"

NOTICE OF CREDITORS' MEETINGS FOR THE CREDITORS OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC. PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* (CANADA)

NOTICE IS HEREBY GIVEN that a meeting (the "**Creditors' Meeting**") of the creditors (the "**Creditors**") of Extreme Retail (Canada) Inc. and Extreme Properties Inc. (the "**Applicants**"), described in the Consolidated Plan of Compromise and Arrangement dated September 15, 2009 (as restated, supplemented or amended from time to time in accordance with the provisions thereof, the "**Plan**"), a copy of which is attached as Schedule "A" to the Creditors' Meeting Order which accompanies this Notice, will be held to consider and, if deemed advisable, to pass a resolution to approve the Plan proposed by the Applicants pursuant to the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**").

The full text of the resolution to approve the Plan is attached as Schedule "E" to the Creditors' Meeting Order. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Plan filed by the Applicants, a copy of which is attached as Schedule "A" to the Creditors' Meeting Order.

This Plan is being considered pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated September 23, 2009 (as may be amended, the "**Creditors' Meeting Order**") which authorized and directed the Applicants to present the Plan to the Unsecured Creditors at the Creditors' Meeting. In order to become effective, the Plan must be approved by the Required Majority of Creditors and sanctioned by a final Order of the Court (the "**Sanction Order**").

For purposes of the Creditors' Meeting, the Plan provides for voting by Eligible Voting Creditors. The Creditors' Meeting for the purpose described above shall be held at the office of the Monitor, Commerce Court West, 199 Bay Street, Suite 3300, Toronto, Ontario on Monday, November 6, 2009, pursuant to the following schedule:

Date of Meeting	Time of Meeting	Location of Meeting
November 6, 2009	10:00 a.m. (Toronto time)	199 Bay Street, Suite 3300, Toronto, Ontario

VOTING AT CREDITORS' MEETING

Eligible Voting Creditors who are not attending in person at the Creditors' Meeting are requested to date, sign and return the enclosed form of proxy to the Monitor. In order to be acted upon, the enclosed form of proxy must be delivered or faxed to the Monitor at:

KPMG Inc.,
in its capacity as Monitor of
Extreme Retail (Canada) Inc. and Extreme Properties Inc.

199 Bay Street, Suite 3300
Toronto, Ontario M5L 1B2
Attention: Michael G. Creber and R. Michael Craig
Fax: (416) 777-3364
E-mail: mcreber@kpmg.ca / michaelcraig@kpmg.ca

by no later than 1:00 p.m. (Toronto time) on the last Business Day preceding the Creditors' Meeting or prior to any adjournments thereof, or by registering the form of proxy with the Chair prior to the commencement of the Creditors' Meeting or any adjournment thereof.

If the Eligible Voting Creditor is not an individual it may only attend and vote at the Creditors' Meeting if it has appointed a proxyholder to attend and act on its behalf at the Creditors' Meeting.

The enclosed form of proxy gives discretionary authority to proxyholders to consider any amendments to the Plan proposed at or prior to the Creditors' Meeting.

SANCTION HEARING

NOTICE IS HEREBY GIVEN that if the Plan is approved by the Required Majority of Creditors at the Creditors' Meeting pursuant to the CCAA, the Applicants will seek Court approval of the Plan at a motion for a Sanction Order, which motion shall be returnable at 330 University Avenue, Toronto, Ontario at 10:00 a.m. (Toronto time) on November 16, 2009, or as soon after that date as the matter can be heard.

Any person (other than the Applicants and the Monitor) who wishes to receive materials and appear at the Court sanction hearing to approve the Plan must serve upon the solicitors for the Applicants and the Monitor, and file with the Court, a Notice of Appearance by no later than 5:00 p.m. (Toronto time) on November 9 (Mon), 2009.

DATED at Toronto, Ontario this ____ day of _____, 2009.

EXTREME RETAIL (CANADA) INC.

By: _____
Name: Ted Agnew
Title: Chief Financial Officer

EXTREME PROPERTIES INC.

By: _____
Name: Ted Agnew
Title: Chief Financial Officer

SCHEDULE "C"

Court File No. CV-09-8084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

PROXY FOR USE BY HOLDERS OF UNSECURED CLAIMS

TO BE USED FOR THE MEETING OF CREDITORS (THE "CREDITORS' MEETING")

Before completing this Proxy, please read carefully the enclosed Instructions for Completion of Proxy set out on the reverse side hereof.

Capitalized items not otherwise defined herein have the meaning ascribed to them in the Consolidated Plan of Compromise and Arrangement of Extreme Retail (Canada) Inc. and Extreme Properties Inc. (the "**Applicants**") dated September 15, 2009 (as restated, supplemented or amended from time to time in accordance with the provisions thereof, the "**Plan**").

THE UNSECURED CREDITOR hereby revokes all proxies previously given and nominates, constitutes, and appoints _____ or, if no person is specified, Michael G. Creber of KPMG Inc., the Monitor of the Applicants, or such person as that officer may designate as nominee of the Unsecured Creditor, with power of substitution, to attend on behalf of and act for the undersigned Unsecured Creditor at the Creditors' Meeting and to vote the amount of the Unsecured Creditor's Claim as determined for voting purposes pursuant to the Claims Process and Bar Order, as follows:

A. **(mark one only)**:

☐ **VOTE FOR** approval of the Plan; or

☐ **VOTE AGAINST** approval of the Plan; and

B. vote at the nominee's discretion and otherwise act thereat for and on behalf of the Unsecured Creditor in respect of any amendments or variations to the above

matter and to any other maters that may come before the Creditors' Meeting, or any adjournment thereof.

Dated at _____ this _____ day of _____, 2009.

Unsecured Creditor Signature:
(If Unsecured Creditor is a corporation this section must be completed by duly authorized officer or attorney of the corporation)

Name:_____
(Print Name of Unsecured Creditor, as it appears on the Proof of Claim Form or Lease Terms Form, as the case may be)

By: _____
Name:
Title:
(Signature of Unsecured Creditor, and if applicable, Authorized Officer or Attorney of Unsecured Creditor and Name and Title of duly appointed officer or attorney of the Corporation)

Witness Signature
(Only applicable if Unsecured Creditor is an individual)

Name:_____
(Print Name of Witness)

By: _____
(Signature of Witness)

Phone Number of Unsecured Creditor _____

INSTRUCTIONS FOR COMPLETION OF PROXY

1. **If an officer of KPMG Inc., the Monitor of the Applicants, is appointed or is deemed to be appointed as proxyholder and the Unsecured Creditor fails to indicate a vote for or against the approval of the Plan on this Proxy, this Proxy will be voted FOR approval of the Plan.**

2. Each Unsecured Creditor who has a right to vote has the right to appoint a person (who does not need to be an Unsecured Creditor) to attend, act and vote for and on his, her or its behalf at the Creditors' Meeting, or any adjournments thereof, and such right may be exercised by inserting in the space provided therefor the name of the person to be appointed. **If no name has been inserted in the space provided, the Unsecured Creditor will be deemed to have appointed an officer of the Monitor as the Unsecured Creditor's proxyholder.**

3. If this proxy is not dated in the space provided therefor, it shall be deemed to bear the date on which it was received by the Monitor.

4. This proxy must be signed by the Unsecured Creditor or by his or her attorney duly authorized in writing or, where the Unsecured Creditor is a corporation, by a duly

authorized officer or attorney of the corporation with an indication of the title of such officer or attorney.

5. Valid proxies bearing or deemed to bear a later date shall revoke this proxy. In the event that more than one valid proxy for the same Unsecured Creditor and bearing or deemed to bear the same date is received with conflicting instructions, such proxies will be treated as disputed proxies and shall not be counted for the purpose of the vote.

6. **This Proxy must be received by the Monitor, delivery or facsimile, by no later than 1:00 p.m. (Toronto Time) on the last Business Day preceding the Creditors' Meeting or any adjournment thereof at the following address:**

KPMG Inc.,
in its capacity as Monitor of
Extreme Retail (Canada) Inc. and Extreme Properties Inc.
Commerce Court West
199 Bay Street, Suite 3300
Toronto, Ontario M5L 1B2
Attention: Michael G. Creber and R. Michael Craig
Fax: (416) 777-3364
E-mail: mcreber@kpmg.ca / michaelcraig@kpmg.ca

or deposited with the Chair prior to the commencement of the Creditors' Meeting but no Proxy will be accepted by the Chair after commencement of the Creditors' Meeting.

7. If the Unsecured Creditor is not an individual it may only attend and vote at the Creditors' Meeting if it has appointed a proxyholder to attend and act on its behalf at the Creditors' Meeting.

SCHEDULE "D"

NOTICE TO CREDITORS OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

RE: NOTICE OF THE MEETING OF THE UNSECURED CREDITORS OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC. (the "Applicants") PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT (the "CCAA")

PLEASE TAKE NOTICE that this notice is being published pursuant to an order of the Superior Court of Justice of Ontario dated September 23, 2009 (the "Order") establishing the procedure for the Applicants to call, hold and conduct a meeting of the Unsecured Creditors (as defined in the Creditors' Meeting Order) of the Applicants for the purposes of considering, and if though advisable, approving a plan of arrangement and compromise (the "Plan") under the CCAA amongst the Applicants and its Creditors. The Creditors' Meetings will be held as follows:

10:00 A.M. (TORONTO TIME) ON NOVEMBER 6, 2009
AT THE OFFICE OF THE MONITOR, 199 BAY STREET, SUITE 3300
TORONTO, ONTARIO

Only Unsecured Creditors who have submitted a Proof of Claim or Lease Terms Form, as the case may be, in accordance with the terms of the Claims Process and Bar Order dated September 23, 2009, shall be entitled to attend and vote on the Plan at the Creditors' Meeting.

Further information and copies of any documents in the CCAA proceedings of the Applicants, including the Creditors' Meeting Information Package and the Plan, can be obtained on the website of KPMG Inc., the Monitor, at www.kpmg.ca/extremeretail or by contacting Michael G. Creber or R. Michael Craig, at KPMG Inc., the Court-appointed Monitor of the Applicants (Telephone: 416-777-3825 / 416-777-8822 and Fax 416-777-3364).

DATED at _____ this _____ day of _____, 2009.

SCHEDULE "E"

TEXT OF PLAN RESOLUTION

EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.
(the "Applicants")

Consolidated Plan of Compromise and Arrangement
under the *Companies' Creditors Arrangement Act*

BE IT RESOLVED THAT:

1. the Consolidated Plan of Compromise and Arrangement dated September 15, 2009 filed by the Applicants under the *Companies' Creditors Arrangement Act*, as may be amended, restated or supplemented (the "**Plan**"), presented to the Creditors' Meeting be and is hereby authorized and approved in accordance with the Creditors' Meeting Order;

2. notwithstanding that this resolution has been passed and the Plan has been adopted by the Unsecured Creditors and/or approved by the Court, the directors of the Applicants be and are hereby authorized and empowered to amend or not proceed with this resolution in accordance with the Plan and the Creditors' Meeting Order; and

3. any one director or officer of the Applicants be, and he or she is hereby authorized, empowered and instructed, acting for and in the name of and on behalf of the Applicants (but not the creditors), to execute, or cause to be executed under the seal of the Applicants or otherwise, and to deliver or cause to be delivered for, on behalf of and in the name of the Applicants all such documents, agreements and instruments and to do or cause to be done all such other acts and things as such director or officer of the Applicants determines to be necessary or desirable in order to carry out the Plan, such determination to be conclusively evidenced by the execution and delivery by such directors or officers of such documents, agreements or instruments or the doing of any such act or thing.

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 EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC.

Court File No. CV-09-8084-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

CREDITORS' MEETING ORDER

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

Steven L. Graff (LSUC # 31871V)
Ian E. Aversa (LSUC # 55449N)

Tel: 416.863.1500
Fax: 416.863.1515

Solicitors for the Applicants

5575625.9

Court File No. CV-09-8084-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EXTREME RETAIL (CANADA) INC. AND EXTREME PROPERTIES INC. (the "Applicants")

FIFTH REPORT OF THE MONITOR
DATED OCTOBER 30, 2009

BACKGROUND

1. On March 20, 2009, the Applicants were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), pursuant to an Initial Order under which, *inter alia*: (i) the Applicants were determined to be entitled to relief under the CCAA; (ii) KPMG Inc. was appointed as monitor (the "**Monitor**"); and (iii) a stay of proceedings was granted until April 20, 2009 (the "**Stay Period**").

2. On April 14, 2009, the Honourable Mr. Justice Wilton-Siegel of the Ontario Superior Court of Justice granted an Order which, *inter alia*: (i) amended the Initial Order in the form of the Amended and Restated Initial Order; (ii) extended the Stay Period until June 12, 2009; and (iii) approved the First Report of the Monitor dated April 8, 2009 (the "**First Report**") and the activities of the Monitor described therein.

3. On June 12, 2009, the Honourable Madam Justice Hoy of the Ontario Superior Court of Justice granted an Order which, *inter alia*: (i) extended the Stay Period until August 21, 2009; and (ii) approved the Second Report of the Monitor dated June 8, 2009 (the "**Second Report**") and the activities of the Monitor described therein.

4. On August 21, 2009, the Honourable Mr. Justice Newbould of the Ontario Superior Court of Justice granted an Order which, *inter alia*: (i) extended the Stay Period until September 25, 2009; and (ii) approved the Third Report of the Monitor dated August 18, 2009 (the "**Third Report**") and the activities of the Monitor described therein.

5. On September 23 and September 24, 2009, the Honourable Madam Justice Hoy of the Ontario Superior Court of Justice granted an Order which, *inter alia*: (i) extended the Stay Period until November 20, 2009; (ii) approved the Claims Process and Bar Order; (iii) approved the Creditors' Meeting Order; and (iv) approved the Fourth Report of the Monitor dated September 14, 2009 (the "**Fourth Report**") and the activities of the Monitor described therein.

6. Copies of the Initial Order and the Amended and Restated Initial Order, together with their respective endorsements, the other Orders granted in these proceedings, the application and motion materials filed in these proceedings, and the Monitor's First Report, Second Report, Third Report and Fourth Report, among other things, can be found on the Monitor's website at www.kpmg.ca/extremeretail (the "**Website**").

7. Pursuant to paragraph 24 of the Amended and Restated Initial Order, the Monitor was authorized and directed to monitor the Property and the Applicants' conduct of the

Business, with the powers and obligations set out in the CCAA and the Amended and Restated Initial Order.

8. Capitalized terms not defined in this Fifth Report are as defined in the Amended and Restated Initial Order or in the Applicants' consolidated plan of compromise and arrangement dated September 15, 2009 (the "**Plan**").

PURPOSE OF THIS REPORT

9. The purposes of this Fifth Report are as follows:

(a) to report on the activities of the Monitor for the period from March 20, 2009 to October 29, 2009;

(b) to report on the Applicants' significant activities from March 20, 2009 to October 29, 2009;

(c) to report on the Applicants' actual cash flow performance from March 20, 2009 to October 16, 2009;

(d) to report on the status of the claims process up to and including the Claims Bar Date of October 23, 2009;

(e) to provide the Monitor's assessment of the Plan; and

(f) to recommend that Unsecured Creditors affected by the Plan vote in favour of acceptance of the Plan.

GENERAL ACTIVITIES OF THE MONITOR

10. The Monitor remains in regular contact with the Applicants and their advisors about issues of concern to them and the issuance of payments with respect to obligations required and/or permitted by the Amended and Restated Initial Order.

11. On a weekly basis, the Monitor has been monitoring the weekly and cumulative receipts and disbursements of the Applicants. The Monitor has reviewed post-petition disbursements made by the Applicants after March 20, 2009. The Monitor has not reviewed pre-petition disbursements made by the Applicants.

12. During the period from March 20, 2009 to October 29, 2009, the Monitor held discussions with the following individuals:

Name	Title	Company
Tom Norwell	Former President and CEO	Extreme Retail (Canada) Inc.
Brian Worts	CEO	Extreme Retail (Canada) Inc.
Ted Agnew	CFO	Extreme Retail (Canada) Inc.
Ken Opper	Former Executive Vice-President and COO	Extreme Retail (Canada) Inc.
Peter Neubauer	Internal Legal Counsel	Extreme Retail (Canada) Inc.
Steven Graff & Ian Aversa	Applicants' Legal Counsel	Aird and Berlis LLP
Frank Spain	Director	Invar (Buck or Two) Limited

and various other parties of interest, including but not limited to, vendors, landlords and their legal counsel, employees, and franchisees.

13. As provided for in the Amended and Restated Initial Order, the Monitor established the Website in connection with these CCAA proceedings. The Monitor has posted and will

continue to post copies of Orders and endorsements, motion and application records, the Monitor's reports and the current service list, along with other relevant documents, on the Website.

14. In preparing this Fifth Report, the Monitor has relied upon the information (written and oral) made available from the Applicants and their financial and legal advisors. The Monitor has not audited or otherwise verified the completeness or accuracy of the information provided.

OPERATIONAL RESTRUCTURING

15. During the period of March 20, 2009 to October 29, 2009, Extreme Retail (Canada) Inc. ("**Extreme Retail**") and Extreme Properties Inc. ("**Extreme Properties**"), as applicable: (i) repudiated and closed, or reassigned to certain franchisees, all of their corporate store locations (the "**Corporate Stores**"); (ii) reviewed the profitability of all its franchisees (the "**Franchisees**") and repudiated leases for underperforming locations; and (iii) reviewed head office expenses, including payroll, and implemented significant cost reduction initiatives. The Applicants have advised the Monitor that their operational restructuring process is complete, and that forecasts indicate positive operating cash flow on a go forward basis prior to payment of professional fees related to the CCAA process.

CASH FLOW PERFORMANCE

16. The Applicants' cash receipts and disbursements from March 20, 2009 (the week of the Initial Order) to October 16, 2009 are summarized below and are compared with the

information contained in the revised cash flow which was appended to the Affidavit of Ted Agnew sworn on August 18, 2009 and filed with this Honourable Court.

SCHEDULE OF RECEIPTS AND DISBURSEMENTS
FOR THE PERIOD MARCH 20, 2009 TO OCTOBER 16, 2009
(unaudited)

	Period to Date			
	31 Weeks Ending			
Week Ending	**16-Oct**	**16-Oct**	**Variance $**	**Variance %**
	Actual	*Forecast*	*Fav / (Unfav)*	*Fav / (Unfav)*
I. Cash Flows				
Operating receipts				
Royalties	2,003,382	1,989,212	14,170	0.71%
Franchisee Rent Receipts	65,039	94,896	(29,857)	-31.46%
Franchisee Loan & Other Receipts	191,381	118,755	72,626	61.16%
Corporate store sales	420,147	211,785	208,361	98.38%
Vendor Rebates	243,551	102,789	140,762	136.94%
subtotal	2,923,500	2,517,438	406,062	16.13%
Operating Disbursements				
Head Office Payroll & Benefits	(1,292,898)	(1,217,006)	(75,892)	-6.24%
Management Services	(247,623)	(206,416)	(41,207)	-19.96%
Corporate Store Payroll & Benefits	(129,692)	(73,052)	(56,640)	-77.53%
Employee Travel and Other	(223,804)	(204,884)	(18,920)	-9.23%
Head Office Rent Payments	(211,819)	(161,674)	(50,146)	-31.02%
Corporate Store Rent Payments	(186,918)	(127,668)	(59,250)	-46.41%
Franchisee rent payable	(207,873)	(176,748)	(31,125)	-17.61%
Franchisee assistance disbursements	(107,339)	(274,464)	167,125	60.89%
Corporate store utilities and other exp	(26,404)	(31,966)	5,562	17.40%
Head office utilities and other exp.	(223,337)	(290,546)	67,209	23.13%
Sales Tax Remittances	(115,932)	(100,101)	(15,831)	-15.82%
subtotal	(2,973,638)	(2,864,525)	(109,114)	-3.81%
Operating Cash Flow	**(50,138)**	**(347,086)**	**296,948**	**-85.55%**
New franchise development				
Proceeds from sale of franchising	839,425	-	839,425	
Labour franchise openings	(52,283)	(10,000)	(42,283)	-422.83%
Design/ Construction costs	(213,696)	(25,000)	(188,696)	-754.78%
Inventory and other costs	(282,029)	(10,000)	(272,029)	-2720.29%
subtotal	**291,416**	**(45,000)**	**336,416**	**747.59%**
Other non-operating activities				
Inventory and FA liquidation/movi	179,175	-	179,175	
Other receipts/(disbursements)	31,075	(32,444)	63,520	195.78%
Interest and Bank Fees	(16,753)	(1,000)	(15,753)	-1575.34%
Professional Fee Payments	(478,532)	(490,141)	11,609	2.37%
subtotal	**(285,036)**	**(523,585)**	**238,550**	**45.56%**
Non-operating cash flow	**6,381**	**(568,585)**	**574,966**	**101.12%**
Net Cash Flow	**(43,757)**	**(915,672)**	**871,914**	**95.22%**
DIP Lender	-	600,000	(600,000)	100.00%
II. Cash Balance				
Opening Cash Balance	415,476	325,000	90,476	27.84%
Net Cash Flow	(43,757)	(915,672)	871,914	95.22%
DIP Financing	-	600,000	(600,000)	-100.00%
Closing Cash Balance	**371,719**	**9,328**	**362,391**	**3884.86%**

Notes:

[1] Actual results include actual cash flow experience for the period March 20, 2009 to September 4, 2009. Amounts are presented on the basis that cheques/wire transfers are issued and cleared on the same day.

[2] Projected amounts are those set out in the revised cash flow forecast that was appended to the Affidavit of Ken Opper, former COO Extreme Retail (Canada) Inc., sworn June 8, 2009; and a second revised cash flow forecast that was appended to the Affidavit of Ted Agnew, CFO of Extreme Retail (Canada) Inc., sworn August 18, 2009.

17. The above-noted cash flow results were received by the Monitor and discussed with the Applicants' management so that the Monitor could obtain management's explanations with respect to the variance between the projections and the actual results.

18. The opening cash balance of approximately $415,000 was $90,000 favourable due to lower than expected disbursements incurred on the few days prior to the date of the Initial Order.

19. Operating receipts were $406,000 favourable primarily due to (i) Corporate Store sales that produced $208,000 more than forecasted as they were open longer than expected and (ii) $141,000 higher than expected vendor rebates that the Applicants did not initially include in their assumptions. Those amounts were somewhat offset by $30,000 of lower franchise rent receipts received by the Applicants, which was as a result of certain Franchisees' leases being repudiated earlier than initially forecasted.

20. Operating disbursements were $109,000 unfavourable primarily due (i) $57,000 in additional Corporate Store payroll; (ii) $59,000 in additional Corporate Store rent; and (iii) $31,000 higher than expected Franchisee rent payments due to a higher number of leases being repudiated and the Franchisees not paying their portion of the rent. Also, the Applicants incurred $41,000 in additional management services due to performing an operational review and hiring a new CEO and a $50,000 unfavourable variance in head office rent payments due to moving locations and paying rent in advance for the new location. These unfavourable variances were offset by $167,000 lower than expected Franchisee assistance disbursements as a result of the Applicants' repudiating Franchisee locations earlier than initially forecasted.

21. New franchise developments were not forecasted previously as the likelihood of completing the transactions was uncertain at the time of the forecast. Receipts of $839,000 include franchise fees and funds received by the Applicants to cover the costs of labour, design and construction, inventory, and other costs related to franchise openings. Net cash flow to date has been $291,000; only minor future disbursements are forecasted as these franchises are already open.

22. Other non-operating activities were $239,000 favourable due to receipts of $179,000 from the bulk liquidation of inventory and fixed assets from Corporate Stores that were closed, $64,000 greater than expected other receipts due to collection of insurance premiums by the Applicants that will remit them on behalf of their Franchisees and $12,000 less in professional fees than forecasted due to timing, all offset by $16,000 greater than expected interest and bank fees. Professional fees include retainers totalling $125,000.

23. As a result, net cash flows during the period in question were better than projected, and the Applicants did not need to draw on the DIP facility detailed in the Amended and Restated Initial Order as at October 16, 2009. The closing cash balance as at October 16, 2009 totalled approximately $372,000, which was $362,000 favourable due to greater than projected net cash flow largely from Corporate Store sales, inventory liquidation and new franchise development, and a favourable opening cash balance.

24. For the period of October 17, 2009 to November 20, 2009, the Applicants expect to have positive net cash flow from operations of approximately $103,000. Non-operating activities are expected to have negative net cash flow of $158,000 primarily due to

professional fee payments of $90,000 and timing of payments made on behalf of Franchisees for which the Applicants have already received payment. The result is a net cash outflow of $55,000 over the forecast period and a forecasted cash balance of approximately $316,000 on November 20, 2009.

CORPORATE OVERVIEW

25. As previously stated, there are two Applicants: Extreme Retail and Extreme Properties. Extreme Properties holds substantially all of the Applicants' franchise leases, and a minimal amount of the Applicants' other assets and liabilities. Extreme Retail holds substantially all of the remaining assets and has the balance of the liabilities. Thus Extreme Properties is a tenant in respect of franchise locations and sublets them to Franchisees. On the other hand, Extreme Retail is the franchisor and has franchise arrangements with Franchisees. Despite these divisions between the entities, the Monitor understands that they are significantly dependent on each other, as Extreme Retail requires the leases to allow its Franchisees to operate and Extreme Properties requires these operations to drive value from the leases it holds.

CLAIMS PROCESS

26. As described in the Fourth Report, this Honourable Court granted the Claims Process and Bar Order on September 23, 2009 which outlined the procedures for calling for and determining the Claims of the Applicants' Creditors. The Claims Process and Bar Order required all Unsecured Claims against the Applicants that arose prior to the commencement of the CCAA proceedings to be filed with the Monitor by October 23, 2009 (the "**Claims Bar Date**"). As of the Claims Bar Date of October 23, 2009, the

Monitor received a total of 192 Unsecured Claims, with a total value as filed by the Unsecured Creditors of $11,061,774.

27. The Monitor reviewed all Unsecured Claims received and contacted Unsecured Creditors where information was not complete, or the balance of the claim was not consistent with the Applicants' records.

28. The Monitor noted discrepancies between some of the Unsecured Claims filed and the records of the Applicants. As of the Claims Bar Date, the Monitor noted 104 claim discrepancies with total difference of $3.040,427. The Monitor contacted both the Applicants and the Unsecured Creditor to determine the reason for the difference and assess the validity of the information obtained from the Applicants and the Unsecured Creditor relating to the Unsecured Claim. Wherever possible, the Monitor assisted the Applicants and the Unsecured Creditor in consensually resolving claim amounts. As of the date of this Fifth Report, there are a total of eighteen (18) disputes outstanding, which amount to $1,666.842 of $11,139,186 total of Unsecured Claims. Two (2) of the disputed claims, which were disallowed as outlined below, represent $1,244,014 of the disputes outstanding.

29. The Monitor received and accepted five (5) late Unsecured Claims representing $26.529. The late Unsecured Claims were accepted primarily due to technical difficulties and language barriers encountered by the Unsecured Creditors in completing and filing their Unsecured Claims.

30. The Monitor continued to work with Unsecured Creditors and the Applicants to consensually resolve these differences until the end of day October 30, 2009; which is the

last day that the Monitor is allowed to send a Notice of Revision or Disallowance. As at October 30, 2009, the Monitor sent two (2) Notices of Disallowance in the total amount of $1,244,014. These claims relate to ongoing legal proceedings that are contested by the Applicants and are in dispute.

31. If, after contacting both the Unsecured Creditor and the Applicants, the Monitor could not validate the Unsecured Creditor's Unsecured Claim, more specifically the amount over and above the claim as documented on the Applicants' books and records, a Dispute Notice was sent out to the Unsecured Creditor.

OVERVIEW OF PLAN

32. A copy of the Plan can be found on the Monitor's Website, as an attachment to the Creditors' Meeting Order.

33. The purpose of the Plan is to affect a compromise and arrangement of all Unsecured Claims against the Applicants, in order to enable the business of the Applicants to continue.

34. The Plan filed by the Applicants is a consolidated Plan that provides that the assets and liabilities of the Applicants are to be combined and one class of Unsecured Creditors be created to consider and vote on the Plan. The Monitor understands that the filing of a consolidated Plan and the creation of a single creditor class to vote on the Plan was a condition precedent for the support of the financial sponsors of the Plan, who are parties related to the existing secured creditors and/or shareholders of the Applicants.

35. The Plan does not compromise Claims of Secured Creditors or Employee Restructuring Claims. As discussed in greater detail in the Fourth Report, the Monitor obtained a legal opinion from its legal counsel Borden Ladner Gervais LLP ("**BLG**") relating to the enforceability of the Secured Creditors security over the property of Extreme Retail. Employee Restructuring Claims arise from, or are in any way related to, the restructuring or termination of the employment of an employee of the Applicants pursuant to a Notice of Repudiation or Termination which is effective prior to the Plan Implementation Date.

36. The Plan currently provides Unsecured Creditors, who have successfully proven their claims, with three (3) options to receive distributions under the Plan. Unsecured Creditors can either (i) immediately receive a proportionate share of $750,000 (minus any amounts paid to Unsecured Creditors under option (iii)); (ii) immediately receive a proportionate share of $600,000 (minus any amounts paid to Unsecured Creditors under option (iii)) and a proportionate share of $300,000 that the Applicants intend to distribute to Unsecured Creditors in one (1) year; or (iii) the lesser of $500 and their proven claim.

37. Based on a total Unsecured Claims pool of $11,139,186 as of October 30, 2009, including Disputed Claims of $1,666,842, those Unsecured Creditors selecting option (i) above would receive approximately $0.067 for each $1 claimed and those Unsecured Creditors selecting option (ii) above would receive approximately $0.054 in the first distribution and $0.027 in the second distribution, in the event the second distribution is made by the Applicants under the Plan. A full listing of Unsecured Creditors who have filed Claims is attached as **Appendix "A"**.

LIQUIDATION ANALYSIS

38. As previously stated, there are two Applicants: Extreme Retail and Extreme Properties.

39. The Monitor believes that if the Plan is not implemented, the most likely alternative will be a liquidation of the assets under the CCAA or the *Bankruptcy and Insolvency Act* ("***BIA***"), and the distribution of the net proceeds of such realization to Creditors in accordance with their respective priorities.

40. For the purpose of liquidation analysis, as set out in this Fifth Report, the two Applicants would be treated separately and Creditors of Extreme Retail would receive a different payout than the Creditors of Extreme Properties.

41. The Monitor's analysis indicates that it is expected that in the event that the Plan is not accepted by the Unsecured Creditors and a liquidation of the assets of the Applicants ensues, the recovery for the Unsecured Creditors would be minimal. The analysis indicates that in the event of liquidation, the amount available to the Unsecured Creditors would be less than the proposed proceeds to be derived under the Plan for both those Creditors of Extreme Retail and Extreme Properties as discussed above.

42. In performing its analysis, the Monitor considered the impact under a liquidation of selling below market leases, the liability associated with repudiating existing leases which were determined to not be saleable, proceeds from the sale of remaining assets

held by each of the Applicants, professional fees to process the sale of the leases, and costs related to the liquidation proceedings. [1]

43. The Monitor also notes the impact that a liquidation would have on the Applicants' various stakeholders. The closure of the Franchisee locations would severely impact the source of income for a number of affected individuals, most notably Franchisees and employees, both the twenty (20) at the Applicants' head office and approximately eight-hundred (800) at the Franchisee locations, resulting in these individuals having to seek alternative sources of income. Suppliers to the Franchisee locations, often small owner-managed companies dependent on these longstanding relationships with the Applicants and the Franchisees, would face a difficult challenge at the prospect of having to replace the orders lost due to the liquidation of the Applicants. Landlords would be faced with further lease repudiations.

CREDITORS' MEETING

44. In order to complete the restructuring of the Applicants, it is necessary that the Applicants, with the assistance and oversight of the Monitor, call, hold and conduct a meeting of the Applicants' Unsecured Creditors. The meeting will take place at 10:00am (Toronto time) on Friday November 6, 2009 at the office of the Monitor, 199 Bay Street, Suite 3300, Toronto, Ontario.

[1] Amongst the assets of Extreme Properties is a contingent and unliquidated litigation claim. As in the case of any litigation, there are legal costs involved in pursuing the claim and it is uncertain whether Extreme Properties will be able recover under the claim. The Monitor has been informed by Extreme Properties' management that in the event it is successful with the claim it is unlikely that Extreme Properties will be entitled to recover an amount greater than $75,000. The Monitor has not undertaken an independent analysis of this litigation claim.

45. The Monitor prepared a notice which will be displayed in the Report on Business section of the Globe and Mail's Friday, October 30, 2009 national edition.

RECOMMENDATION

46. Based on the analysis outlined in this Fifth Report, including both the financial and qualitative implications of the Plan as compared to a potential liquidation, the Monitor recommends that the Unsecured Creditors with Proven Voting Claims approve the Plan at the Creditors' Meeting.

47. Based on the foregoing, the Monitor recommends that this Honourable Court grant an Order approving this Fifth Report and the activities of the Monitor described herein.

All of which is respectfully submitted by:

KPMG INC.
In its capacity as Court Appointed Monitor of
Extreme Retail (Canada) Inc. and Extreme Properties Inc.

By: Michael G. Creber
President

APPENDIX "A"

Listing of Unsecured Creditors who have filed Claims

Creditor
0691708 B.C. Ltd
0801261 B.C. Ltd.
0815924 B.C. Ltd.
1018331 Ontario Ltd
1035406 ONTARIO INC
1037714 Ontario Inc.
1091060 Alberta Ltd.
1103538 Ontario Inc.
11357 NFLD LTD.
1138107 Ontario Inc.
1152441 Ontario Inc.
1167623 Alberta Ltd.
1178369 Ontario Inc
1183837 Ontario Inc.
1259724 Alberta Ltd.
1263499 Alberta Inc.
1277989 Ontario Ltd.
1289768 Ontario Inc.
1311937 Ontario Inc.
1319918 Alberta Ltd.
1395179 Ontario Ltd.
1435706 Ontario Inc.
1446201 Ontario Ltd.
1463181 Ontario Inc.
1479317 Ontario Limited
1526081 Ontario Inc
1577803 Ontario Limited
1582902 Ontario Inc.
1649692 Ontario Inc.
1729058 Ontario Ltd.
1749224 Ontario Inc.
20 VIC Management (Toronto) Inc.
2001070 Ontario Inc.
2006195 Ontario Inc.
2011201 Ontario Limited
2055825 Ontario Limited
2108153 Ontario Inc.
2115411 Ontario Inc.
2166391 Ontario Inc
2175639 Ontario Inc
2674255 Manitoba Ltd.
3070239 Manitoba Ltd.
4260805 Canada Inc.
4276605 Manitoba Ltd.
429031 B. C. Ltd.
4299035 Canada Inc.
4607504 Manitoba Ltd.
566480 B.C. LTD.
620941 B. C. LTD.
644192 Alberta Ltd.
6491898 CANADA INC.
7046456 Canada Inc
850072 Alberta Ltd
884676 Ontario Ltd
990555 Ontario Ltd
A.E.S. Imports Inc.
Almark Sales & Imports
Arcturus Realty Corporation
Arctic Market Sales
Barrie Hydro
BDO Dunwoody LLP
Beard Winter LLP
Bentall Retail Services (Toronto)
BFI Canada- Winnipeg
BIC Enterprises Ltd
Butterfly Fashion Trading
Cadillac Fairview Corp (Eastern Canada Portfolio)
Cadillac Fairview Corporation (Ontario Portfolio)
Canada Revenue Agency
Canasia Toys & Gifts Inc.
Carlton Cards Limited
Cine Maison Royal
Cobank Property Tax Services Inc.
Coca-Cola Bottling Company
Crayola Canada
Daien Enterprises Inc
David Scotthorne Enterprises Ltd.
DBD Holdings Ltd.
Dehaan Design Co.
Depanneur Franco Inc
Depanneur Franco Inc
Dorfin
Eastland Shopping Centre Inc.
Electric Electric Ltd
Eyecandy Accessories Inc
Fairway Holdings Incorporated
First Capital Realty Inc.
Frisco International Corporation
GDA Construction Corporation
Gertex Hosiery Inc.

Listing of Unsecured Creditors who have filed Claims

Creditor
Giftcraft Ltd
Glazers Inc.
Golden Tree Trading Ltd.
Gordon Gould
Gorgeous Gems
Gowling Lafleur Henderson LLP
Grosnor Disribution Ajax Inc.
Handee Products
Holiday Inn Hotel & Suites Reginav
Humpty Dumpty Snack Foods Inc. Canada
International Playing Card
Ivanhoe Cambridge Inc. (Victoria Sq.-Montreal)
Jacques L. Berthiaume
Jenda Enterprises Inc.
Jenera Sales
John Wiley & Sons Canada Ltd
Luco Enterprises Inc.
Luco Enterprises Inc.
M4M Retail Ltd.
Manitoba Hydro
Market Wise
Marvin Enterprises Inc.
Mathews Value Retail Ltd.
Miles Davison LLP
Montez (Mayflower) Inc.
Morguard Investments Limited (Mississauga)
Morguard Investments Ltd. (Vancouver)
Multicraft Imports Inc.
Nova Scotia Power Inc.
Orillia Power Distribution
P.K. Douglass Inc.
Peter Neubauer
Petworld Pet Products Inc.
Picture Frame Clearing House
Piersanti & Company
Plaza Atlantic Limited (N.S.)
Power Stream- Vaughan
Premier Brands
Raetrelea Enterprises Inc
Reel Choice Distribution Inc
Riocan Real Estate Investment (Toronto)
Roll-Shemar Inc.
Royal Specialty Sales
SaskPower
Shape Duncan Limited Partnership
Shapiro Cohen
Siddarth Imports Inc.
SKS Novelty Co Ltd
SmartCentres
Splash International Marketing Inc
Surican Inc.
Tera Dilta Enterprises Ltd.
TigerDirect.CA Inc.
Today's Products Inc.
Toronto Hydro-Electric System Ltd.
Toy Galaxy
Tuff Control Systems Ltd.
Unique Party Favors
V& L Associates Inc.
V.H.A. Holdings Ltd.
VanPak Registered Ltd.
Vanthoff Holdings Ltd.
Vincent G Labrosse
Wann Retail Inc.
WIS International
Wisdom Electronics Inc.
Woolf & Ville Inc.
WOS Corp.
Yogeshwarovijayletaram Enterprises Ltd.

TABLE OF CONTENTS

Page

TAB 10

CanLII

Woodward's Ltd., 1993 CanLII 870 (BC SC)

Date: 1993-04-20
Docket: A924791
Other citations: 84 BCLR (2d) 206; 20 CBR (3d) 74; [1993] BCJ No 852 (QL)
Citation: Woodward's Ltd., 1993 CanLII 870 (BC SC), <http://canlii.ca/t/1dhrf> retrieved on 2015-12-16

Date of Release: April 20, 1993

No. A924791
Vancouver
Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

- AND -

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, c. 59

IN THE MATTER OF WOODWARD'S LIMITED, WOODWARD STORES LIMITED AND ABERCROMBIE & FITCH CO. (CANADA) LTD.	)	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE TYSOE (IN CHAMBERS)

Counsel for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.:	Michael A. Fitch Susan M. Eyre D. Geoffrey Cowper
Counsel for Hans Andriessen and certain other terminated employees:	Paul J. Pearlman
Counsel for R. Longine and certain other terminated employees:	James E. Howell
Counsel for Royal Trust Corporation of Canada:	Vincent Morgan
Counsel for National Bank Leasing:	Digby R. Leigh
Counsel for North American Trust Company:	Douglas B. Hyndman
Counsel for Triple Five Corporation Limited:	B.A.R. Smith, Q.C. (Alta.)
Counsel for Bucci Investment Corporation and Prospero International Realty Inc.:	William E.J. Skelly
Counsel for Cambridge Shopping Centres Limited:	Douglas I. Knowles Clayton W. Caverly
Counsel for Neptune Foods:	Sean Donovan
Counsel for Park Royal Shopping Centre Limited and others:	Robert G. Kuhn Nicolaas A. Blom
Counsel for Laing Properties:	Robert P. Sloman

Counsel for Oakridge Centre Holdings Inc. and others: Gordon K. Mitchell L.M. Candido

Counsel for General Electric Capital Canada Inc.: Alan H. Brown

Counsel for Zellers Inc.: James P. Taylor, Q.C. Scott A. Turner Michael Harquail (Ont.)

Date and place of hearing: April 13, 14 and 15, 1993 Vancouver, B.C.

INTRODUCTION

The Petitioners ("Woodward's") apply for an order approving the classes of creditors designated in their plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") filed on April 7, 1993 (the "Reorganization Plan"). Woodward's proposes to hold meetings of these classes of creditors during the first part of May 1993 for the purpose of voting on the Reorganization Plan.

The classes of creditors designated by the Reorganization Plan are Secured Creditors, Noteholders, Landlords and General Creditors. Each of these terms is defined in the Reorganization Plan. There is no issue as to the appropriateness of classes of secured creditors, noteholders, landlords and general creditors. The question is whether or not there should be additional classes.

The definitions in the Reorganization Plan of the classes of creditors are as follows:

"Secured Creditors" means the Secured Trustee as holder of the Secured Notes;

"Noteholders" means the A & F Debentureholders, the Stores Debentureholders, the 9% Noteholders and the 10% Noteholders;

"Landlord" means any landlord, head lessor, sublessor or owner of premises which has entered into any Lease with any member of the Woodward's Group and includes any mortgagee or successor in title of such premises who has taken possession of such premises or is collecting rent in respect of such premises as well as any party who has taken an assignment of rents or assignment of lease in respect of such premises, whether as security or otherwise; provided, however, that if more than one person would otherwise come within this definition of Landlord in respect of any particular Lease, the rights and claims of all such persons in respect of such Lease will be dealt with collectively under this Plan and each reference herein to such Landlord shall be construed as a collective reference to all such persons;

"General Creditors" means all persons with unsecured claims for any Indebtedness against Woodward's Group as at the General Creditor Meeting Date, including the Pre-Filing Trade Creditors, Employee Creditors, the Landlords and the Equipment Financiers but, for the Landlords and the Equipment Financiers, only to the extent of their claims to be dealt with in the General Creditor class as provided herein, and specifically excluding Post-Filing Trade Creditors, the Noteholders and the holders of the Unaffected Obligations.

The additional classes that have been proposed are as follows:

(a) employees of Woodward's that have been terminated since the commencement of these proceedings on December 11, 1992 (these employees made a formal application for separate classification);

(b) Royal Trust Corporation of Canada which holds a debenture creating a fixed charge against certain equipment purchased by Woodward's with the financing provided by Royal Trust;

(c) equipment financiers (which could include Royal Trust);

(d) creditors of Woodward Stores Limited (the "Operating Company") that hold the guarantee or joint covenant of its holding company, Woodward's Limited (the "Holding Company");

(e) one of more classes of landlords whose leases are being repudiated.

There is the potential that two parties having agreements to lease with Woodward's will want to make submissions that they should be in a separate or different class. These parties were only served with the Petition in this proceeding recently and it was agreed that my ruling would not affect their ability to make submissions at a subsequent time. It was also agreed that General Electric Capital Canada Inc. would not be bound by my ruling and could make submissions that it should be in a separate or different class or that it should be considered to be a holder of an Unaffected Obligation.

I will return to the positions of the various parties but I think it will be useful to first review the authorities setting forth the general principles applicable to the issue of creditor classification.

GENERAL PRINCIPLES

The starting point of the case authorities is the decision of the English Court of Appeal in ***Sovereign Life Assurance Company v. Dodd,*** [1892] 2 Q.B. 573 where Lord Esher said the following at pp. 579-80 in relation to the meeting of creditors to consider a plan of arrangement under the Joint Stock Companies Arrangement Act:

> The Act says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) 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.

Bowen L.J. made the following comments at p. 583:

> The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class or classes to be called. 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.

There has been some jurisprudence over the years regarding creditor classification but, like the jurisprudence on other issues under the CCAA, it has intensified over the past five to ten years. One of the earlier cases of the present wave of jurisprudence dealing with creditor classification is ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*** (1988), 1988 CanLII 3570 (AB QB), 72 C.B.R. 20 (A.Q.B.). In that case Forsyth J. rejected the argument that different secured creditors should be placed in separate classes because they held separate security over different assets or because the relative values of their security were different. The Court rejected the "identity of interest" approach which involves each class only containing creditors with identical interests. Instead, the Court followed the approach which I will call the "non-fragmentation" approach. This approach avoids the creation of a multiplicity of classes by including creditors with different legal rights in the same class as long as their legal rights are not so dissimilar that it is not possible for them to vote with a common interest. This is essentially the approach that was suggested by Bowen L.J. in the passage from the ***Sovereign Life*** quoted above (although his words have been incorrectly attributed to Lord Esher in at least one case authority and one article).

The approach taken in the ***Oakwood Petroleums*** case has been specifically adopted by the B.C. Court of Appeal in ***Northland Properties Limited v. Excelsior Life Insurance Company of Canada*** (1989), 1989 CanLII 2672 (BC CA), 73 C.B.R. 195. In the lower court decision in that case the Court considered the similarities and dissimilarities of various mortgagees holding mortgages against different properties and concluded that they should be in the same class. Dealing with the points of dissimilarity, Trainor J. said as follows at p. 192 of 73 C.B.R.:

> 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.

After the Court of Appeal in ***Northland Properties*** quoted the above passage, it said the following (at p. 203):

> 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.

As the B.C. Court of Appeal has specifically adopted the reasoning in ***Oakwood Petroleums***, the approach which I have called the "non-fragmentation" approach is the one to be followed in British Columbia. As will be seen shortly, the "non-fragmentation" approach has also been preferred over the "identity of interest" approach by the Ontario courts.

There have been two recent cases that are particularly relevant because they deal with employees, landlords and equipment lessors in circumstances that are similar to the situation at hand. The first of these cases is ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*** (1991), 8 C.B.R. (3d) 312 (O.C.J.) where one of the proposed classes consisted of all creditors other than two secured creditors, including holders of unsecured debentures, terminated employees, landlords whose leases had been repudiated and equipment lessors whose leases were to be repudiated (although the report does not specifically say it, I assume that the proposed class also included the general trade creditors). The Court rejected the argument of one of the landlords that there should be a separate class of

creditors consisting of the landlords and the equipment lessors. Borins J. utilized the "non-fragmentation" approach as illustrated by the following passage on pp. 317-8:

> In my view, an important principle to consider in approaching ss. 4 and 5 of the C.C.A.A. is that followed in *Re Wellington Building Corp.*, 1934 CanLII 93 (ON SC), 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.), in which it was emphasized that the object of ss. 4 and 5 is not confiscation but is to enable compromises to be made for the common benefit of the creditors as creditors, of for the common benefit of some class of creditors as such. To this I would add that recognition must be given to the legislative intent to facilitate corporate re-organization and that in the modern world of large and complicated business enterprises the excessive fragmentation of classes could be counter-productive to the fulfilment of this intent. In this regard, to approach the classification of creditors on the basis of identity of interest, as suggested by counsel for H & R Properties, would in some instances result in the multiplicity of classes, which would make any re-organization difficult, if not impossible, to achieve. In my view, in placing a broad and purposive interpretation upon the provisions of the C.C.A.A. the court should take care to resist approaches which would potentially fragment creditors and thereby jeopardize potentially viable plans of arrangement, such as the plan advanced in this application.

The other recent decision is ***Re Grafton-Fraser Inc. and Canadian Imperial Bank of Commerce*** (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.). In that case Houlden J.A. approved the classification of creditors into secured creditors, landlords and unsecured creditors. It appears from the report that the plan contemplated that some leases would be repudiated and there would be rent reductions in respect of certain of the continuing premises. I am told that the final plan of Grafton-Fraser Inc. did not include the landlords with continuing leases at reduced rental rates in the same class as the landlords whose leases were repudiated, but the decision of Houlden J.A. appears to be predicated on the fact that the two types of landlords would be in the same class. It had been argued that the landlords

should be in the same class as the unsecured creditors. Houlden J.A. felt that it was appropriate to have the landlords in a separate class for two reasons; namely, there would be great difficulty in ascertaining the amounts of the claims of the landlords and the plan enjoined the landlords from exercising their contractual and statutory remedies.

Before I apply the general principles outlined above to the circumstances of this case, I wish to add some comments regarding the classification of creditors. The case authorities focus on the differences in the legal rights of the creditors in determining whether their interests are sufficiently similar or dissimilar to warrant creditors being placed in the same class or separate classes. I agree that it is the legal rights of the creditors that must be considered and that other external matters that could influence the interests of a creditor are not to be taken in account. However, it is my view that the legal rights should not be considered in isolation and that they must be considered within the context of the provisions of the reorganization plan. It would be appropriate to segregate two sets of creditors with similar legal interests into separate classes if the plan treats them differently. Conversely, it may be appropriate to include two sets of creditors with different legal rights in the same class if the plan treats them in a fashion that gives them a commonality of interest despite their different legal rights. In addition, when the Court is assessing whether there is a sufficient commonality of interest to include two sets of creditors in the same class, it is necessary in my view to examine their legal rights within the context of the potential failure of the reorganization plan. The treatment of the two sets of creditors under the plan should be compared to the rights they would have in the event of the failure of the plan (i.e., bankruptcy or other liquidation).

TERMINATED EMPLOYEES

The first set of creditors that submitted that it should be in a separate class is the group of former employees of Woodward's who were terminated after December 11, 1992, the date of commencement of these CCAA proceedings. These former employees all have claims against Woodward's for damages as a result of Woodward's failure to give them reasonable notice of termination. The Reorganization Plan includes the terminated employees in the class of General Creditors which also includes the trade suppliers and other unsecured claims of the Operating Company. The Reorganization Plan proposes that the General Creditors receive 37% of the principal amounts of their proven claims.

The two counsel acting for former employees on this application submitted that their clients should comprise a separate class of creditors for several reasons. They say that the terminated employees are largely middle-aged, long service employees with limited education who have little prospect of finding alternate employment. They point to the fact that the courts recognize the difference between a contract of employment and an ordinary commercial contract. They further make reference to the fact that the trade suppliers will be selling merchandise to the reorganized company and that they will have a potentially continuing relationship which may influence the manner in which they vote on the plan. Finally, they say that the trade suppliers have the ability to "write off" their losses and that they will receive different income tax treatment in respect of their losses than the terminated employees.

In arguing that the terminated employees should form their own class, counsel relied on the article ***Reorganizations under the Companies' Creditors Arrangement Act*** (1947) 25 Can. Bar Rev. 587 by Stanley E. Edwards. This article has been relied upon extensively by the courts in interpreting the *CCAA*. However, the article has not been followed with respect to the classification of creditors. Mr. Edwards proposes the "identity of interest" approach which was not been adopted by the Alberta, British Columbia and Ontario courts. The preferred approach is the "non-fragmentation" approach.

The legal rights of the terminated employees are the same as the legal rights of the trade suppliers. They are both creditors with unsecured claims against the Operating Company (the secured and preferred amounts payable to employees under provincial legislation and the ***Bankruptcy and Insolvency Act*** have already been paid to the terminated employees). In a bankruptcy or other liquidation they would both receive the same pro rata amount of their claims. They are to receive the same pro rata amount of their claims under the Reorganization Plan.

The fact that there is a recognized difference between contracts of employment and ordinary commercial contracts is not relevant because the contracts of employment of the terminated employees have come to an end. The terminated employees have claims for damages against Woodward's for wrongful dismissal. Once the amount of damages for an employee has been agreed upon or determined by the Court, the difference between the two types of contracts becomes historical and the employee has the same rights as any other unsecured creditor. The differences between the

two types of contracts may result in the employees receiving higher amounts of damages but the differences do not warrant the terminated employees being entitled to a higher distribution than the other unsecured creditors.

I am satisfied that there is a sufficient commonality of interest between the terminated employees and the other members of the General Creditors class that they should be included in the same class.

EQUIPMENT FINANCIERS AND ROYAL TRUST CORPORATION OF CANADA

It is convenient to deal with the submissions of the equipment lessors and Royal Trust at the same time because if Royal Trust is not put in a class of its own, its alternate position was that it should be included in a class with the equipment lessors.

The term "Equipment Financiers" is defined in the Reorganization Plan. In brief, the term means any person who has provided financing for the acquisition or installation of office equipment or trade fixtures and who has retained a security interest by way of a lease or a security instrument. Woodward's has notified or will be notifying certain equipment financiers that it no longer requires their equipment. These equipment financiers will then have a claim against Woodward's for damages resulting from the repudiation of their contractual arrangements. It is these equipment financiers who wish to be in a separate class. The Reorganization Plan proposes that the terminated equipment financiers be treated as General Creditors and that they receive 37% of the amounts of their claims. The amount of each claim would presumably be the discounted value of future payments owing by Woodward's to the equipment financier less the present value of the equipment.

Most of the equipment financiers are parties that bought the equipment and are leasing it to Woodward's on a normal type of term lease. The equipment financiers who are lessors include National Bank Leasing, North American Trust Company and Royal Bank Leasing. Royal Trust also falls within the definition of "Equipment Financier" but it is not a lessor. It financed the acquisition by Woodward's of certain equipment by way of a traditional financing arrangement. It loaned money to Woodward's on a term basis and it took security in the form of a debenture creating a fixed charge against the equipment that it financed.

In other contexts under the CCAA the treatment of equipment leases in relation to the treatment of security

documents causes me considerable doubts. Should equipment leases be treated the same as security instruments in all or some cases? Does it make a difference whether the lease is classified as an operating lease or a capital lease? Should the extent of depreciation of the subject asset be taken into account? Fortunately these questions can be left for another time because they do not need to be resolved in order to deal with the classification issue.

Lessors and debentureholders do have different legal rights but the question to be answered is whether the different rights result in a lack of commonality of interest. In a bankruptcy a lessor is entitled to retake possession of the leased goods upon default and, if the lease is worded properly, the lessor is entitled to prove as an unsecured creditor for its damages. In the case of a debentureholder in a bankruptcy situation, the debentureholder has the right to cause the charged assets to be sold and it is entitled to prove as an unsecured creditor for the deficiency on its loan. In most cases the damages of the lessor and the deficiency on the debentureholder's loan will be equivalent; namely, the difference between the present value of the monies that are owed and the value of the leased goods or the charged assets. Hence, the rights of an equipment lessor and the rights of a debentureholder with a fixed charge on financed equipment in a bankruptcy situation are roughly the same. The equipment lessors and Royal Trust are being treated the same under the Reorganization Plan. Therefore, there is a sufficient commonality of interest for Royal Trust to be included in the same class as the equipment lessors.

Some submissions were made with respect to the priority between Royal Trust and The R-M Trust Company which is the sole Secured Creditor under the Reorganization Plan. I do not accept the contention that Royal Trust has priority over The R-M Trust Company on any of Woodward's assets other than the ones that are covered by the fixed charge in favour of Royal Trust.

The question then becomes whether the equipment financiers (including Royal Trust) belong in a separate class or in the class of General Creditors. This is an example of why the legal rights of the parties must be examined within the context of the Reorganization Plan. In isolation the rights of the equipment financiers and the rights of unsecured creditors are very different. But the treatment of the two groups in the Reorganization Plan could affect their interests.

If the Reorganization Plan provided that Woodward's was to retain the financed equipment and the equipment financiers were to be paid the same proportion of their indebtedness as the unsecured creditors, the equipment financiers would be entitled to be included in a different class from the unsecured creditors. They would be losing their proprietary or security rights in the equipment and they would be receiving the same pro rata distribution as unsecured creditors who do not have same rights. However, that is not what the Reorganization Plan is proposing.

The Reorganization Plan does not affect any of the proprietary or security rights of the equipment financiers. Woodward's is allowing the equipment financiers to fully exercise those rights outside of the Reorganization Plan. All the Reorganization Plan is purporting to affect are the claims of the equipment financiers for damages or the deficiencies on loans. These claims are unsecured claims and there is no reason why they should be treated any differently than the claims of unsecured creditors. There is a sufficient commonality of interest between the unsecured creditors and the equipment financiers with respect to their unsecured claims for damages or the deficiencies on loans. It is appropriate to include the equipment financiers in the class of General Creditors with respect to these claims.

This classification of the equipment financiers is consistent with the decision in ***Sklar-Peppler***, *supra*, where the Ontario Court of Justice approved the grouping of equipment lessors in the same class as the unsecured creditors.

HOLDERS OF GUARANTEES OR JOINT COVENANTS

The class of General Creditors is comprised of creditors of the Operating Company. However, at least two of these creditors hold a guarantee or joint covenant of the Holding Company. National Bank Leasing holds a guarantee from the Holding Company and the debenture held by Royal Trust is a joint debenture from the Operating Company and the Holding Company. For ease of reference I will refer to a creditor holding a guarantee or joint covenant of the Holding Company as the holder of a guarantee and such reference shall also include the holder of a joint covenant.

The Holding Company does not own any tangible assets. Other than the shares in the Operating Company, the only asset owned by the Holding Company is an inter-company account owed to it by the Operating Company. This inter-company account means that upon the bankruptcy or other liquidation of the Operating Company, the Holding Company

would be an unsecured creditor entitled to share on a pro rata basis in distributions to the unsecured creditors of the Operating Company. If the Holding Company was also to be liquidated, the money received on account of the inter-company receivable would be distributed to the creditors of the Holding Company, including creditors of the Operating Company with guarantees from the Holding Company and other unsecured creditors if sufficient monies were available to fully satisfy the secured and preferred creditors of the Holding Company. The result is that unsecured creditors of the Operating Company with guarantees from the Holding Company may receive more money than the other unsecured creditors of the Operating Company in the event of bankruptcies or other liquidations of the two companies.

On April 16, 1993 the Monitor appointed in these proceedings issued a report confirming that upon a liquidation of the two companies, the unsecured creditors of the Holding Company would receive a distribution. The Monitor estimates a liquidatation distribution for the unsecured creditors of the Holding Company to be in the range from 2% to 12%.

The distinction between the interests of the unsecured creditors of the Operating Company and the interests of the unsecured creditors of the Holding Company is recognized in the classification of the creditors in the Reorganization Plan. The unsecured creditors of the Holding Company are included in the class of Noteholders which is a different class from the General Creditors, the class that includes the unsecured creditors of the Operating Company. It is proposed in the Reorganization Plan that the Noteholders receive 32% of their indebtedness.

The Reorganization Plan ignores the fact that the holders of guarantees are unsecured creditors of both companies. It proposes that they receive the same 37% proportion of their indebtedness as the other General Creditors and their status as creditors of the Holding Company is not reflected.

In view of the fact that the holders of guarantees do have different legal rights from the other members of the class of General Creditors, it is necessary to decide whether the rights are so dissimilar that they cannot vote on the Reorganization Plan with a common interest. It was submitted by counsel for Woodward's that there is a common interest because the holders of guarantees will still receive more under the Reorganization Plan than they will be paid upon a liquidation of the two companies. I do not think that this

is sufficient to create a commonality of interest with the other members in the class of General Creditors who have lesser legal rights. To the contrary, I believe that this is an example of what Bowen L.J. had in mind in the ***Sovereign Life*** case, *supra*, when he used the term "confiscation". By being a minority in the class of General Creditors, the holders of guarantees can have their guarantees confiscated by a vote of the requisite majority of the class who do not have the same rights. The holders of guarantees could be forced to accept the same proportionate amount as the other members of the class and to receive no value in respect of legal rights that they uniquely enjoy and that would have value in a liquidation of the two companies.

The passage from ***Sklar-Peppler*** quoted above made reference to the decision in ***Re Wellington Building Corp.***, *supra*. In that case the Court was asked to approve a scheme of arrangement under the ***CCAA*** that had one class of secured creditors which included bondholders, lienholders, third mortgagee and fourth mortgagees. The Court refused to approve the scheme on the basis that there should have been more than one class of secured creditors. Kingstone J. said the following at p. 54 of 16 C.B.R.:

> ... 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. 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 the bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company which would permit the holders of junior securities to put through a scheme inimicable to this class and amounting to confiscation of the vested interest of the bondholders.

In ***Re 229531 B.C. Ltd.*** (1989), 1989 CanLII 2823 (BC SC), 72 C.B.R. 310 (B.C.S.C.) the Court refused to approve a plan of arrangement under the ***CCAA*** for numerous reasons. One of the reasons was that a guarantee held by one creditor was to be released as a result of the reorganization plan and the creditor was to receive the same proportionate distribution

as all of the other unsecured creditors. In other words, the guarantee was being confiscated by the vote of other creditors who did not enjoy the same rights as the creditor which held the guarantee.

If it was clear that no monies would be available to unsecured creditors upon a liquidation of the Holding Company, the legal rights of the holders of the guarantees would have no practical value and there would then be no objection to their inclusion in the class of General Creditors. There is also a point where the prospects of the unsecured creditors of the Holding Company receiving any monies upon its liquidation would be so uncertain that the commonality of interest between the holders of the guarantees and the other members of the class of General Creditors would not be affected. However, I am not satisfied in this case that such prospects are so uncertain that the holders of guarantees should be forced to be in the same class as the other unsecured creditors of the Operating Company. In making this statement, I note that the unsecured creditors of the Holding Company are to receive 32% of their indebtedness under the Reorganization Plan.

I should stress that it is important in my view that there is only one difference between the rights of the holders of the guarantees and the rights of the other members of the class of General Creditors. It is clear that the one additional right enjoyed by the holders of the guarantees is not being given any value under the Reorganization Plan. The result could be different if the other members of the class of General Creditors had additional rights that were not enjoyed by the holders of the guarantees. There could be a trade-off between the rights that were not commonly shared and the groups could have a sufficient commonality of interest to be included in the same class. Here, there is no potential trade-off between the two groups and the one additional right of the holders of the guarantees is being confiscated without compensation.

Counsel for Woodward's suggested that the issue of the guarantees be left to the fairness hearing (i.e., the hearing to consider the sanctioning of the Reorganization Plan). As I believe that the holders of guarantees have a sufficiently different legal right to warrant a separate classification, it follows that I would consider the Reorganization Plan to be unfair to them if they are included in the class of General Creditors. I should not order meetings for the creditors to vote on the Reorganization Plan when I know that those meetings would be fruitless because I would refuse to approve the outcome of the meetings.

LANDLORDS

Counsel for Triple Five Corporation Limited submitted that there should be two classes of landlords, one class consisting of landlords with anchor tenants whose leases are being repudiated and the other class consisting of the remaining landlords. Counsel for Bucci Investment Corporation and Prospero International Realty Inc. submitted that there should be three classes of landlords, one class consisting of landlords with anchor tenants whose leases are being repudiated, a second class consisting of landlords without anchor tenants whose leases are being repudiated and the third class consisting of the remaining landlords.

Counsel for Triple Five Corporation Limited put forward three reasons in support of his position. A fourth reason was also put forward initially but it was withdrawn and reserved for the fairness hearing. The three reasons are as follows:

(a) a repudiation of a lease by an anchor tenant will cause the landlord to be in breach of other contractual obligations and the consequences of such a repudiation go beyond the liquidated damages that result from the repudiation of a lease by a tenant other than an anchor tenant;

(b) there is no precedent for the selective repudiation of leases under the ***CCAA*** and Woodward's has chosen not utilize the proposal provisions of the ***Bankruptcy and Insolvency Act*** that now has a procedure for the repudiation of leases;

(c) Zellers Inc. (and its parent, The Hudson's Bay Company) is a stranger to the relationship between Woodward's and its creditors and its involvement in Woodward's reorganization (by way of a merger with the reorganized company) requires a higher degree of fairness.

In my view, none of these reasons is a valid justification for the creation of a separate class of landlords:

(a) the additional consequences of a repudiation by an anchor tenant flow from external considerations and the different consequences to different landlords does not result from different legal rights existing between the landlords and Woodward's. As was held in ***Northland Properties***, *supra*, separate creditor classification must be based on a difference in legal interests or rights;

(b) ***Sklar-Peppler***, *supra*, and ***Grafton-Fraser***, *supra*, are both examples of reorganizations involving repudiations of leases. The fact that the ***Bankruptcy***

and Insolvency Act now specifically provides for the repudiation of leases does not mean that a reorganization involving lease repudiation cannot be attempted under the *CCAA* and it certainly does not mean that there should be separate classes of landlords;

(c) the aspect of fairness is a matter to be considered on the application for the Court to sanction the Reorganization Plan. The application is commonly called the fairness hearing. There is nothing in the involvement of Zellers Inc. that requires the creation of separate classes for landlords.

Counsel for Bucci and Prospero did not put forward any independent grounds for the creation of separate landlord classes. His point was that if there was justification for the creation of a separate class for landlords with anchor tenants whose leases were being repudiated, there was equal justification for the creation of a separate class for the other landlords whose leases were being repudiated.

There was one point that bothered me about the grouping of all the landlords into a single class. In addition to including landlords whose leases were being repudiated, the class includes landlords who are having their leases partially repudiated by the unilateral reduction in the amount of leased space and landlords who are having the rent under their leases unilaterally reduced. Both of these two groups of landlords would be having a continuing relationship with Woodward's. Unlike the trade suppliers, the continuing relationship between these landlords and Woodward's is based on legal rights. I was concerned that the continuing legal relationship between these landlords and Woodward's may give them a different interest from interests of the landlords whose leases are being wholly repudiated. For example, the continuing landlords may be more willing to vote in favour of the Reorganization Plan because they will be able to recoup some of their losses from the profits generated out of the continuing relationship with Woodward's. The answer to my concern is that the rent under all of the continuing leases is to be adjusted to market rent. The landlords whose leases are being repudiated will also be leasing their premises to new tenants at market rent. Accordingly, the landlords with continuing leases will not have any advantage over the other landlords and there will be sufficient commonality of interest to include all of the landlords in one class.

During submissions I queried whether the landlords should be included in the class of General Creditors. At

first blush a landlord whose lease is being repudiated is in the same position as the other unsecured creditors of the Operating Company. The reason why it is appropriate for the Landlords to be in a different class is that they receive different treatment under the Reorganization Plan. The General Creditors are to be paid 37% of their claims while the Landlords are to paid an amount equal to six months' rent. One reason for the different treatment is the fact that it is very difficult to properly quantify the claims of the Landlords and the efforts of the Landlords to mitigate their damages will not be known prior to the implementation of the Reorganization Plan. This rationale was accepted in ***Grafton-Fraser***, *supra*, where the Court approved a separate classification for the landlords. Another justification for the different treatment is the fact that the ***Bankruptcy and Insolvency Act*** provides that landlords whose leases are repudiated are entitled to compensation equal to six months' rent.

In the ***Grafton-Fraser*** case, *supra*, the Court approved a landlord class which, at least at the time of the decision, appeared to include both landlords with repudiated leases and landlords with continuing leases at reduced rental rates.

It is my view that there is sufficient commonality of interest among the landlords for all of them to be included in a single class. I am reinforced in my decision by the positions of the other landlords represented by counsel at the hearing. Mr. Kuhn, Mr. Knowles and Mr. Mitchell, who each represent landlords in each of the three proposed landlord classes, all supported the single class for the landlords and that position in itself demonstrates that the landlords do have a commonality of interest.

CONCLUSION

I approve the classes of creditors designated in the Reorganization Plan with the exception that the class of General Creditors should not include creditors of the Operating Company who hold guarantees or joint covenants from the Holding Company. I dismiss the application of the terminated employees for separate classification and I reject the other submissions for separate classifications.

April 20, 1993
"
Vancouver, B.C.

" D. Tysoe, J.

TAB 11

CanLII

Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587 (CanLII)

Date: 2008-08-18
Docket: C48969; M36489
Other citations: 92 OR (3d) 513; 296 DLR (4th) 135; 47 BLR (4th) 123; 45 CBR (5th) 163; [2008] OJ No 3164 (QL); 168 ACWS (3d) 698; 240 OAC 245
Citation: Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587 (CanLII), <http://canlii.ca/t/20bks> retrieved on 2015-12-16

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

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

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

an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

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

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

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

APPEAL from the sanction order of C.L. Campbell J., 2008 CanLII 27820 (ON SC), [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

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

Cases referred to Steinberg Inc. c. Michaud, 1993 CanLII 3991 (QC CA), [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442 (CanLII), [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CanLII 3826 (ON CA), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721 (CanLII), 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 2005 CanLII 42247 (ON CA), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), 2005 CanLII 41379 (ON SC), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); Stelco Inc. (Re), 2006 CanLII 16526 (ON CA), [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); consd Other cases referred to Air Canada (Re), 2004 CanLII 34416 (ON SC), [2004] O.J. No. 1909, [2004] O.T.C. 1169, 2 C.B.R. (5th) 4, 130 A.C.W.S. (3d) 899 (S.C.J.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42 (CanLII), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, 113 A.C.W.S. (3d) 52, REJB 2002-30904; [page515] Canadian Red Cross Society (Re), 1998 CanLII 14907 (ON SC), [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Gen. Div.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA), [1990] B.C.J. No. 2384, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, 23 A.C.W.S. (3d) 976 (C.A.); Cineplex Odeon Corp. (Re) (2001), 2001 CanLII 32746 (ON CA), 24 C.B.R. (4th) 201 (Ont. C.A.); Country Style Food Services (Re), 2002 CanLII 41751 (ON CA), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée, 2003 CanLII 33980 (QC CS), [2003] J.Q. no 9223, [2003] R.J.Q. 2157, J.E. 2003-1566, 44 C.B.R. (4th) 302, [2003] G.S.T.C. 195 (C.S.); Dylex Ltd. (Re), 1995 CanLII 7370 (ON SC), [1995] O.J. No. 595, 31 C.B.R. (3d) 106, 54 A.C.W.S. (3d) 504 (Gen. Div.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101, 23 A.C.W.S. (3d) 1192 (C.A.); Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., 1976 CanLII 142 (SCC), [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, 75 D.L.R. (3d) 63, 14 N.R. 503, 26 C.B.R. (N.S.) 84, [1977] 1 A.C.W.S. 562; Fotini's Restaurant Corp. v. White Spot Ltd., 1998 CanLII 3836 (BC SC), [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256 (S.C.); Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.); Muscletech Research and Development Inc. (Re), 2006 CanLII 34344 (ON SC), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16 (S.C.J.); Olympia & York Developments Ltd. (Re) (1993), 1993 CanLII 8492 (ON SC), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149 (Gen. Div.); Ravelston Corp. (Re), [2007] O.J. No. 1389, 2007 ONCA 268 (CanLII), 31 C.B.R. (5th) 233, 156 A.C.W.S. (3d) 824, 159 A.C.W.S. (3d) 541; Reference re: Constitutional Creditors Arrangement Act (Canada), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, [1934] S.C.J. No. 46, [1934] 4 D.L.R. 75, 16 C.B.R. 1; Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1, [1935] 1 W.W.R. 607 (P.C.), affg [1933] S.C.R. 616, [1933] S.C.J. No. 53, [1934] 1 D.L.R. 43; Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 2000 ABCA 238 (CanLII), [2000] 10 W.W.R. 314, 84 Alta. L.R. (3d) 52, 266 A.R. 131, 9 B.L.R. (3d) 86, 20 C.B.R. (4th) 46, 99 A.C.W.S. (3d) 533 (C.A.)[Leave to appeal to S.C.C. refused [2001]

S.C.C.A. No. 60, 293 A.R. 351]; Rizzo & Rizzo Shoes Ltd. (Re) (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006; Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.); Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 2000 CanLII 16921 (ON CA), 50 O.R. (3d) 688, [2000] O.J. No. 3993, 137 O.A.C. 74, 20 C.B.R. (4th) 160, 100 A.C.W.S. (3d) 530 (C.A.); T&N Ltd. and Others (No. 3) (Re), [2006] E.W.H.C. 1447, [2007] 1 All E.R. 851, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283, [2006] Lloyd's Rep. I.R. 817 (Ch.) Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 Business Corporations Act, R.S.O. 1990, c. B.16, s. 132 Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192 [as am.] Civil Code of Québec, C.c.Q. Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 4, 5.1 [as am.], 6 [as am.] Companies Act 1985 (U.K.), 985, c. 6, s. 425 Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 92, (13), (21) Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 Authorities referred to Dickerson, Reed, The Interpretation and Application of Statutes (Boston: Little, Brown and Company, 1975) [page516] Houlden, L.W., and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd ed., looseleaf (Scarborough, Ont.: Carswell, 1992) Driedger, E.A., Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) Smith, Gavin, and Rachel Platts, eds., Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London, U.K.: Butterworths, 1995) Jacskson, Georgina R., and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Descretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, Janis P., ed., Annual Review of Insolvency Law, 2007 (Vancouver: Carswell, 2007) Driedger, E.A., and R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002) House of Commons Debates (Hansard), (20 April 1933) at 4091 (Hon. C.H. Cahan)

The judgment of the court was delivered by

BLAIR J.A.: -- A. Introduction

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

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

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

holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

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

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada- wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 2001 CanLII 32746 (ON CA), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, 2002 CanLII 41751 (ON CA), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

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

The parties

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

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

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

The ABCP market

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

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

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

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

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

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

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

The liquidity crisis

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

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

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

The Montreal Protocol

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

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

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

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

The Plan
(a) Plan overview

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

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

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

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

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

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

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

> [31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:
> (a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below- cost financing for margin funding facilities that are designed to make the notes more secure; (b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts; (c)

the Canadian banks provide below-cost financing for the margin funding facility; and (d) other parties make other contributions under the Plan.

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

The CCAA proceedings to date

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

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

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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

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

[38] The appellants attack both of these determinations. C. Law and Analysis

> [39] There are two principal questions for determination on this appeal:
> (1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors? (2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]
> (1) Legal authority for the releases

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

> [41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because: (a) on a proper interpretation, the CCAA does not permit such releases; (b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect; (c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867; (d) the releases are invalid under Quebec rules of public order; and because (e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "gap filling" and inherent jurisdiction

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

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which

gives the Act its efficacy: Canadian Red Cross Society (Re), 1993 CanLII 14907 (ON SC), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), 1995 CanLII 7370 (ON SC), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

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

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

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto:
Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

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

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

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

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA), [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1990 CanLII 6979 (ON CA), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

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

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

Application of the principles of interpretation

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

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

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

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

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair- and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

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

The statutory wording

> [58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in: (a) the skeletal nature of the CCAA; (b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in (c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable". Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

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

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530] . . .
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

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

Compromise or arrangement

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

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

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., 1976 CanLII 142 (SCC), [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 2000 CanLII 16921 (ON CA), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), 2004 CanLII 34416 (ON SC), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 1993 CanLII 8492 (ON SC), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

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

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

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

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

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

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

Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

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

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

> [71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:
> (a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534] (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it; (c) the Plan cannot succeed without the releases; (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

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

companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

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

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

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), 2000 ABQB 442 (CanLII), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., 2000 ABCA 238 (CanLII), [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), 2006 CanLII 34344 (ON SC), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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

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

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

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in

Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

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

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CanLII 3826 (ON CA), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, 2001 BCSC 1721 (CanLII), [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 2005 CanLII 42247 (ON CA), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

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

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

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

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

closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

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

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

> In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1990 CanLII 6979 (ON CA), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. (Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does

not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

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

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. (Citations omitted; emphasis added) See Stelco Inc. (Re), 2005 CanLII 41379 (ON SC), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

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

[88] Indeed, the Stelco plan, as sanctioned, included third- party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), 2006 CanLII 16526 (ON CA), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

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

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

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

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

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

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

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether

unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

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

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

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

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

The 1997 amendments

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

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of

the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that
(a) relate to contractual rights of one or more creditors; or
(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

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

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

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

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

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some

stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée), 2003 CanLII 33980 (QC CS), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

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

The division of powers and paramountcy

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

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p. 661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

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

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

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.
(2) The Plan is "fair and reasonable"

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

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), 2007 ONCA 268 (CanLII), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

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

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

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv)

limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., 1998 CanLII 3836 (BC SC), [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

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

> [113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
> (a) The parties to be released are necessary and essential to the restructuring of the debtor; (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it; (c) the Plan cannot succeed without the releases; (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally; (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that, (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

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

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

them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

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

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

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

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

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

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

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

Appeal dismissed.
SCHEDULE "A" --
CONDUITS Apollo
Trust Apsley Trust Aria
Trust Aurora Trust
Comet Trust Encore
Trust Gemini Trust

Ironstone Trust MMAI-I Trust Newshore Canadian Trust Opus Trust Planet Trust Rocket Trust Selkirk Funding Trust Silverstone Trust Slate Trust Structured Asset Trust Structured Investment Trust III Symphony Trust Whitehall Trust SCHEDULE "B" -- APPLICANTS ATB Financial Caisse de dépôt et placement du Québec Canaccord Capital Corporation [page549] Canada Mortgage and Housing Corporation Canada Post Corporation Credit Union Central Alberta Limited Credit Union Central of BC Credit Union Central of Canada Credit Union Central of Ontario Credit Union Central of Saskatchewan Desjardins Group Magna International Inc. National Bank of Canada/National Bank Financial Inc. NAV Canada Northwater Capital Management Inc. Public Sector Pension Investment Board The Governors of the University of Alberta SCHEDULE "C" -- COUNSEL (1) Benjamin Zarnett and Frederick L. Myers, for the Pan- Canadian Investors Committee (2) Aubrey E. Kauffman and Stuart Brotman, for

4446372 Canada Inc. and 6932819 Canada Inc. (3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG (4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd. (5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals) (6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor (7) Mario J. Forte, for Caisse de Dépôt et Placement du Québec (8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550] (9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.) (10)

Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd. (11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank (12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees (13) Usman Sheikh, for Coventree Capital Inc. (14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc. (15) Neil C. Saxe, for Dominion Bond Rating Service (16) James A. Woods, Sébastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd. (18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

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

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, 1993 CanLII 3991 (QC CA), [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 12

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF QUÉBEC

No.: 200-11-017167-084

DATE: November 14, 2008

IN THE PRESENCE OF: THE HONORABLE ÉTIENNE PARENT, J.S.C. (JP1892)

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

CHARLES-AUGUSTE FORTIER INC., 424, boulevard Raymond, Québec (Québec) G1C 7S4

Debtor
-and-

RAYMOND CHABOT INC., 140, Grande-Allée Est, bureau 200, Québec (Québec) G1R 5P7

Monitor
-and-

CAISSE DESJARDINS DE LIMOILOU, 3174, 1ère Avenue, Québec (Québec) G1L 3P7
-and-
AXA ASSURANCES INC., 2640, boulevard Laurier, bureau 900, Québec (Québec) G1V 5C2
-and-
GE CANADA EQUIPMENT FINANCING G.P. / FINANCEMENT D'ÉQUIPEMENT GE CANADA S.E.N.C., 3075, chemin des Quatre-Bourgeois, bureau 410, Québec (Québec) G1W 4Y9

Impleaded Parties

JUDGMENT

Introduction

[1] Can a plan of arrangement under the CCAA provide for the release of the surety (bond) of the debtor?

[2] This is the principal question being raised in the context of the approval of the plan of arrangement proposed by the debtor (CAF) to its creditors on November 4, 2008.

[3] No creditor filed an appearance in order to contest the approval of the plan of arrangement; however, a few minutes prior to the trial, two creditors, Styro Rail Inc. and Transport Michel Deschamps & Fils (the objecting creditors) transmitted an objection by facsimile.

[4] Notwithstanding the irregularity of this form of objection, the Court will address the motion to approve taking into consideration the various points raised by the objecting creditors to the extent that they relate to facts already proven or are based on arguments in law.

Context

[5] For more than forty years, CAF has operated in the field of aqueduct, sewer and road construction. It also operates demolition equipment in addition to performing snow removal work.

[6] Over the years, CAF prospered. In 2007, it had approximately 150 employees.

[7] CAF is mandated to complete a major project, namely the extension of Highway 50 in Thurso.

[8] This project proves disastrous. CAF suffers a loss of approximately $5 million on a contract totaling $25 million. At this time, the value of this contract represents half of its business revenue.

[9] Another important road work construction, Route 175 in the Parc des Laurentides, also results in losses, but to a lesser extent.

[10] The difficulties encountered by CAF are exacerbated by the meteoric rise in the cost of petroleum products and derivative products, which make up an important part of CAF's supply of raw materials.

[11] Having liquidity issues, CAF, on June 11, 2008, obtains an initial order under the CCAA.

[12] The order provides for DIP financing by GE Canada Equipment Financing (GE) up to an amount of $2 million. This DIP financing is guaranteed by a first-ranking charge over CAF's assets.

[13] This DIP financing has allowed CAF to meet its short-term obligations since June 2008.

[14] Contemporaneously with GE's intervention, CAF must also obtain the cooperation of AXA Assurances Inc. (AXA).

[15] Indeed, AXA provides performance bonds and bonds for wages, materials and services. These bonds are required by governments, public organizations and municipalities for all public works with whom CAF does business.

[16] The participation of AXA enables CAF to continue its operations. At the time of the initial order, AXA faces potential claims by subcontractors of CAF totaling approximately $10 million.

[17] Since the initial order, the representatives of CAF and the monitor negotiate a refinancing of CAF's operations, both at the short-term and long-term levels, to ensure the survival of the company.

[18] These negotiations culminate in the presentation of the plan of arrangement on November 4, 2008.

[19] In order to be able to submit this plan, CAF had to convince both lenders and its bonding company to support its project.

[20] Despite the difficult economic context, the impleaded parties GE and Caisse Desjardins de Limoilou (Caisse) agree to participate in the reorganization of CAF.

[21] However, the participation of AXA, as bonding company, is necessary to the establishment of a viable plan of arrangement.

[22] According to the testimony of the monitor, CAF must be able to provide the bonds required by the public work providers, which contracts are essential to its profitability.

[23] On the other hand, GE and Caisse require that AXA guarantee, in whole or in part, their monetary advances to CAF under the plan.

[24] AXA agrees to participate in the plan on the condition that the creditors who benefit from the labour and material payment bonds reduce their claims to 85% of their value.

[25] In this context, the plan foresees three categories of creditors:

Secured creditors:	These creditors have mortgages or other security instruments over CAF's assets. The plan requires a six-month moratorium on the reimbursement of the capital.
Bonded creditors and declared creditors:	This category includes creditors who benefit from bonds for wages, materials and services issued by AXA. It also includes creditors who may have a construction hypothec according to the *Civil Code of Québec*. According to information obtained at trial, 95% of the creditors in this class are bonded creditors. The plan offers these creditors 85% of their proven claim, in three instalments. a) An initial payment of 25% payable on or about December 15, 2008;

b) A second payment of 25% payable April 30, 2009; and

c) A final payment of 35% payable October 30, 2009.

Unsecured creditors: These are creditors that do not benefit from any surety bonds or security instruments and they will share $650,000, which is comprised of an initial amount of $500 for each creditor, in addition to a dividend of approximately 10% for the excess of their claims.

[26] The objecting creditors submit that it is illegal that the plan provides for releases in favour of AXA. They base such arguments on three judgments of the Court of Appeal of Québec.

[27] However, these cases do not concern situations similar to the case at bar.

[28] In two of these judgments, the Court of Appeal highlights that the stay of proceedings against the debtor under Section 11 of the CCAA does not contain a stay of proceedings against third parties.

[29] In the third case, the decision of *Steinberg*, the Court of Appeal limits the releases that the plan may grant to the directors of the debtor.

[30] This decision was followed by an amendment to the CCAA in 1997, adding Section 5.1 to the CCAA, which provides for the possibility of releasing directors from their obligations, but with certain reservations.

[31] The monitor provides the Court with a judgment dated August 18, 2008 from the Court of Appeal of Ontario. This judgment, which was rendered in the context of a motion to approve a plan of arrangement, analyzes the two following questions:

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

[32] Mr. Justice Blair conducts a thorough analysis to address the issues raised. With respect to the first question, he states the following:

---

[1] idem, au paragraphe 39.

> [43] On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.
>
> [44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* 1998 CanLII 14907 (ON S.C.), (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* 1995 CanLII 7370 (ON S.C.), (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."
>
> (Emphasis of Court)

[33] Continuing his analysis of the exceptional nature of the interference of the rights that creditors have against third parties under civil law, which they are deprived of by the effect of the approval of a plan of arrangement, Mr. Justice Blair continues:

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

[34] It is also interesting to note that the *Steinberg* judgment cited above, which was rendered fifteen years earlier by the Court of Appeal is the subject of a careful analysis resulting in the following conclusion:

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

[35] On September 2, 2008, the Supreme Court of Canada denied the application for leave to appeal this decision.

[36] With respect, the Court considers that the principles in this case find application in Québec. The wide variety of resources and tools that a company can call upon in order to present a plan of arrangement requires a flexible approach in the application of the CCAA's provisions.

[37] This does not mean that the release of a third party must be systematically accepted as part of a plan of arrangement. Quite the contrary, the specific circumstances justifying the refusal of the recourse against the third party must be considered. An analysis of the particular circumstances which may justify such compromise against third parties must be conducted.

[38] In the case of *Metcalfe*, the Court of Appeal of Ontario provides certain parameters of analysis:

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;

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

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

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

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

Reasonableness of the plan in respect of the compromise of recourses against AXA

[39] The importance that AXA has in the restructuring and continuation of CAF's operations fully justifies the releases requested from the bonded creditors.

[40] Article 4.2 of the plan provides:

To enable the company to continue its operations, it is essential that new bonds (bid, performance and payment of wages, materials and services) are issued by AXA.

In order to agree to issue new bonds, AXA requires the following:

1) the approval of the plan of compromise and arrangement between the company and its creditors;

2) the settlement of proven claims of bonded creditors in exchange for a full and final release in favour of CAF and AXA.

Furthermore, to allow the company to submit its plan to its creditors, AXA has demonstrated its willingness to undertake certain commitments for the benefit of CAF in order to facilitate its refinancing.

[41] The Court is of the opinion that the present case is one in which the following criteria are met:

(a) The party seeking releases is playing a central role in the plan of arrangement proposed by the debtor;

(b) The plan of arrangement will fail if the releases are not granted;

(c) The party benefiting from the releases, which are a partial release in the present case, will contribute significantly to the plan of arrangement;

(d) The plan of arrangement is beneficial not only to the debtor but to all creditors;

(e) The creditors who manifested themselves at the time of the acceptance of the plan were fully informed of the release given to AXA; in this regard, the Court notes that it appears in the minutes that the objecting creditors had raised certain questions to the monitor and the debtor in respect of such releases prior to the vote;

(f) The partial releases which are granted are fair and reasonable and do not go against public order.

[42] Accordingly, the Court finds that the CCAA allows for the release of third parties in the context of a plan of arrangement. In this case, the release is reasonable and justified. It meets the objectives of the CCAA in that it is in the best interest of all creditors and the debtor.

[43] The objecting creditors raise the fact that AXA has not undertaken to ensure payment of 85% of the proven claims of the bonded creditors. At the time of the hearing on the present application, the monitor provides a letter from AXA's counsel confirming unequivocally such undertaking. The objecting creditors' argument of opposing creditors is therefore dismissed.

[44] Finally, the objecting creditors argue that the plan is contrary to the initial order.

[45] Indeed, paragraph 15 of the initial order provides that any person who has provided a bond should continue to honour it.

[46] This order is consistent with Section 11.2 of the CCAA. It merely states that there is no stay of proceedings against third parties despite the stay of proceedings against the debtor pursuant to Section 11 CCAA.

[47] With respect, there is no correlation between this conclusion of the initial order and the provisions found in the plan.

[48] Beyond the arguments raised by the objecting creditors, the following observations command the Court's approval of the plan.

[49] The voting results of the meeting held November 4, 2008 are the following:

	Secured		**Bonded and Declared**		**Unsecured**	
	For	*Against*	*For*	*Against*	*For*	*Against*
$	2,508,667	n/a	7,575,708	1,362,176	4,135,774	213,746
Nb	6	n/a	82	6	213	14
%($)	100%	n/a	84.76%	15.24%	95.09%	4.91%
%(Nb)	100%	n/a	93.18%	6.82%	93.83%	6.17%

[50] The Court finds that the creditors of all categories lend overwhelming support to the plan.

[51] This support may be explained in part because the plan ensures the continuation of CAF's operations. For many of the creditors, this will maintain an ongoing business relationship with the company.

[52] In addition, the creditors must have taken into consideration the monitor's recommendations. The monitor's report indicates that in the context of a liquidation of CAF's assets, the creditors would likely receive a lesser amount than is proposed by the plan. In fact, the unsecured creditors would receive no dividend.

[53] The Court is not bound by the vote of creditors. To hold otherwise would render the approval process useless.

[54] However, the broad consensus of the creditors and the monitor's recommendations are, at the very least, important factors which the Court cannot ignore.

[55] In this case, the proposal made to the various classes of creditors is reasonable in light of the circumstances.

[56] It is true that the bonded creditors could, in the context of proceedings instituted against AXA or the owners of property affected by legal mortgages, recover all of their debt.

[57] However, the Court finds that an overwhelming majority of the bonded creditors have accepted to reduce their claim to 85% of their proven claim. The costs and delays associated with recovery proceedings against these third parties, not including the associated risks, may explain this choice.

FOR THESE REASONS, THE COURT:

[58] GRANTS the motion to approve the plan of arrangement.

[59] EXEMPTS the monitor from service of the present application and notice of presentation other than those already sent.

[60] DECLARES that the DIP lender's charge will remain in place until full repayment of any amount due to the DIP lender and the debtor is authorized to maintain such DIP facility until the monitor has filed into the Court record a certificate confirming integral reimbursement of all amounts due to the DIP lender, which is to take place before December 15, 2015.

[61] DECLARES that the DIP lender is not a creditor covered by the plan of arrangement.

[62] RATIFIES the amended plan of compromise and arrangement dated November 4, 2008, approved by the required majority in each category of creditors, as is provided for therein for all legal purposes.

[63] ORDERS the provisional execution of this judgment notwithstanding appeal and without security.

[64] THE WHOLE without costs.

ÉTIENNE PARENT, J.C.S.

M^e^ Luc Paradis (box 49)
Morency, société d'avocats s.e.n.c.r.l.
Attorneys for Debtor

Me William Noonan (box 2)
Hickson - Noonan
Attorneys for monitor

Me Yves Chassé (box 133)
Fasken, Martineau, DuMoulin
Attorneys for Caisse Desjardins de Limoilou

M^e^ Christian Roy (box 92)
Ogilvy Renault
Attorneys for AXA Assurances inc.

M^e^ Isabelle Germain (box 10)
McCarthy Tétrault s.e.n.c.r.l., s.r.l.
Attorneys for GE Canada Equipment Financing G.P./
Financement d'équipement GE Canada s.e.n.c.

Me Richard Roy
RPGL AVOCATS
85, rue Bellehumeur, bureau 260
Gatineau (Québec) J8T 8B7
Attorneys for opposing parties

Date of hearing: November 6, 2008

Field of law: Bankruptcy and insolvency

DGCdocs - 2206604 v1

CanLII

Charles-Auguste Fortier inc. (Arrangement relatif à), 2008 QCCS 5388 (CanLII)

Date : 2008-11-14
Dossier : 200-11-017167-084
Autre citation : JE 2009-9
Référence : Charles-Auguste Fortier inc. (Arrangement relatif à), 2008 QCCS 5388 (CanLII), <http://canlii.ca/t/21k92> consulté le 2015-12-16

Charles-Auguste Fortier inc. (Arrangement relatif à) **2008 QCCS 5388**

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE QUÉBEC

N° : 200-11-017167-084

DATE : 14 novembre 2008

EN PRÉSENCE DE : L'HONORABLE ÉTIENNE PARENT, (JP1892) J.C.S.

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. (1985), CH. C-36 EN SA VERSION MODIFIÉE

CHARLES-AUGUSTE FORTIER INC., 424, boulevard Raymond, Québec (Québec) G1C 7S4

Débitrice

et

RAYMOND CHABOT INC., 140, Grande-Allée Est, bureau 200, Québec (Québec) G1R 5P7

Contrôleur

et

CAISSE DESJARDINS DE LIMOILOU, 3174, 1ère Avenue, Québec (Québec) G1L 3P7

et

AXA ASSURANCES INC., 2640, boulevard Laurier, bureau 900, Québec (Québec) G1V 5C2

et

GE CANADA EQUIPMENT FINANCING G.P. / FINANCEMENT D'ÉQUIPEMENT GE CANADA S.E.N.C., 3075, chemin des Quatre-Bourgeois, bureau 410, Québec (Québec) G1W 4Y9

Mises en cause

JUGEMENT

Introduction

[1] Un plan d'arrangement formulé en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (*LACC*) peut-il prévoir la libération d'une caution du débiteur proposant?

[2] Voilà la principale question soulevée dans le cadre de la demande d'homologation du plan d'arrangement (le Plan) proposé par la Débitrice (CAF) à ses créanciers le 4 novembre 2008.

[3] Aucun créancier n'a comparu afin de contester la demande en homologation du Plan. Toutefois, deux créanciers, Styro Rail inc. et Transport Michel Deschamps & fils (les Opposantes) ont transmis par télécopieur, quelques minutes avant l'audition, un avis de contestation sous forme de lettre.

[4] Malgré l'irrégularité de cette forme d'opposition, le Tribunal disposera de la demande d'homologation en tenant compte des moyens formulés par les

Opposantes, dans la mesure où ceux-ci reposent sur des faits prouvés ou sur des arguments de droit.

Contexte

[5] CAF œuvre depuis plus de 40 ans dans le domaine de la construction d'ouvrages d'aqueduc, d'égout et de voirie. Elle opère également des équipements de concassage, en plus d'effectuer des travaux de déneigement.

[6] Au fil des ans, CAF prospère. En 2007, elle compte environ 150 employés.

[7] Elle s'engage alors dans un projet d'envergure, le prolongement de l'autoroute 50 à Thurso.

[8] L'aventure s'avère désastreuse. CAF essuie une perte d'environ 5 millions de dollars, sur un contrat total de 25 millions de dollars. À cette époque, la valeur de ce contrat représente la moitié du chiffre d'affaires de CAF.

[9] Un autre chantier routier important, la Route 175 dans le Parc des Laurentides, entraîne également des pertes importantes, mais dans une moindre mesure.

[10] Les difficultés de CAF sont exacerbées par l'augmentation fulgurante du coût des produits pétroliers et des produits dérivés, lesquels constituent une partie importante de l'approvisionnement de CAF en matières premières.

[11] À court de liquidités, CAF obtient, le 11 juin 2008, une ordonnance initiale en vertu de la *LACC*.

[12] L'ordonnance autorise la mise en place d'un financement temporaire, consenti par la mise en cause GE Canada Equipment Financing G.P. /Financement d'équipement GE Canada s.e.n.c. (GE) jusqu'à concurrence de 2 millions de dollars. Ce financement temporaire est assorti d'une garantie de premier rang sur l'ensemble des actifs de CAF.

[13] Le financement temporaire permet à CAF de faire face à ses obligations à court terme depuis juin 2008.

[14] Parallèlement à l'intervention de GE, CAF doit aussi obtenir la collaboration de la mise en cause AXA Assurances inc. (AXA).

[15] En effet, AXA fournit les cautionnements d'exécution et pour gages, matériaux et services. Ces cautionnements sont exigés des donneurs d'ouvrage publics (gouvernements, organismes publics, municipalités, etc) avec qui CAF fait affaires.

[16] La participation d'AXA permet à CAF de poursuivre ses opérations. Au moment de l'ordonnance initiale, AXA fait également face à des réclamations potentielles de sous-traitants de CAF totalisant environ 10 millions de dollars.

[17] Depuis l'ordonnance initiale, les représentants de CAF et du Contrôleur négocient un refinancement des opérations de CAF, autant au niveau du court terme que du long terme, afin d'assurer la survie de l'entreprise.

[18] Ces négociations ont abouti par la présentation du Plan, le 4 novembre 2008.

[19] Afin d'être en mesure de soumettre ce Plan, CAF devait convaincre à la fois des prêteurs et une compagnie de cautionnement de l'appuyer dans son projet.

[20] Malgré le contexte économique difficile, les mises en cause GE et Caisse Desjardins de Limoilou (la Caisse) acceptent de participer à la relance de CAF.

[21] Cependant, la participation d'AXA, à titre de caution, s'avère nécessaire à la mise en place d'un plan d'arrangement viable.

[22] D'une part, CAF doit être en mesure de fournir les cautionnements requis par les donneurs d'ouvrage, dont les contrats sont essentiels à sa rentabilité, selon le témoignage du Contrôleur.

[23] D'autre part, GE et la Caisse exigent qu'AXA cautionne, en tout ou en partie, leurs avances consenties à CAF dans le cadre du Plan.

[24] AXA accepte de s'impliquer dans le Plan. En contrepartie, elle exige que les créanciers bénéficiant de son cautionnement réduisent leurs réclamations à 85% de leurs créances.

[25] Dans ce contexte, le Plan prévoit trois catégories de créanciers:

1. Créanciers garantis:		Il s'agit de créanciers qui possèdent des hypothèques ou autres sûretés réelles sur les biens de CAF. Le Plan requiert un moratoire de six mois pour le remboursement du capital.
2. Créanciers cautionnés et dénoncés:	créanciers	Cette catégorie regroupe les créanciers qui bénéficient du cautionnement pour gages, matériaux et services émis par AXA. Il comprend également les créanciers qui peuvent faire valoir une hypothèque légale de la construction, au sens du Code civil du Québec. Selon les informations obtenues à l'audience, 95 % des créanciers de cette catégorie sont des créanciers cautionnés. Le Plan offre à ses créanciers de recevoir 85 % de leur réclamation prouvée, en trois versements: a) un premier versement de 25 % payable le ou vers le 15 décembre 2008; b) un deuxième versement de 25 % payable le 30 avril 2009; et c) un dernier versement de 35 % payable le 30 octobre 2009.
3. Créanciers ordinaires:		Ces créanciers, qui ne bénéficient d'aucune garantie ni de cautionnement, se partageront 650 000 $, à raison d'une première tranche de 500 $ pour chaque créancier, en plus d'un dividende d'environ 10% pour l'excédant de leur créance.

[26] Les Opposantes soumettent qu'il est illégal que le Plan prévoit une quittance en faveur d'AXA. Ils appuient leurs arguments sur trois arrêts de la Cour d'appel du Québec[1].

[27] Or, ces arrêts ne visent pas des situations qui s'apparentent au présent dossier.

[28] Dans deux des arrêts, la Cour d'appel souligne que la suspension des recours contre le débiteur, en vertu de l'article 11 de la Loi, n'emporte pas la suspension des recours contre les tiers.

[29] Dans la troisième affaire, l'arrêt *Steinberg*, la Cour d'appel limite la quittance que le Plan peut accorder aux administrateurs d'un débiteur.

[30] Cet arrêt fut suivi par une modification à la *LACC* en 1997, soit l'ajout de l'article 5.1 à la *LACC*, qui précise la possibilité de libérer les administrateurs de leurs responsabilités, sous certaines réserves[2].

[31] Le Contrôleur soumet au Tribunal un arrêt du 18 août 2008 de la Cour d'appel d'Ontario[3]. Cet arrêt, prononcé dans le cadre d'une demande d'homologation d'un plan d'arrangement, analyse les questions suivantes :

> There are two principal questions for determination on this appeal:
>
> 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
>
> 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?[4]
>
> (Soulignement du Tribunal)

[32] Monsieur le juge Blair procède à une analyse approfondie afin de répondre aux questions soulevées. Il s'exprime notamment ainsi concernant la première question :

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

> [44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* 1998 CanLII 14907 (ON SC), 1998 CanLII 14907 (ON S.C.), (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* 1995 CanLII 7370 (ON SC), 1995 CanLII 7370 (ON S.C.), (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t] he history of CCAA law has been an evolution of judicial interpretation."
>
> (Soulignements du Tribunal)

[33] Poursuivant l'analyse du caractère exceptionnel de l'atteinte aux droits que les créanciers possèdent contre les tiers en vertu du droit civil, dont ils sont privés par l'effet de l'homologation d'un plan d'arrangement, le juge Blair poursuit :

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

[34] Il est aussi intéressant de souligner que l'arrêt *Steinberg* précité, prononcé quinze ans plus tôt par la Cour d'appel, fait l'objet d'une minutieuse analyse, au terme de laquelle est énoncée la conclusion suivante :

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

[35] Le 2 septembre 2008, la Cour suprême du Canada refuse la demande d'autorisation d'en appeler de cette décision[5].

[36] Avec égards, le Tribunal estime que les principes énoncés dans cette affaire trouvent application au Québec. La grande variété de moyens et d'outils

auxquels une compagnie peut faire appel afin de présenter un plan d'arrangement exige une approche souple des dispositions de la *LACC*.

[37] Cela ne signifie pas que la libération d'un tiers, dans le cadre d'un plan d'arrangement, doive être systématiquement acceptée. Au contraire, les circonstances particulières justifiant l'exclusion du recours contre un tiers doivent être analysées.

[38] Dans *Metcalfe,* la Cour d'appel d'Ontario suggère certains paramètres d'analyse :

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

Raisonnabilité du Plan en regard de l'exclusion des recours contre AXA

[39] L'importance qu'occupe AXA dans la restructuration de CAF et la continuation de ses opérations justifie amplement la quittance exigée des créanciers cautionnés.

[40] L'article 4.2 du Plan prévoit :

> Pour permettre à la Compagnie de poursuivre ses opérations, il est essentiel que de nouveaux cautionnements (soumission, exécution et paiement des gages, matériaux et services) soient émis par AXA Assurances inc.
>
> Pour accepter d'émettre de nouveaux cautionnements, AXA Assurances inc. a notamment exigé :
>
> 1) l'acceptation et l'homologation d'un plan de transaction et d'arrangements entre la Compagnie et ses Créanciers ;
>
> 2) le règlement des Réclamations Prouvées des Créanciers Cautionnés en contrepartie d'une quittance complète, générale et finale en faveur de la Compagnie et de AXA Assurances inc.

> Par ailleurs, pour permettre à la Compagnie de soumettre le Plan à ses Créanciers, AXA Assurances inc. s'est montrée disposée à prendre certains engagements au bénéfice de la Compagnie, de façon à faciliter son refinancement.[6]

[41] De l'avis du Tribunal, il s'agit d'un cas où les critères suivants sont réunis:

a) La partie qui obtient la quittance joue un rôle central dans le plan d'arrangement proposé par le débiteur;

b) Le plan d'arrangement échouera à défaut que la quittance soit accordée;

c) La partie qui bénéficie de la quittance, partielle en l'espèce, contribue de façon importante au plan d'arrangement;

d) Le plan d'arrangement est bénéfique non seulement pour la débitrice mais pour l'ensemble des créanciers;

e) Les créanciers qui se sont prononcés au moment de l'acceptation du Plan étaient parfaitement informés de la quittance accordée à AXA; à ce sujet, le Tribunal souligne qu'il apparaît au procès-verbal que les Opposantes ont posé des questions au Contrôleur et à la débitrice au sujet de la quittance, avant que le vote ne soit tenu;

f) La quittance partielle accordée est juste et raisonnable et ne va pas à l'encontre de l'ordre public.

[42] En conséquence, le Tribunal conclut que la *LACC* permet de prévoir la quittance d'un tiers dans le cadre d'un plan d'arrangement. En l'espèce, la quittance apparaît raisonnable et justifiée. Elle rencontre les objectifs de la *LACC*, dans le meilleur intérêt de l'ensemble des créanciers et de la Débitrice.

[43] Les Opposantes soulèvent qu'AXA ne s'est pas engagée à assurer le paiement de 85% des réclamations prouvées des créanciers cautionnés. Lors de l'audition de la requête, le Contrôleur dépose une lettre émanant des procureurs d'AXA confirmant sans équivoque cet engagement[7]. Cet argument des Opposantes est donc rejeté.

[44] Finalement, les Opposantes soutiennent que le Plan va à l'encontre de l'ordonnance initiale.

[45] En effet, le paragraphe 15 de l'ordonnance initiale prévoit que toute personne ayant fourni un cautionnement doit continuer à l'honorer.

[46] Cette ordonnance est conforme aux dispositions de l'article 11.2 *LACC*. Elle précise simplement qu'il n'y a pas suspension des recours contre les tiers malgré l'effet de suspension des recours contre le débiteur en vertu de l'article 11 *LACC*.

[47] Avec égards, il n'existe aucune corrélation entre cette conclusion de l'ordonnance initiale et les dispositions que l'on retrouve au Plan.

[48] Au-delà des arguments soulevés par les Opposantes, les constats suivants commandent l'homologation du Plan.

[49] Les résultats du vote de l'assemblée tenue le 4 novembre 2008 sont les suivants:

	Garantis		**Dénoncés et Cautionnés**		**Non garantis**	
	Pour	*Contre*	*Pour*	*Contre*	*Pour*	*Contre*
$	2 508 667	n/a	7 575 708	1 362 176	4 135 774	213 746
Nb	6	n/a	82	6	213	14
% ($)	100 %	n/a	84,76 %	15,24 %	95,09 %	4,91%
% (Nb)	100 %	n/a	93,18 %	6,82 %	93,83 %	6,17

[50] Le Tribunal constate que les créanciers de toutes catégories accordent un appui massif au Plan.

[51] Cet appui peut s'expliquer notamment parce que le Plan assure la continuation des opérations de CAF. Ainsi, cela signifie, pour plusieurs des créanciers, le maintien de leurs relations d'affaires avec cette entreprise.

[52] En outre, les créanciers ont, de toute évidence, tenu compte des recommandations du Contrôleur. Son rapport précise que dans le cadre d'un processus de liquidation des actifs de CAF, les créanciers obtiendraient une somme inférieure à ce qu'offre le Plan. En fait, les créanciers ordinaires ne recevraient aucun dividende.

[53] Le Tribunal n'est pas lié par le vote des créanciers. La procédure d'homologation serait inutile si cela était le cas.

[54] Cependant, le large consensus des créanciers ainsi que les recommandations du Contrôleur constituent, à tout le moins, des éléments importants que le Tribunal ne peut ignorer.

[55] En l'espèce, la proposition formulée aux diverses catégories de créanciers apparaît raisonnable, à la lumière de l'ensemble des circonstances.

[56] Il est vrai que les créanciers cautionnés et dénoncés pourraient, dans le cadre de poursuites intentées contre AXA ou les propriétaires d'immeubles visés par les hypothèques légales, espérer récupérer la totalité de leurs créances.

[57] Cependant, le Tribunal constate qu'une très forte majorité des créanciers cautionnés et dénoncés ont accepté de réduire leur créance à 85 % de leur réclamation prouvée. Les coûts et les délais associés aux recours contre ces tiers, sans compter les risques qui s'y rattachent, peuvent expliquer ce choix.

POUR CES MOTIFS, LE TRIBUNAL:

[58] **ACCUEILLE** la requête en homologation du plan d'arrangement.

[59] **DISPENSE** le Contrôleur de la signification de la requête et de tout avis de présentation autre que ceux déjà transmis.

[60] **DÉCLARE** que la charge du prêteur temporaire demeura en place jusqu'au remboursement intégral de tout somme due au prêteur temporaire et la Débitrice est autorisée à maintenir la Facilité temporaire et ce, jusqu'au dépôt par le Contrôleur dans le dossier de la Cour d'un certificat confirmant le remboursement complet et intégral de toutes sommes dues au prêteur temporaire, devant avoir lieu avant le 15 décembre 2008.

[61] **DÉCLARE** que le prêteur temporaire n'est pas un créancier visé par le plan d'arrangement.

[62] **HOMOLOGUE** le plan de transaction et d'arrangement amendé daté du 4 novembre 2008 approuvé par les majorités requises par chacune des catégories des créanciers qui y sont prévues, à toutes fins que de droit.

[63] **ORDONNE** l'exécution provisoire du présent jugement malgré appel, et sans caution.

[64] **LE TOUT** sans frais.

ÉTIENNE PARENT, J.C.S.

M^e^ Luc Paradis (casier 49)
Morency, société d'avocats s.e.n.c.r.l.
Procureurs de la requérante

Me William Noonan (casier 2)
Hickson - Noonan
Procureurs du contrôleur

Me Yves Chassé (casier 133)
Fasken, Martineau, DuMoulin
Procureurs de la Caisse Desjardins de Limoilou

M^e^ Christian Roy (casier 92)
Ogilvy Renault
Procureurs de Axa Assurances inc.

M^e^ Isabelle Germain (casier 10)
McCarthy Tétrault s.e.n.c.r.l., s.r.l.
Procureurs de la mise en cause GE Canada Equipment Financing G.P. /

Financement d'équipement GE Canada s.e.n.c.

Me Richard Roy
RPGL AVOCATS
85, rue Bellehumeur, bureau 260
Gatineau (Québec) J8T 8B7
Procureurs des Opposantes
Date d'audience : 6 novembre 2008

Domaine de droit : Faillite et insolvabilité

---

[1] *Michaud* c. *Steingerg inc.,*1993 CanLII 3991 (QC CA), [1993] R.J.Q. 1684 (C.A.), AZ-93011723 aux pages 16 et suivantes; *Hydro Québec* c. *Meubles Dinec inc.* 2005 QCCA 747 (CanLII) aux pages 3 et suivantes; *Toiture P.E. Carrier inc.* c. *2603373 Canada inc.* 1994 CanLII 5854 (QC CA), [1994] RJQ 1540 (C.A.).

[2] 1997, Ch. 12, article 122.

[3] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* , 2008 ONCA 587 (CanLII); il s'agit du pland'arrangement canadien proposé à la suite de la « crise du papier commercial ».

[4] idem, au paragraphe 39.

[5] Il importe de souligner à cet égard que monsieur le juge LeBel, qui avait rédigé l'opinion pour la majorité dans l'arrêt *Steinberg* en 1993, fait partie de la formation ayant refusé l'autorisation.

[6] Cette exigence s'apparente à celle analysée dans Metcalfe, où il était mis en preuve que « *the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."* » (paragraphe 32).

[7] Pièce R-3.

TAB 13

C.F.G. Construction Inc.

UNOFFICIAL TRANSLATION

C.F.G. Construction Inc.

[1] The debtor applicant CFG Construction inc. (CFG), asks the Court to approve the Proposal accepted by creditors on February 25th, 2010 (the Proposal).

[2] This application for approval was challenged by a number of creditors (the Opponents). They claim that the Proposal is illegal in that it provides for the release of the guarantors of CFG, which the Bankruptcy and Insolvency Act [1] (BIA) prohibits.

[3] Even if the Court concluded that this discharge is permitted by the BIA, the Opponents argue the absence of circumstances allowing this exceptional measure.

[4] The Opponents argue that the classes of creditors created by CFG for the purpose of voting on the Proposal do not meet the case law criteria regarding the interests of creditors of each class.

[5] They point out, moreover, that the Trustee has failed to make and provide the list of creditors of each class prior to the vote on the Proposal, rendering any consultation between them impossible. In addition, some creditors have voted as secured creditors despite the fact that, after the meeting, their claims have been declared ineligible for this category.

[6] Importantly, one of the two bonding companies benefiting from the release stipulated in its favor in the Proposal, Jevco, supports the Opponents.

Context

[7] CFG works as general contractor in the field of construction. It focuses its activities on two specialties: the construction of engineering works (bridges, roads, dams, etc.) and demolition (including asbestos removal).

[8] Originally, the company worked only in the field of demolition. Its sole director and shareholder was Clement Glode. In recent years, his son Franky Glode joined the company. CFG then launched activities in the field of building engineering works, given Franky Glode's engineering training.

[9] The annual turnover of CFG quickly grew from a few hundred thousand dollars to several million, the main business revenue arising from construction contracts.

[10] Unlike demolition contracts, CFG's construction contracts must be guaranteed by licensed insurance companies. This is a requirement of the work providers.

[11] In fact, the majority of CFG'S construction contracts are awarded by the Quebec government, specifically the Ministry of Transportation.

[12] CFG does business with two bonding companies, Axa Assurances inc. (Axa) and Jevco Insurance Company (Jevco). These bonding companies hold hypothecary guarantees on the universality of CFG properties to secure their obligations. In addition,

the directors and shareholders Clément and Franky Glode jointly personally guaranteed the obligations of CFG towards Axa and Jevco.

[13] CFG has experienced serious financial difficulties in 2009. According to its president Franky Glode, the problem comes from a poor estimate of projects and excessively rapid expansion of the company. These problems were compounded by disputes with the Commission on Health and Safety (CSST) and the Québec Construction Commission (CCQ) [2].

[14] While CFG showed operating profits for the fiscal years ending July 31st, 2007 and 2008, it has suffered a loss of over $750,000 for the 16-month period ending November 30th, 2009 [3].

[15] In August 2009, Jevco noted the problems suffered by CFG. On August 6th, it transmits a notice of withdrawal of authorization to collect receivables to certain creditors. On August 31st, 2009, Jevco gives CFG a notice of intent to enforce its hypothecary guarantee, under section 244 BIA.

[16] On October 7th, 2009, Jevco requests the appointment of an interim receiver. Axa also serves a notice under section 244 BIA and a notice of withdrawal of authorization to collect receivables.

[17] CFG is in default with several of its creditors.

[18] On December 2nd 2009, the company files a notice of intention under the BIA. At the same time, the company obtains the appointment of trustee as interim receiver under section 47.1 BIA.

[19] On December 9th, 2009, a judgment authorizes the implementation of a temporary secured financing by a prior charge (DIP), a loan from Axa totaling $500,000. This funding is necessary to provide sufficient funds to enable CFG to rapidly complete its construction contracts. The completion of the contracts is expected to facilitate the collection of accounts receivable attached to them and the submission of a proposal.

[20] Axa and Jevco thus agree to suspend the effect of their notice of withdrawal of authorization to collect receivables, allowing the trustee to carry out receivable collection.

[21] The events take place according to projections of the Trustee and CFG. The construction works are essentially executed in January 2010 and the Trustee undertakes the collection of accounts receivable.

[22] On February 1st, 2010, CFG files its Proposal. At the general meeting of creditors, held on February 25th, 2010, and chaired by the official receiver, the majority of creditors of each of the categories provided for in the Proposal declare themselves in favor of its acceptance, as amended at the meeting.

[23] The Proposal essentially provides full payment of secured creditors. It must be stressed that Axa is part of the category of secured creditors being subrogated to the rights of the National Bank, having paid the latter's secured claim. [4]

[24] Also paid in full, through the collection of accounts receivable, are the debts arising under subsection 224(1.2) of the Income Tax Act, or under other comparable provincial legislation, as well as the claims of the CCQ and CSST. Preferred employee claims are paid in full according to the priorities set out in Article 136(1)d) BIA.

[25] The unsecured creditors are grouped into two categories.

[26] The creditors of the first type are called "guaranteed creditors" in the Proposal [5]

[27] The Proposal provides the following for the creditors of this category:

> [...] The proposing Debtor offers, in full and final settlement of proven claims accepted by the trustee, payment applications and / or eligible claims under the criteria of the bonding companies, both against Axa Assurances Inc. and Jevco and against creditors who have published accepted legal hypothecs in the field of construction, a sum sufficient to pay eighty percent (80%) of the amount of claims proven and accepted under the bond(s) for wages, materials and services from guaranteed creditors and of the claims of creditors who have published accepted legal hypothecs in the field of construction. The settlement of these claims will be made by the trustee from the collection of receivables within 180 days of the date of acceptance of the proposal by the Court. In the event that there would be a shortfall, the proponent will proceed to the liquidation of assets, to a refinancing, or to an injection of funds by a third party, the whole under the supervision of the trustee and with the consent of the secured creditors, if applicable, within a maximum period of 30 days.
>
> [...]
>
> At the date of the last payment distributed to creditors guaranteed according to the criteria of the bonds, the proposing Debtor will have paid an amount equivalent to 80% of claims proven by them and consequently the proposing Debtor, Axa Assurances Inc. and will Jevco will be liberated and released of all demands, claims, actions or causes of action, judgments that such guaranteed creditors would otherwise have been entitled to assert due or in part [sic] to works and / or services rendered at the request of the debtor proponent and covered by the bonds for wages, materials and services issued by Axa Assurances Inc. and Jevco, in favor of the debtor proponent.
>
> (The Court underlines)

[28] The second category of unsecured creditors includes all other creditors.

[29] Article 10 of the Proposal provides that all claims from these creditors will be paid in proportion from "a lump sum of $250,000 paid by a third party to the trustee within 180 days from the date of acceptance of the proposal by the Court", the dividends being distributed 30 days after the date of approval of the final statement of receipts and disbursements of the trustee by the Court [6].

[30] Opponents are guaranteed creditors who voted against the acceptance of the proposal.

Relevant Statutory Provisions

[31] The following provisions of the Bankruptcy and Insolvency Act are at the heart of the analysis of the issues in dispute:

> 54. (2) For the purpose of subsection (1),
>
> (a) the following creditors with proven claims are entitled to vote:
>
> (i) all unsecured creditors, and
>
> (ii) those secured creditors in respect of whose secured claims the proposal was made;
>
> (b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose
>
> (i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and
>
> (ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);
>
> 59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
>
> 62. (2) Subject to subsection (2.1), a proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) all unsecured claims; and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, or represented by a proxyholder, at the meeting and voting on the resolution to accept the proposal.

(2.1) A proposal accepted by the creditors and approved by the court does not release the insolvent person from any particular debt or liability referred to in subsection 178(1) unless the proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the proposal.

(3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

Analysis

Release of the bonding companies

[32] Based on recent judgments in Quebec and Ontario in matters relating to corporate restructuring under the Companies' Creditors Arrangement Act [7] (CCAA), the Debtor, supported in this by the trustee and Axa, says it is possible, under the BIA, to provide for the release of bonding companies within a proposal.

[33] In support of its argument, the Debtor emphasizes that a proposal which aims at restructuring a company shares the same objectives that an arrangement made by a company to its creditors under the CCAA.

[34] CFG maintains that paragraphs 66(1) and 66(1.4) BIA allow courts to import the approach adopted under the CCAA:

66. (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

(1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

[35] A provision equivalent to subsection 66 (1.4) BIA is found under section 42 CCAA.

[36] With respect, these provisions do not have the scope alleged by the Debtor. They do not allow the importation of the provisions of the CCAA into the BIA, nor vice-versa. They apply to provisions dealing with the approval of transactions or arrangements between a company and its shareholders. This refers in particular to arrangements defined in Article 192 of the Canada Business Corporations Act. [8]

[37] The decisions cited by the parties regarding the release of bonding companies were rendered in matters related to arrangement with creditors under the CCAA. [9]

[38] Does this mean that it is not possible to consider a similar measure in a proposal?

[39] At first glance, the grounds which allow for this exceptional measure under the CCAA should also be applied to a proposal.

[40] The following extract from the Ontario Court of Appeal's judgment in *Metcalfe* [10] supports a consistent approach between the two laws. It stresses that both the arrangement under the CCAA and the proposal under the BIA are contracts in which the debtor and its creditors can negotiate a wide range of conditions, including the release of third parties [11] :

> [61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.
>
> [62] A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. 1976 CanLII 142 (S.C.C.), [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* 2000 CanLII 16921 (ON CA), 2000 CanLII 16921 (ON C.A.), (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* 2004 CanLII 34416 (ON SC), 2004 CanLII 34416 (ON S.C.), (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 1993 CanLII 8492 (ON SC), 12 O.R. (3d) 500 at 518 (Gen. Div.).
>
> [63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA

> context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan – including the provision for releases – becomes binding on all creditors (including the dissenting minority).
>
> (The Court underlines)

[41] However, Opponents point out a fundamental difference between the two laws. Thus, nothing in the CCAA provides that the bonding company remains liable despite the acceptance of the proposed arrangement.

[42] On the contrary, the legislator states at section 62(3) BIA that the acceptance of a proposal by a creditor does not release a person who would not be released under the law in the event of the discharge of the debtor.

[43] This section refers to the section of the BIA concerning the discharge of the debtor, in which in section 179 BIA is found. This provision clearly provides that the debtor's bankruptcy does not release the bonding company from its obligations.

[44] CFG replies that section 62(3) BIA does not apply if the proposal does not make any reference to the bond.

[45] It would not prevent a debtor from proposing to its creditors an agreement under which a third party, including a bonding company, can be released. This follows from the contractual nature of the proposal. The acceptance of this condition clearly set out in the proposal would prevent the application of sections 62(3) and 179 BIA.

[46] Although this interpretation is of a certain interest, it is incompatible with the interpretation which follows from the reading of section 62 BIA as a whole.

[47] Indeed, paragraph 62(2.1) of the BIA states that the acceptance of a proposal by the creditors and its approval by the court do not release the insolvent person of a debt or liability referred to in paragraph 178(1) BIA. This last provision contains a series of debts for which the bankrupt is not discharged by bankruptcy.

[48] However, the legislator permits parties to expressly provide for the possibility of compromising on such a debt or liability in the proposal, but only if the concerned creditor (English version "the creditor in relation to that debt") votes for the acceptance of the proposal.

[49] Several conclusions follow from this paragraph.

[50] On the one hand, this paragraph refers to the discharge of the debtor, as does subsection 62(3) BIA.

[51] In addition, the legislator allows for the proposal to "explicitly [provide] for the compromise." The legislator allows the debtor to include the release of a debt under section 178 BIA in his proposal. He does not give the same permission to the debtor for a debt under section 179 BIA, given the silence of the next paragraph, 62(3) BIA.

[52] A final important observation follows from this analysis. Even while allowing the debtor to transact on a debt under section 178 BIA, the legislator gives the creditor affected by this compromise a veto right by providing that this creditor must vote to accept the proposal for the debt release to be effective.

[53] In 2002, the Court of Appeal decided on the effect of the acceptance of a proposal on a subordination agreement, under which a creditor agreed to priority repayment of another creditor [12].

[54] Rochon J.A., recognizing the contractual nature of the proposal in bankruptcy, adds:

> [23] In the case at bar, I come to the same conclusion when it comes to a proposal because of the purely personal effect of the judicial contract resulting from it vis-à-vis the insolvent person.
>
> [24] Clearly, the proposal is not an act of bankruptcy. To make a proposal, the applicant must, however, be an insolvent person (art. 50(1) BIA). The ultimate goal of a subordination agreement for the creditor benefitting from it is to ensure to be paid in priority to subordinated creditors in the event of financial difficulties of the debtor. I see no reason not to retain, in matters related to a proposal, the comment of Professor MacDougall towards the function of the subordination agreement:
>
> > Given the important role subordination agreements can play in facilitating debtor's access to credit, it is unthinkable that their availability would be restricted by a conclusion that they are unenforceable in bankruptcy.
>
> [25] In this case, the agreement between the parties contains no express or implied provision that would have the effect of limiting its scope in the event of financial difficulties suffered by Biz Club. On the contrary, it is apparent that the parties have contracted because of these financial difficulties: the appellant was facilitating the credit that his partner could not obtain without his involvement and the respondent was obtaining additional insurance of being paid by this same contract. It would be incongruous to say the least to refuse, due to the insolvency of the debtor, to give effect to a contract which has been designed specifically to alleviate the consequences of that insolvency.
>
> (The Court underlines)

[55] Then analyzing the impact of sections 62 and 179 BIA on the issue in dispute, he adds:

[27] By a referral mechanism, section 62(3) renders the rule provided in section 179 of the BIA applicable to the proposal.

[...]

[28] Analyzing the need for such a section, the author Goldstein says:

> Significantly, it does not say that the order of discharge extinguishes or discharges the debt itself; all it says is that the bankrupt is released. The discharge operates *in personam* rather than *in rem*. Taken alone, this would probably be sufficient to maintain the liability of the guarantor. However, in an apparent effort to display abundance of caution, the Act adds in its section 149 that an order of discharge "does note release a person who at the date of the bankruptcy was a partner or a co-trustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or of the nature of a surety for him. [l]

[29] More recently, my colleague Robert J., after referring to the teaching of Professor Bohémier, says:

As Professor Bohémier indicates in the above passage, this section is an illustration of the principle that the discharge from debts does not affect the rights that creditors can assert against third parties, bankruptcy being a defense that is personal to the debtor. The legislator was remarkably explicit in enacting this provision. It follows in my opinion that it should be given a large and liberal interpretation, which follows moreover from the text of section 179 BIA itself, which clarifies that a person who "seemed to be a surety for the bankrupt" is not released by his discharge order [...]

Moreover, I do not believe that the inclusion of the surety and others in this text implies that the legislator intended to limit exhaustively to these specific cases the situations in which creditors maintain a recourse against third parties despite the debtor's bankruptcy.

(Underlining by Rochon J.A.)

[56] It does not appear that the proposal in this case specifically referred to the subordination agreement. However, this judgment underscores the broad and liberal interpretation to be given to section 179 BIA.

[57] Section 50 BIA illustrates another situation where the legislator limits the scope of the proposal:

> (13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to

the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

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

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

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

[58] The contractual rights to which subsection 50(14) BIA applies include bonds given by directors to creditors of the debtor.

[59] Authors Houlden, Morawetz and Sarra comment this provision under "Release of Claims Against Third Parties":

Generally speaking, a proposal can only provide for the compromise of claims against the debtor; it cannot require creditors to compromise their claims against third parties.[13]

(The Court underlines)

[60] Without asserting that it is never possible to provide for the release of third parties as part of a proposal, the Court considers that unless a creditor expressly waives the bond, it cannot be deprived of his recourse against the bonding company by accepting a proposal that provides for its release.

[61] The Debtor submits that this conclusion creates an unjustified distinction between the CCAA and the BIA.

[62] It is worth pointing out that despite the significant reform which came into force on September 18th, 2009, Parliament kept the two statutory regimes. They contain important distinctions.

[63] Among these distinctions, the period of protection granted to a debtor under the BIA remains limited to six months, while there is no time limit in the CCAA. The notice of intention to file a proposal under the BIA automatically entails a stay of proceedings, while an authorization is still required under the CCAA.

[64] The failure of the process under the BIA leads the debtor's bankruptcy while the debtor retains its legal capacity, despite the failure of its efforts under the CCAA.

[65] Parliament partitions, to some extent, both statutory regimes in subsection 66(2) of the BIA:

(2) Notwithstanding the Companies' Creditors Arrangement Act,

(a) proceedings commenced under that Act shall not be dealt with or continued under this Act; and

b) proceedings shall not be commenced under Part III of this Act in respect of a company if a compromise or arrangement has been proposed in respect of the company under the Companies' Creditors Arrangement Act and the compromise or arrangement has not been agreed to by the creditors or sanctioned by the court under that Act.

[66] This provision prohibits to process applications under the CCAA under the provisions of the BIA.

[67] Accordingly, the uniformity in the application of the BIA and the CCAA is not an argument to rule out the legislator's expressed will to refuse the release of the bonding company in relation to a proposal.

[68] Before analyzing the implications of this conclusion, the Court deems it important to dispose of some other arguments submitted by the Opponents that can also have an impact on the outcome of the application for approval of the Proposal.

No grounds for release of bonding companies

[69] Assuming the possibility of obtaining the release of the bonding companies in the context of a proposal, the Debtor had to demonstrate the necessity of this measure with regards to the criteria set out in case law.

[70] The *Metcalfe* judgment [14], cited above, submits the following elements in regards to the appropriate analysis:

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

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

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

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

c) The Plan cannot succeed without the releases;

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

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

[71] No one element is decisive in itself. The analysis should be made taking into account the particular facts of each application.

[72] CFG's proposal provides that the bonded creditors will receive 80% of their "eligible claims under the criteria of the bonding companies "[15] Axa and Jevco.

[73] As the total estimated value [16] of these claims reaches nearly $4.5 million, this means that the bonded creditors waive nearly $900,000 of claims from which Axa and Jevco will be discharged if the Proposal is approved.

[74] However, neither AXA nor Jevco inject any money to enable CFG to submit its proposal. The proportion of 80% offered to guaranteed creditors was established based on CFG's accounts receivable on its contracts. It is true that the temporary funding of $500,000 made by Axa allowed for the completion of these contracts. However, this funding enjoyed a first rank priority charge and was fully repaid to Axa before the creditors' vote on the Proposal.

[75] In addition to the absence of any monetary contribution, Axa and Jevco will not provide any new bonding commitment for CFG activities as part of its reorganization. Indeed, CFG intends to abandon construction work to focus its activities on demolition, which requires no bonding. This is not attributable to Axa and Jevco, but the fact remains that they do not contribute more to this aspect of the recovery of CFG.

[76] The Debtor emphasizes that it has obtained the cooperation of the two bonding companies by the suspension of their notice of withdrawal of authorization to collect receivables. They have thus enabled the Trustee to collect accounts, which facilitated the reorganization process.

[77] In the case of Jevco it is the only contribution to CFG's efforts. The Court considers that this is clearly insufficient to justify the release of this third party. Besides, Jevco opposes its discharge, arguing that its bonding obligations are binding not only towards the subcontractors but also towards the work provider, who requires a bond to award a contract to a general contractor.

[78] At first sight surprising, Jevco's position reflects its concern that the very institution of bonding should be undermined by the release mechanism, should it expand. Jevco adds that it underwrote the bond for good and valuable consideration. It seems unfair to Jevco to evade its obligations, not only towards subcontractors, but also towards the work provider.

[79] It is not necessary to decide on this argument; the Court finds that Jevco played no important role to promote the submission of the Proposal.

[80] The Debtor replies that the release of Axa and Jevco remains nevertheless a key element to the Proposal. Indeed, it is expected that unsecured creditors will receive a sum of $250,000 from a third party.

[81] This third party is CFG president Franky Glode. He testifies that he will take funds in part from his savings and borrow the balance, giving some personal assets as collateral.

[82] If Axa and Jevco are not released by the Proposal, they will claim from him and his father, having guaranteed the bonding companies on behalf of CFG, for all amounts paid to the bonded creditors and not covered by the assets of CFG. As the assets of CFG are sufficient only to pay secured creditors and about 80% of the bonded creditors, it is expected that Axa and Jevco will claim from them severally approximately $900,000, or 20% of the value of guaranteed loans.

[83] In this case, no amount will be available to unsecured creditors. The revival of CFG will be all the more compromised as its directors and shareholders, Franky and Clément Glode, will face a claim of about $900,000 from Axa and Jevco.

[84] In this sense, it is not so much the participation of Axa and Jevco that is necessary to the recovery of CFG as the abandonment by bonded creditors of their right to receive the full amount of their claims. The situation would be different if Jevco and Axa gave up part of their rights.

[85] It is nothing of the sort. Bonding companies do not risk anything in the operation, and only the bonded creditors bear the brunt of the Proposal to enable CFG directors to offer part of their renunciation (just over 25%, or $250,000 on a renunciation of $900,000) to unsecured creditors.

[86] It does not seem reasonable to force a single category of stakeholders to carry the full weight of the Proposal.

[87] The situation of CFG against its bonding companies Axa and Jevco has nothing in common with the situation analyzed by the undersigned in the case of Charles-Auguste Fortier Inc.

[88] We must recall that in the reorganization of the company under the CCAA, Axa had played a crucial role not only during the restructuring period but also in recovery of the company.

[89] Axa had guaranteed the obligations of the debtor towards the interim lender and taken significant risks by agreeing to bond the company in the continuation of its business.

[90] The creditors subject to the release granted to Axa gave almost unanimous support for it, in the hope to continue doing business with the debtor for other contracts.

[91] In the present case, the bonded creditors cannot count on future contracts to lessen expected losses. This probably explains why several of them have opposed the approval of the Proposal by retaining the services of attorneys who have made representations at the hearing. [17]

[92] In summary, despite the clear consequences in case of a refusal to approve the Proposal, the Court can find no grounds for the release of bonding companies Axa and Jevco, assuming that this is possible under the BIA.

Invalidity of categories of creditors

[93] Subsection 54(2)b) BIA allows for the creation of more than one class of unsecured creditors for the purpose of voting on the proposal.

[94] Guided by the principles derived from the relevant case law, Opponents argue that there must be a community of interest between creditors of the same class.

[95] Mr. Justice Clément Gascon expresses this principle in the following terms while analyzing an application to provide for separate categories of creditors, made under subsection 50(17) BIA:

> [67] In the *Steinberg* decision, the Court of Appeal reviewed the categories of claims established as part of an arrangement under the CCAA. Building on the decisions of English law and *common law*, the Court stresses among other things tnat different categories must have different interests. For this, the Court said, we must be faced with different factual situations that influence decisions or positions in different ways.
>
> [68] In establishing the categories of creditors, the Court of Appeal also specifies that it is necessary to look for creditors with common interests, but not necessarily identical or equal interests. Interest should not be so distinct as to make it impossible for creditors of a category to consult together in a common goal. One of the goals is to prevent injustice. [18]
>
> (The Court underlines)

[96] The Opponents point out that the category of guaranteed creditors is in fact divided in two categories.

[97] Some of these creditors, by voting for the Proposal, agree to waive 20% of their claims, guaranteed by the bonds underwritten by AXA and Jevco.

[98] However, these bonds include coverage limits for construction sites.

[99] Thus, for two construction sites, those of the Prime Dam and of the Trois-Rivières Culvet, the evidence demonstrates that the insufficient coverage of the bonding

contracts allowed bonded creditors on these sites to receive an amount ranging between 72% and 78% of their claims.

[100] This information was forwarded to these bonded creditors before the vote on the proposal. The representative of one of these creditors, Mtre Richard Hamelin of the Schock-Concrete inc. company, confirms that Mr. Prud'homme, Jevco representative, had advised a few days before the vote, that the coverage of the bonding contract for the Trois-Rivières Culvet contract was limited to 72%. The proposal to pay 80% of the claim thus enhanced his position and convinced that creditor to vote for its acceptance.

[101] This case is not unique. There are 24 known bonded creditors on these two contracts, and together they have claims totaling approximately $1.5 million. [19]

[102] However, the detailed tabulation of votes[20] shows that at least 14 of these creditors, whose claims total approximately $1,013,000, voted for the Proposal.

[103] Opponents claim that these creditors did not share their interests. They had the opportunity to improve their position, while for their part, they had to give up 20% of their claims. By creating a separate category for bonded creditors who lost 20% of their claims, the Proposal would not have reached the threshold of 2/3 value required by the BIA.

[104] Conversely, the Debtor and the Trustee argue that they had no obligation to create separate categories between unsecured creditors. But if the votes of unsecured creditors are combined, their total exceeds the applicable thresholds.

[105] In the *Steinberg* judgment[21], Madam Justice Marie Deschamps, J.C.A., as she then was, quoted with approval the following passages of a case from the English Court of Appeal:

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.
>
> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning 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. [22]
>
> (Underlining not added)

[106] The evidence clearly demonstrates that the interests of bonded creditors differ depending on the bond coverage they benefit from. It is easy to understand that creditors benefitting from the Proposal have different interests from those who must give up 20% of their claim. In this sense, it is certainly impossible for them to work together based on a common interest. The fact that all receive a payment of 80% of their claims does not prove a common interest in this situation.

[107] The Debtor and the Trustee knew these differences before the vote.

[108] The Court therefore considers that the categories of unsecured creditors provided for the purpose of voting on the Proposal also prevent its approval.

[109] The argument that this issue should have been raised prior to the meeting cannot be accepted, in the particular context of this file.

[110] Indeed, the Opponents were unable to obtain details of the bonded creditors whose coverage was limited before the meeting to vote on the Proposal. The small pieces of information gleaned did not allow them to apply for a suspension of the holding of the meeting, as was done in the case of The Royal Penfield.

[111] Finally, another anomaly, Axa and Jevco have not given their position on the admissibility of claims as guaranteed claims prior to the meeting.

[112] However, the report of the Trustee prior to the meeting to vote on the proposal indicates, as of February 5th, 2010:

> To finalize the proposal before the creditors' meeting of, the trustee must validate accepted claims with Axa Assurances and Jevco to verify the amounts and claims that are eligible for the bonding companies. [23]

[113] However, on the date of the hearing of the application for approval before the Court, the Trustee had not completed this step. In the case of Axa, a list prepared as of March 31st, 2010 [24], more than one month after the date of the meeting, shows the complete rejection of five claims and the substantial reduction of at least six other claims. However, many of these companies have voted as bonded creditors at the creditors' meeting. The Trustee has accepted the claims for voting purposes, without considering the positions of Axa and Jevco. In the case of Jevco, the Trustee explained that it was the only solution, given the lack of cooperation on its part. The Court questions the possibility of completing the Proposal in the absence of this collaboration.

[114] The Court has so far no way of knowing the number and value of bonded creditors eligible "according to the criteria" [25] of Jevco.

[115] In short, the voting process itself, beyond the failure to provide two categories of bonded creditors, is problematic.

Summary

[116] It would have been desirable that the parties resolve the impasse submitted to the Court. One cannot ignore the fact that despite its difficulties, CFG has managed to maintain its operations in the field of demolition. Its reputation has enabled it to win contracts worth approximately $900,000 over the past weeks. According to its president, twenty-five people are employed by the company.

[117] These considerations are important, but they cannot justify the Court in approving CFG's proposal in light of the valid grounds for opposition raised by dissenting creditors.

[118] The rejection of the application for approval entails the bankruptcy of the Debtor. [26] In the current circumstances, it is not for the Court to reformulate the proposal. If the only reason causing the refusal to approve the Proposal concerned the categories of unsecured creditors or their qualifications, it could be appropriate to order the holding of a new vote on the Proposal taking into account the parameters set out in the judgment.

[119] However, as the release of Axa and Jevco is at the heart of CFG's proposal, this solution is not appropriate. The Court notes, however, that the Debtor still has the option to make a new proposal in the context of bankruptcy if an acceptable compromise can be found with all those concerned.

THEREFORE, THE COURT:

[120] **DISMISSES** the debtor's application to approve the amended proposal of February 25th, 2010.

[121] **THE WHOLE** with costs against the body of creditors.

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE QUÉBEC

N° : 200-11-018928-096

DATE : 12 avril 2010

EN PRÉSENCE DE : L'HONORABLE ÉTIENNE PARENT, J.C.S. (JP1892)

DANS L'AFFAIRE DE LA PROPOSITION DE:

C.F.G. CONSTRUCTION INC., 990, rue Philippe-Paradis, Québec (Québec) G1N 4E4

Débitrice-proposante

et

ROY MÉTIVIER ROBERGE INC., ès-qualités de syndic à la proposition de la débitrice-requérante, 2960, boulevard Laurier, bureau 210, Québec (Québec) G1V 4S1

Syndic

et
SIGNALISATION SMG2 INC., 372, rue Adanac, Québec (Québec) G1C 8H8
et
PAVAGE NORDIC INC., 380, rue Faraday, Québec (Québec) G1N 4E5
et
GRUES J.L.R. INC.., 1400, du Grand Tronc, Québec (Québec) G1N 4H8
et
ARMATURES BOIS-FRANCS INC., 249, boulevard Bonaventure, Victoriaville (Québec) G6T 1V5

et
NOÉ VEILLETTE INC., 290, des Dominicains, Trois-Rivières (Québec) G9A 3A6
et
BÉTON PROVINCIAL, 8090, rue Boyer, Québec (Québec) G2K 1S9

Créanciers Opposants
et

COMPAGNIE D'ASSURANCE JEVCO., 5250, boulevard Décarie, bureau 100, Montréal, (Québec) H2X 2H9

et

AXA ASSURANCE INC., 2020, University, bureau 700, Montréal (Québec) H3A 2A5

Mis en cause

JUGEMENT

---

[1] La débitrice requérante, CFG Construction inc. (CFG), demande au Tribunal d'approuver la proposition concordataire acceptée par ses créanciers le 25 février 2010 (la Proposition).

[2] Cette demande d'approbation est contestée par un certain nombre de créanciers (les Opposants). Ils allèguent que la Proposition est illégale en ce qu'elle prévoit la libération des cautions de CFG, ce que la *Loi sur la faillite et l'insolvabilité*[1] (LFI) interdirait.

[3] Même si le Tribunal concluait que cette libération est permise par la LFI, les Opposants plaident l'absence de circonstances autorisant cette mesure exceptionnelle.

[4] Les Opposants font valoir que les catégories de créanciers créées par CFG aux fins du vote sur la Proposition ne respectent pas les critères jurisprudentiels concernant la communauté d'intérêts des créanciers faisant partie de chaque catégorie.

---

[1] L.R.C., chap. B-3.

[5] Ils soulignent de plus que le Syndic a omis de déterminer et de fournir la liste des créanciers de leur catégorie avant la tenue du vote sur la Proposition, rendant ainsi impossible toute consultation entre ceux-ci. En outre, certains créanciers ont voté à titre de créanciers cautionnés alors que, postérieurement à l'assemblée, leurs créances ont été déclarées inadmissibles à cette catégorie.

[6] Fait important à souligner, l'une des deux cautions bénéficiant de la libération stipulée en sa faveur à la Proposition, Jevco, appuie les Opposants.

Contexte

[7] CFG œuvre comme entrepreneur général dans le domaine de la construction. Elle concentre ses activités dans deux spécialités : la construction d'ouvrages de génie (ponts, routes, barrage, etc.) ainsi que la démolition (incluant l'enlèvement d'amiante).

[8] À l'origine, l'entreprise agissait uniquement dans le domaine de la démolition. Son administrateur et actionnaire unique était Clément Glode. Au cours des dernières années, son fils Franky Glode s'est joint à l'entreprise. CFG s'est alors lancée dans le domaine de la construction d'ouvrages de génie, vu la formation d'ingénieur de Franky Glode.

[9] Le chiffre d'affaires annuel de CFG est rapidement passé de quelques centaines de milliers de dollars à plusieurs millions de dollars, les principaux revenus d'affaires découlant des contrats de construction.

[10] Contrairement aux contrats de démolition, les contrats de construction de CFG doivent être cautionnés par des compagnies d'assurances autorisées. Il s'agit d'une exigence des donneurs d'ouvrage.

[11] Dans les faits, la partie la plus importante des contrats de construction de CFG est attribuée par le gouvernement du Québec, plus précisément par le Ministère des transports.

[12] CFG fait affaires avec deux compagnies de cautionnement, Axa Assurances inc. (Axa) et Compagnie d'Assurance Jevco (Jevco). Ces cautions détiennent des garanties hypothécaires sur l'universalité des biens de CFG pour garantir leurs obligations. De plus, les administrateurs et actionnaires Clément et Franky Glode cautionnent solidairement les obligations de CFG envers Axa et Jevco.

[13] CFG a connu des difficultés financières importantes en 2009. Selon son président Franky Glode, le problème provient d'une mauvaise estimation de projets et d'une expansion trop rapide de l'entreprise. À ces problèmes se sont ajoutés des litiges

avec la Commission de la santé et de la sécurité au travail (CSST) et avec la Commission de la construction du Québec (CCQ)[2].

[14] Alors que CFG présentait des bénéfices d'exploitation pour les années financières se terminant les 31 juillet 2007 et 2008, elle a plutôt essuyé une perte de plus de 750 000 $ pour la période de 16 mois se terminant le 30 novembre 2009[3].

[15] En août 2009, Jevco constate les problèmes de CFG. Le 6 août, elle transmet à certains créanciers un avis de retrait d'autorisation de percevoir les créances. Le 31 août 2009, Jevco remet à CFG un préavis d'intention de mettre à exécution sa garantie hypothécaire, selon l'article 244 LFI.

[16] Le 7 octobre 2009, Jevco demande la nomination d'un séquestre intérimaire. Axa signifie également un préavis selon l'article 244 LFI et un avis de retrait d'autorisation de percevoir les créances.

[17] CFG devient en défaut auprès de plusieurs de ses créanciers.

[18] Le 2 décembre 2009, l'entreprise dépose un avis d'intention en vertu de la LFI. Par la même occasion, elle obtient la nomination du Syndic à titre de séquestre intérimaire en vertu de l'article 47.1 LFI.

[19] Le 9 décembre 2009, un jugement autorise la mise en place d'un financement temporaire garanti par une charge prioritaire, prêt consenti par Axa pour un montant de 500 000 $. Ce financement est nécessaire afin de fournir les liquidités suffisantes pour permettre à CFG de parachever rapidement ses contrats de construction. L'achèvement des contrats doit faciliter la perception des comptes à recevoir qui s'y rattachent et la présentation d'une proposition.

[20] Axa et Jevco acceptent alors de suspendre l'effet de leurs avis de retrait d'autorisation de percevoir les créances, permettant au Syndic d'effectuer le recouvrement des créances.

[21] Les événements se déroulent selon les projections de CFG et du Syndic. Les travaux de construction sont, pour l'essentiel, exécutés en janvier 2010 et le Syndic entreprend la perception des comptes recevables.

[22] Le 1er février 2010, CFG dépose sa Proposition. Lors de l'assemblée générale des créanciers, tenue le 25 février 2010, et présidée par le séquestre officiel, la majorité

---

[2] Pièce S-2; voir la section 3 du rapport du Syndic sur la proposition, daté du 5 février 2010, aux pages 6 à 8.

[3] Idem, aux pages 8 et 9.

des créanciers de chacune des catégories prévues à la Proposition se prononce en faveur de son acceptation, telle qu'amendée lors de cette assemblée.

[23] La Proposition prévoit essentiellement le paiement complet des créanciers garantis. Il faut souligner qu'Axa fait partie de la catégorie des créanciers garantis étant subrogée aux droits de la Banque Nationale, dont elle a acquitté la créance garantie[4].

[24] Sont également payées en totalité les créances découlant du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou de toute autre disposition législative provinciale comparable, ainsi que les créances de la CCQ et de la CSST, à même l'encaissement des comptes à recevoir. Les réclamations privilégiées des employés sont payées entièrement selon l'ordre de priorité prévu l'article 136(1)d) LFI.

[25] Les créanciers non garantis sont regroupés en deux catégories.

[26] Les créanciers de la première catégorie sont qualifiés de « créanciers cautionnés » à la Proposition[5]

[27] La Proposition prévoit ce qui suit pour les créanciers de cette catégorie :

> [...] la proposante offre, en règlement complet et final des réclamations prouvées et admises par le syndic, demandes de paiement et/ou réclamations admissibles selon les critères des compagnies de cautionnement, tant à l'encontre de *Axa Assurances Inc.* que de *Jevco*, ainsi que des créanciers ayant publié des hypothèques légales du domaine de la construction admises, une somme suffisante afin de payer quatre-vingts pour cent (80 %) du montant des réclamations prouvées et admises en vertu du ou des cautionnements pour gages, matériaux et main-d'œuvre des créanciers cautionnés ainsi que les créances des créanciers ayant publié des hypothèques légales du domaine de la construction admises. Le paiement desdites créances sera effectué par le syndic, à même l'encaissement des recevables, dans les 180 jours suivant la date d'acceptation de la proposition par le Tribunal. Dans l'éventualité où il y aurait un manque à gagner, la proposante procédera, soit à la liquidation d'actifs, soit à un refinancement, soit à une injection de fonds par un tiers, le tout sous la supervision du syndic et avec l'accord des créanciers garantis, s'il y a lieu, dans un délai maximum de 30 jours.
>
> [...]
>
> À la date du dernier paiement distribué aux créanciers cautionnés selon les critères des cautions, la débitrice proposante aura alors versé un montant équivalent à 80 % du montant des réclamations prouvées par ces derniers et

[4] Pièce S-2, la proposition amendée dont l'approbation est demandée se trouve sous l'onglet D.
[5] Idem, à la page 3.

> conséquemment, la débitrice proposante, *Axa Assurances Inc.* et *Jevco* seront libérées et quittancées de toutes demandes, réclamations, actions ou causes d'actions, jugements que tels créanciers cautionnés selon les critères auraient autrement eu droit de faire valoir, en raison ou en partie de travaux et/ou services rendus à la demande de la débitrice proposante et couverts par les cautionnements pour gages, matériaux et main-d'œuvre émis par *Axa Assurances Inc.* et *Jevco*, en faveur de la débitrice proposante.
>
> (Soulignements du Tribunal)

[28] La deuxième catégorie de créanciers non garantis inclut tous les autres créanciers.

[29] L'article 10 de la Proposition prévoit que l'ensemble des réclamations de ces créanciers sera payé au prorata à même « un montant forfaitaire de 250 000 $ versé par un tiers au syndic dans les 180 jours suivant la date d'acceptation de la proposition par le Tribunal », les dividendes étant distribués 30 jours suivant la date d'approbation du relevé définitif des recettes et des déboursés du syndic par le Tribunal[6].

[30] Les Opposants sont des créanciers cautionnés qui ont voté contre l'acceptation de la Proposition.

Dispositions législatives pertinentes

[31] Les dispositions suivantes de la *Loi sur la faillite et l'insolvabilité* sont au cœur de l'analyse des questions en litige :

> 54 (2) La votation est régie par les règles suivantes :
>
> a) tous les créanciers non garantis, ainsi que les créanciers garantis dont les réclamations garanties ont fait l'objet de la proposition, ont le droit de voter s'ils ont prouvé leurs réclamations;
>
> b) les créanciers votent par catégorie, selon celle des catégories à laquelle appartiennent leurs réclamations respectives; à cette fin, toutes les réclamations non garanties forment une seule catégorie, sauf si la proposition prévoit plusieurs catégories de réclamations non garanties, tandis que les catégories de réclamations garanties sont déterminées conformément au paragraphe 50(1.4);
>
> 59. (1) Avant d'approuver la proposition, le tribunal entend le rapport du syndic dans la forme prescrite quant aux conditions de la proposition et à la conduite du débiteur; en outre, il entend le syndic, le débiteur, l'auteur de la proposition, tout

[6] Idem, pages 5 et 6.

créancier adverse, opposé ou dissident, ainsi que tout témoignage supplémentaire qu'il peut exiger.

Le tribunal peut refuser d'approuver la proposition

(2) Lorsqu'il est d'avis que les conditions de la proposition ne sont pas raisonnables ou qu'elles ne sont pas destinées à avantager l'ensemble des créanciers, le tribunal refuse d'approuver la proposition; et il peut refuser d'approuver la proposition lorsqu'il est établi que le débiteur a commis l'une des infractions mentionnées aux articles 198 à 200.

62 (2) Une fois acceptée par les créanciers et approuvée par le tribunal, la proposition lie ces derniers relativement :

a) à toutes les réclamations non garanties;

b) aux réclamations garanties qui en faisaient l'objet et dont les créanciers ont voté, par catégorie, en faveur de l'acceptation par une majorité en nombre et une majorité des deux tiers en valeur des créanciers garantis présents personnellement ou représentés par fondé de pouvoir à l'assemblée et votant sur la résolution proposant son acceptation.

(2.1) Toutefois, l'acceptation d'une proposition par les créanciers et son approbation par le tribunal ne libèrent la personne insolvable d'une dette ou obligation visée au paragraphe 178(1) que si la proposition prévoit expressément la possibilité de transiger sur cette dette ou obligation et que le créancier intéressé a voté en faveur de l'acceptation de la proposition.

(3) L'acceptation d'une proposition par un créancier ne libère aucune personne qui ne le serait pas aux termes de la présente loi par la libération du débiteur.

179. Une ordonnance de libération ne libère pas une personne qui, au moment de la faillite, était un associé du failli ou cofiduciaire avec le failli, ou était conjointement liée ou avait passé un contrat en commun avec lui, ou une personne qui était caution ou semblait être une caution pour lui.

Analyse

Libération des cautions

[32] S'inspirant de jugements récents prononcés au Québec et en Ontario en matière de restructurations d'entreprises en vertu de la *Loi sur les arrangements avec les*

créanciers des compagnies[7] (LACC), la Débitrice, appuyée en cela par le Syndic et Axa, affirme qu'il est possible, en vertu de la LFI, de prévoir à une proposition concordataire la libération de cautions.

[33] Au soutien de son argumentation, la Débitrice souligne qu'une proposition concordataire qui vise la restructuration d'une entreprise partage les mêmes objectifs qu'un arrangement présenté par une compagnie à ses créanciers en vertu de la *LACC*.

[34] CFG affirme que les paragraphes 66(1) et 66(1.4) LFI permettent d'importer l'approche adoptée sous la LACC :

> 66. (1) Toutes les dispositions de la présente loi, sauf la section II de la présente partie, dans la mesure où elles sont applicables, s'appliquent, compte tenu des adaptations de circonstance, aux propositions faites aux termes de la présente section.
>
> (1.4) Les dispositions de la présente section peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale autorisant ou prévoyant l'approbation de transactions ou d'arrangements entre une personne morale et ses actionnaires ou une catégorie de ceux-ci.

[35] Une disposition équivalente au paragraphe 66 (1.4) LFI se retrouve à l'article 42 LACC.

[36] Avec égards, ces dispositions n'ont pas la portée alléguée. Elles ne permettent pas d'importer à la LFI les dispositions de la LACC, ni l'inverse. Elles visent les dispositions traitant de l'approbation de transactions ou d'arrangements entre une compagnie et ses actionnaires. Cela fait notamment référence aux arrangements définis à l'article 192 de la *Loi canadienne sur les sociétés par actions*[8].

[37] Les décisions citées par les parties au sujet de la libération de cautions ont été prononcées en matière d'arrangement avec les créanciers en vertu de la LACC[9].

[38] Est-ce à dire qu'il n'est pas possible d'envisager une mesure semblable dans une proposition concordataire ?

---

[7] L.R.C., chap. C-36.
[8] L.R.C. 1985, c. C-44.
[9] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* , 2008 ONCA 587 (CanLII); *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403 (CanLII) C.A., 2010-03-04); *Hy Bloom inc. c. Banque Nationale du Canada*, 2010 QCCS 737 (CanLII) (C.S., 2010-03-03); *Charles-Auguste Fortier inc. (Arrangement relatif à)*, 2008 QCCS 5388 (CanLII) (C.S., 2008-11-14).

[39] À première vue, les motifs qui autorisent cette mesure exceptionnelle en vertu de la LACC devraient également trouver application en matière de proposition concordataire.

[40] L'extrait suivant de l'arrêt de la Cour d'Appel de l'Ontario dans *Metcalfe*[10] appuie une approche cohérente entre les deux législations. On y souligne que l'arrangement en vertu de la LACC, tout comme la proposition sous la LFI, constituent des contrats à l'intérieur desquels le débiteur et ses créanciers peuvent négocier un large éventail de conditions, incluant la libération de tiers[11] :

> [61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.
>
> [62] A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. 1976 CanLII 142 (S.C.C.), [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* 2000 CanLII 16921 (ON C.A.), (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* 2004 CanLII 34416 (ON S.C.), (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).
>
> [63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court

---

[10] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* , précité; cet arrêt est aussi connu comme étant l'« affaire des papiers commerciaux ». L'autorisation de pourvoi à la Cour suprême a été rejetée.

[11] Rappelons que dans cette affaire, les tiers quittancés n'étaient pas des cautions. Le fondement des recours éventuels contre eux reposait sur des allégations de fautes.

> sanctioning has been complied with, the plan – including the provision for releases – becomes binding on all creditors (including the dissenting minority).
>
> (Soulignements du Tribunal)

[41] Les Opposants soulignent toutefois une différence fondamentale entre ces deux lois. Ainsi, aucune disposition de la LACC ne prévoit que la caution demeure responsable malgré l'acceptation de l'arrangement proposé.

[42] Au contraire, le législateur énonce à l'article 62(3) LFI que l'acceptation d'une proposition par un créancier ne libère pas une personne qui ne le serait pas aux termes de la loi en cas de libération du débiteur.

[43] Cet article fait référence à la section de la LFI concernant la libération du débiteur, où se retrouve l'article 179 LFI. Cette disposition prévoit clairement que la faillite du débiteur ne libère pas la caution de ses obligations.

[44] CFG rétorque que l'article 62(3) LFI ne s'applique que si la proposition ne fait pas référence au cautionnement.

[45] Elle n'empêcherait pas un débiteur de proposer à ses créanciers une entente en vertu de laquelle un tiers, incluant une caution, peut être libéré. Cela découle du caractère contractuel de la proposition. L'acceptation de cette condition clairement énoncée à la proposition mettrait en échec l'application des articles 62(3) et 179 LFI.

[46] Bien que cette interprétation ne soit pas dépourvue d'intérêt, elle se heurte à l'interprétation qui découle de la lecture globale de l'article 62 LFI.

[47] En effet, le paragraphe 62(2.1) LFI énonce que l'acceptation d'une proposition par les créanciers et son approbation par le tribunal ne libèrent pas la personne insolvable d'une dette ou d'une obligation visée au paragraphe 178(1) LFI. Cette dernière disposition énonce une série de dettes dont le failli n'est pas libéré par la faillite.

[48] Cependant, le législateur permet de prévoir expressément à la proposition la possibilité de transiger sur cette dette ou obligation, mais seulement dans la mesure où le créancier intéressé (version anglaise « *the creditor in relation to that debt* ») vote pour l'acceptation de la proposition.

[49] Plusieurs constats découlent de ce paragraphe.

[50] D'une part, ce paragraphe fait référence à la libération du débiteur, comme le paragraphe 62(3) LFI.

[51] De plus, le législateur permet que la proposition puisse énoncer « expressément la possibilité de transiger ». Le législateur autorise le débiteur à formuler à sa proposition une libération d'une dette visée à l'article 178 LFI. Il ne donne pas cette autorisation au débiteur concernant une dette visée à l'article 179 LFI, vu le silence du paragraphe suivant, 62(3) LFI.

[52] Un dernier constat important découle de cette analyse. Même en permettant au débiteur de transiger sur une dette prévue à l'article 178 LFI, le législateur confère un véto au créancier visé par cette demande de libération, en prévoyant que ce créancier doit voter pour l'acceptation de la proposition pour qu'il y ait libération de la dette.

[53] En 2002, la Cour d'appel doit se prononcer sur l'effet de l'acceptation d'une proposition concordataire sur une convention de subordination, en vertu de laquelle un créancier consent au remboursement prioritaire d'un autre créancier[12].

[54] Monsieur le juge Rochon, reconnaissant le caractère contractuel de la proposition concordataire, ajoute :

> [23] En l'espèce, j'en viens à la même conclusion lorsqu'il s'agit d'une proposition concordataire en raison du caractère purement personnel à la personne insolvable de l'effet du contrat judiciaire qui en découle.
>
> [24] À l'évidence, le concordat n'est pas un acte de faillite. Pour faire une proposition concordataire, le proposant doit cependant être une personne insolvable (art. 50(1) LFI). Le but ultime d'une convention de subordination pour le créancier bénéficiaire est de s'assurer d'être payé par préférence au créancier subordonné en cas de déboires financiers du débiteur. Je ne vois aucune raison de ne pas retenir, en matière de concordat, le commentaire du professeur MacDougall à l'égard de la fonction de la convention de subordination :
>
> > Given the important role subordination agreements can play in facilitating debtor's access to credit, it is unthinkable that their availability would be restricted by a conclusion that they are unenforceable in bankruptcy.
>
> [25] En l'espèce, la convention intervenue entre les parties ne contient aucune disposition expresse ou implicite qui aurait pour effet d'en limiter la portée en cas de difficultés financières de Club Biz. Au contraire, il est manifeste que les parties ont contracté à cause de ces difficultés financières : l'appelante facilitait le crédit que ne pouvait obtenir son associé sans son intervention et l'intimée obtenait une assurance additionnelle d'être payée par cette même convention. Il serait pour le moins incongru de refuser, en raison de l'insolvabilité

[12] *2862565 Canada inc. c Merisel Canada inc.* [2002] R.J.Q. 67 (C.A.).

de la débitrice, de donner effet à un contrat qui a été conçu précisément pour pallier les conséquences de cette même insolvabilité.

(Soulignements du Tribunal)

[55] Analysant ensuite l'impact des articles 62 et 179 LFI sur la question soumise, il ajoute :

[27] Par mécanisme de renvoi, l'article 62 (3) LFI rend applicable à la proposition concordataire la règle énoncée à l'article 179 de la LFI.

[...]

[28] S'interrogeant sur la nécessité d'un tel article, l'auteur Goldstein dit :

> Significantly, it does not say that the order of discharge extinguishes or discharges the debt itself; all it says is that the bankrupt is released. The discharge operates in *personam* rather than *in rem*. Taken alone, this would probably be sufficient to maintain the liability of the guarantor. However, in an apparent effort to display abundance of caution, the Act adds in its section 149 that an order of discharge "does note release a person who at the date of the bankruptcy was a partner or a co-trustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or of the nature of a surety for him. [Je souligne]

[29] Plus récemment, mon collègue le juge Robert, après avoir référé à l'enseignement du professeur Bohémier, dit :

Comme l'indique le professeur Bohémier dans l'extrait précité, cet article est une illustration du principe selon lequel la libération de dettes n'affecte en rien les droits que peuvent faire valoir les créanciers à l'égard des tiers, la faillite étant un moyen de défense personnel au débiteur. Le législateur a prêché par excès de clarté en édictant cette disposition. Il en résulte à mon avis qu'elle doit recevoir une interprétation large et libérale, ce que laisse d'ailleurs comprendre le texte même de l'article 179 L.F.I., qui précise que n'est pas libérée par l'ordonnance de libération du failli une personne qui « semblait être une caution pour lui ». [...]

Plus encore, je ne crois pas que l'inclusion de la caution et d'autres personnes dans ce texte implique que le législateur ait voulu limiter exhaustivement à ces cas précis les situations où les créanciers conservent des recours contre les tiers malgré la faillite du débiteur.

(Soulignements de monsieur le juge Rochon)

[56] Il ne semble pas que la proposition dans cette affaire mentionnait expressément la convention de subordination. Néanmoins, cet arrêt souligne l'interprétation large et libérale qui doit être donnée à l'article 179 LFI.

[57] L'article 50 LFI illustre une autre situation où le législateur limite la portée de la proposition :

> (13) La proposition visant une personne morale peut comporter, au profit de ses créanciers, des dispositions relatives à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.
>
> (14) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou plusieurs créanciers à l'égard de contrats conclus avec un ou plusieurs administrateurs, ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

[58] Les droits contractuels visés par le paragraphe 50(14) LFI comprennent les cautionnements donnés par les administrateurs aux créanciers du débiteur.

[59] Les auteurs *Houlden*, *Morawetz* et *Sarra* commentent cette disposition sous la rubrique « *Release of Claims Against Third Parties* » :

> Generally speaking, a proposal can only provide for the compromise of claims against the debtor; it cannot require creditors to compromise their claims against third parties.[13]
>
> (Soulignements du Tribunal)

[60] Sans affirmer qu'il n'est jamais possible de prévoir la libération de tiers dans le cadre d'une proposition, le Tribunal estime qu'à moins qu'un créancier ne renonce de manière expresse au cautionnement, il ne peut être privé de son recours contre la caution par l'acceptation d'une proposition concordataire qui prévoit sa libération.

[61] La Débitrice fait valoir que cette conclusion crée une distinction injustifiée entre le régime de la LACC et celui de la LFI.

[62] Il n'est pas inutile de souligner que malgré l'importante réforme entrée en vigueur le 18 septembre 2009, le législateur a maintenu les deux régimes. Ils comportent des distinctions importantes.

---

[13] Lloyd W. HOULDEN, Geoffrey B. MORAWETZ et Janis P. SARRA, *The 2010 Annotated Bankruptcy and Insolvency Act,* Toronto, Thomson Carswell, 2010, p. 238.

[63] Parmi ces différences, la période de protection accordée en vertu de la LFI à une débitrice demeure limitée à six mois, alors qu'il n'existe pas de limite temporelle à la LACC. L'avis d'intention de produire une proposition en vertu de la LFI emporte de plein droit la suspension des procédures, alors qu'une autorisation de sursis est encore requise en vertu de la LACC.

[64] L'échec de la démarche en vertu de la LFI entraîne la faillite du débiteur alors que le débiteur conserve sa capacité juridique malgré l'insuccès de ses démarches sous la LACC.

[65] Le législateur cloisonne, jusqu'à un certain point, les deux régimes au paragraphe 66(2) LFI :

> (2) Par dérogation à la *Loi sur les arrangements avec les créanciers des compagnies* :
>
> > a) les procédures intentées sous le régime de cette loi ne peuvent être traitées ou continuées sous celui de la présente loi;
> >
> > b) les procédures ne peuvent être intentées sous le régime de la partie III de la présente loi relativement à une compagnie si une transaction ou un arrangement la visant a été proposé sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* et n'a pas été approuvé par les créanciers ou homologué conformément à celle-ci.

[66] Cette disposition interdit de *traiter* les demandes en vertu de la LACC en vertu des dispositions de la LFI.

[67] En conséquence, l'uniformité dans l'application de la LFI et de la LACC ne constitue pas un argument permettant d'écarter la volonté exprimée par le législateur de refuser la libération de la caution en matière de proposition.

[68] Avant d'analyser les conséquences de cette conclusion, le Tribunal estime important de disposer de certains autres arguments des Opposants qui peuvent également avoir un impact sur les conclusions de la demande d'approbation de la Proposition.

Absence de motifs justifiant la libération des cautions

[69] En tenant pour acquis la possibilité d'obtenir la libération de cautions dans le contexte d'une proposition concordataire, la Débitrice devait faire la démonstration de la nécessité de cette mesure, en regard des critères énoncés par la jurisprudence.

[70] L'arrêt *Metcalfe*[14] précité propose les éléments suivants concernant l'analyse appropriée :

> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.
>
> [71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

[71] Aucun élément n'est décisif en soi. L'analyse doit être faite en tenant compte des faits particuliers à chaque demande.

[72] La proposition de CFG prévoit que les créanciers cautionnés recevront 80 % du montant de leurs « réclamations admissibles selon les critères des compagnies de cautionnement »[15] Axa et Jevco.

[73] Comme la valeur totale estimée[16] de ces créances atteint près de 4 500 000 $, cela signifie que les créanciers cautionnés renoncent à près de 900 000 $ de réclamations dont Axa et Jevco seront libérés si la Proposition est approuvée.

[74] Pourtant, ni Axa ni Jevco n'injectent quelque somme pour permettre à CFG de présenter sa proposition. La proportion de 80 % offerte aux créanciers cautionnés a été

---

[14] Idem.
[15] Pièce S-2, onglet D, proposition amendée soumise à l'approbation, à la page 4.
[16] Le Syndic reconnaît ignorer la valeur réelle des créances cautionnées, son estimation correspondant à la valeur en numéraire des créanciers cautionnés ayant voté sur la proposition.

établie en fonction des comptes à recevoir de CFG sur ses contrats. Il est vrai que le financement temporaire de 500 000 $ consenti par Axa a permis de terminer ces travaux. Cependant, ce financement jouissait d'une garantie prioritaire de premier rang et a été complètement remboursé à Axa avant le vote des créanciers sur la Proposition.

[75] En plus de l'absence de toute contribution monétaire, Axa et Jevco ne fourniront aucun nouvel engagement par cautionnement pour les activités de CFG dans le cadre de sa réorganisation. En effet, CFG entend abandonner la construction pour concentrer ses activités sur la démolition, qui ne nécessite pas de cautionnement. Cela n'est pas imputable à Axa et Jevco, mais le fait demeure qu'elles ne contribuent pas davantage à cet aspect de la relance de CFG.

[76] La Débitrice souligne qu'elle a obtenu la collaboration des deux cautions par la suspension de leurs avis de retrait d'autorisation de percevoir les créances. Elles ont ainsi permis au Syndic de percevoir les comptes, ce qui a facilité la démarche de réorganisation.

[77] Dans le cas de Jevco, il s'agit du seul apport à la démarche de CFG. Le Tribunal considère que cela est nettement insuffisant pour justifier la libération de ce tiers. Du reste, Jevco s'oppose à sa libération, estimant que ses obligations de caution la lient non seulement envers les sous-traitants mais aussi envers le donneur d'ouvrage, qui exige un cautionnement pour adjuger un contrat à un entrepreneur général.

[78] À première vue surprenante, la position de Jevco s'explique par son inquiétude de voir l'institution même du cautionnement d'ouvrages sapée par ce mécanisme de libération, s'il devait s'étendre. Jevco ajoute qu'elle a souscrit le cautionnement pour bonne et valable considération. Il lui apparaît inéquitable de se soustraire à ses obligations, non seulement envers les sous-traitants, mais aussi envers le donneur d'ouvrage.

[79] Sans qu'il soit nécessaire de trancher cet argument, le Tribunal constate que Jevco n'a joué aucun rôle important afin de favoriser la présentation de la Proposition.

[80] La Débitrice rétorque que la libération d'Axa et de Jevco demeure cependant un élément clé à la Proposition. En effet, il est prévu que les créanciers non garantis reçoivent une somme de 250 000 $ provenant d'un tiers.

[81] Or, ce tiers est le président de CFG, Franky Glode. Ce dernier témoigne qu'il puisera en partie dans ses économies et empruntera le solde, en donnant en garantie certains actifs personnels.

[82] Si Axa et Jevco ne sont pas libérées par la Proposition, elles lui réclameront, ainsi qu'à son père, également caution de CFG, tous les montants payés aux

créanciers cautionnés et non couverts par la réalisation des actifs de CFG. Comme les actifs de CFG ne suffisent qu'à payer les créanciers garantis et environ 80 % des créanciers cautionnés, il est à prévoir qu'Axa et Jevco leur réclameront solidairement environ 900 000 $, soit 20 % de la valeur des créances cautionnées.

[83] Dans cette hypothèse, aucune somme ne pourra être offerte aux créanciers non garantis. La relance de CFG sera d'autant plus compromise que ses administrateurs et actionnaires, Franky et Clément Glode, feront face à une poursuite d'environ 900 000 $ d'Axa et Jevco.

[84] En ce sens, ce n'est pas tant la participation d'Axa et de Jevco qui est nécessaire à la relance de CFG que l'abandon par les créanciers cautionnés de leur droit de percevoir la totalité de leurs créances. La situation serait différente si Axa et Jevco renonçaient à une partie de leurs droits.

[85] Il n'en est rien. Les cautions ne risquent rien dans l'opération, seuls les créanciers cautionnés faisant les frais de la Proposition afin de permettre aux dirigeants de CFG d'offrir une partie de leur renonciation (un peu plus de 25%, soit 250 000 $ sur une renonciation de 900 000 $) aux créanciers non garantis.

[86] Il n'apparaît pas raisonnable de faire supporter à une seule catégorie des « parties prenantes » (*stakeholders*) le poids complet de la Proposition.

[87] La situation de CFG en regard de ses cautions Axa et Jevco n'a rien de commun avec la situation analysée par le soussigné dans l'affaire de *Charles-Auguste Fortier Inc.*

[88] Rappelons que dans la réorganisation de cette entreprise en vertu de la *LACC*, Axa avait joué un rôle crucial non seulement pendant la période de restructuration mais aussi dans la relance de l'entreprise.

[89] Axa avait garanti les obligations de cette débitrice envers le prêteur temporaire et avait pris des risques importants en acceptant de cautionner l'entreprise dans la continuation de ses affaires.

[90] Les créanciers visés par la quittance envers Axa avaient donné un appui presque unanime à celle-ci, pouvant espérer continuer à faire affaires avec la débitrice pour d'autres contrats.

[91] En l'espèce, les créanciers cautionnés ne peuvent compter sur des contrats à venir pour amoindrir les pertes anticipées. Cela explique sans doute pourquoi plusieurs

d'entre eux se sont opposés à l'approbation de la Proposition en retenant les services de procureurs qui ont fait des représentations à l'audience[17].

[92] En résumé, malgré les conséquences annoncées en cas de refus d'approuver la Proposition, le Tribunal ne peut trouver de motifs justifiant la libération des cautions Axa et Jevco, à supposer que cela soit possible en vertu de la LFI.

Invalidité des catégories de créanciers

[93] Le paragraphe 54(2)b) LFI permet de prévoir plus d'une catégorie de créanciers non garantis aux fins du vote sur la proposition.

[94] S'inspirant des principes tirés de la jurisprudence en la matière, les Opposants plaident qu'il doit exister entre les créanciers de même catégorie une communauté d'intérêts.

[95] Monsieur le juge Clément Gascon exprime ce principe dans les termes suivants alors qu'il analyse une demande de prévoir de catégories distinctes de créanciers, formulée en vertu du paragraphe 50(17) LFI :

> [67] Dans l'arrêt *Steinberg*, la Cour d'appel a révisé les catégories de réclamations établies dans le cadre d'un arrangement en vertu de la LACC. Prenant appui sur des décisions de droit anglais et de *Common Law*, elle souligne entre autres que des catégories différentes doivent avoir des intérêts différents. Pour cela, dit la Cour, il faut être en face de situations de faits différentes qui influencent les décisions ou prises de position différemment.
>
> [68] En établissant des catégories de créanciers, la Cour d'appel précise aussi qu'il faut rechercher des créanciers ayant des intérêts communs, mais pas nécessairement identiques ou égaux. Les intérêts ne doivent par contre pas être distincts au point qu'il soit impossible pour les créanciers d'une catégorie de se consulter ensemble dans un objectif commun. L'un des buts visés est de prévenir les injustices.[18]
>
> (Soulignements du Tribunal)

[96] Les Opposants soulignent que la catégorie des créanciers cautionnés comporte en réalité deux volets.

---

[17] Dans l'affaire *Charles-Auguste Fortier Inc.*, le seul créancier opposant avait transmis son opposition par télécopieur quelques minutes avant l'audience.

[18] *Le Royal Penfield Inc. c. Groupe Thibault Van Houtte & Associés Ltée*, 2003 CanLII 33980 (QC C.S.).

[97] Une partie de ces créanciers, en votant pour la Proposition, acceptent de renoncer à 20 % de leur réclamation, garantie par les cautionnements souscrits par Axa et Jevco.

[98] Cependant, ces cautionnements comportent des limites de couverture par chantier.

[99] Or, pour deux chantiers, ceux du Barrage Prime et du Ponceau de Trois-Rivières, la preuve démontre que l'insuffisance de couverture des contrats de cautionnement permettait aux créanciers cautionnés sur ces chantiers de recevoir un montant variant entre 72 % et 78 % de leurs réclamations.

[100] Cette information a été transmise à ces créanciers cautionnés avant la tenue du vote sur la proposition. Le représentant de l'un de ces créanciers, Me Richard Hamelin de l'entreprise Schock-Béton inc., confirme que monsieur Prud'homme, représentant Jevco, avait avisé, quelques jours avant le vote, que la couverture du contrat de cautionnement pour le contrat du Ponceau de Trois-Rivières était limitée à 72 %. La proposition de verser 80 % de la réclamation bonifiait sa position et a convaincu ce créancier de voter pour son acceptation.

[101] Ce cas n'est pas unique. Les créanciers cautionnés connus sur ces deux contrats sont au nombre de 24 et possèdent des réclamations totalisant environ 1 500 000 $[19].

[102] Or, la compilation détaillée des votes[20] permet de constater qu'au moins 14 de ces créanciers, dont la valeur des réclamations totalise environ 1 013 000 $, ont voté pour la Proposition.

[103] Les Opposants allèguent que ces créanciers ne partageaient pas leurs intérêts. Ils avaient la possibilité de bonifier leur position, alors que, pour leur part, ils devaient renoncer à 20 % de leurs créances. En créant une catégorie distincte pour les créanciers cautionnés qui perdaient 20 % de leurs réclamations, la Proposition n'aurait pas atteint le seuil de 2/3 en valeur exigé par la LFI.

[104] La Débitrice et le Syndic font valoir à l'inverse qu'ils n'avaient pas l'obligation de créer des catégories distinctes entre les créanciers non garantis. Or, si les votes des créanciers non garantis sont regroupés, leur total dépasse les seuils applicables.

---

[19] Pièce C-6.
[20] Pièce S-1.

[105] Dans l'arrêt *Steinberg*[21], madame la juge Marie Deschamps, alors à la Cour d'appel, cite avec approbation les passages suivants d'une affaire émanant de la Cour d'appel anglaise :

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.
>
> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning 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.[22]
>
> (Soulignements non ajoutés)

[106] La preuve démontre clairement que les intérêts des créanciers cautionnés divergent selon la couverture du cautionnement dont ils bénéficient. Il est facile de comprendre que les créanciers avantagés par la Proposition possèdent des intérêts différents de ceux qui sont appelés à renoncer à 20 % de leur réclamation. En ce sens, il leur est certainement impossible de se concerter sur la base d'un intérêt commun. Le fait que tous reçoivent le paiement de 80 % de leurs réclamations ne démontre pas un intérêt commun dans cette situation.

[107] La Débitrice et le Syndic connaissaient ces divergences avant la tenue du vote.

[108] Le Tribunal estime en conséquence que les catégories de créanciers non garantis prévues aux fins du vote sur la Proposition empêchent également son approbation.

[109] L'argument voulant que ce moyen aurait dû être soulevé avant la tenue de l'assemblée ne peut être retenu, dans le contexte particulier du dossier.

---

[21] *Michaud c Steinberg*, [1993] R.J.Q. 1684 (C.A.).
[22] (1891) 4 All E.R. 246.

[110] En effet, les Opposants n'ont pu obtenir les détails concernant les créanciers cautionnés dont la couverture était limitée avant la tenue de l'assemblée pour le vote sur la Proposition. Les bribes d'informations glanées ne leur permettaient pas de présenter une demande en suspension de la tenue de l'assemblée, comme cela fut fait dans l'affaire *Le Royal Penfield*.

[111] Finalement, autre anomalie, Axa et Jevco ne se sont pas prononcées sur la recevabilité des réclamations comme créances cautionnées avant la tenue de l'assemblée.

[112] Pourtant, le rapport du Syndic avant la tenue de l'assemblée pour le vote sur la proposition énonce, en date du 5 février 2010 :

> Pour finaliser la proposition d'ici l'assemblée des créanciers, le syndic doit valider les réclamations admissibles avec Axa Assurances et Jevco afin de s'assurer des montants et réclamations admissibles par les compagnies de caution.[23]

[113] Or, à la date de l'audition de la demande d'approbation devant le Tribunal, le Syndic n'avait pas complété cet exercice. Dans le cas d'Axa, une liste préparée en date du 31 mars 2010[24], soit plus d'un mois après la tenue de l'assemblée, démontre le rejet complet de cinq réclamations et la diminution substantielle d'au moins six autres réclamations. Or, plusieurs de ces entreprises ont voté comme créanciers cautionnés lors de l'assemblée des créanciers. Le Syndic a accepté les réclamations, aux fins du vote, sans tenir compte de la position d'Axa et Jevco. Dans le cas de Jevco, le Syndic explique qu'il s'agissait de la seule solution, vu son absence de collaboration. Le Tribunal s'interroge sur la possibilité de mener à terme la Proposition en l'absence de cette collaboration.

[114] Le Tribunal n'a pour l'instant aucun moyen de connaître la valeur en nombre et en numéraire des créanciers cautionnés admissibles « selon les critères »[25] de Jevco.

[115] En bref, le processus même du vote, au-delà du défaut de prévoir deux catégories de créanciers cautionnés, pose problème.

Récapitulation

[116] Il aurait certes été souhaitable que les parties puissent dénouer l'impasse soumise au Tribunal. On ne peut ignorer le fait que malgré ses difficultés, CFG a réussi

---

[23] Pièce S-2, sous l'onglet B, rapport du syndic du 5 février 2010 à la page 14.
[24] Pièce A-4.
[25] Expression utilisée à la Proposition, en page 4.

à maintenir ses opérations dans le domaine de la démolition. Sa notoriété lui a permis de décrocher des contrats d'une valeur d'environ 900 000 $ au cours des dernières semaines. Selon son président, vingt-cinq personnes sont à son emploi.

[117] Ces considérations sont importantes, mais elles ne peuvent justifier le Tribunal d'approuver la proposition de CFG à la lumière des motifs d'opposition valablement soulevés par les créanciers opposants.

[118] Le rejet de la demande d'approbation entraîne la faillite de la Débitrice[26]. Dans les circonstances actuelles, il n'appartient pas au Tribunal de reformuler la proposition. Si le seul motif entraînant le refus d'approuver la Proposition concernait les catégories de créanciers non garantis ou leur qualification, il pourrait être opportun d'ordonner la tenue d'un nouveau vote sur la Proposition en tenant compte des paramètres énoncés au jugement.

[119] Cependant, comme la libération d'Axa et Jevco est au cœur de la Proposition de CFG, cette solution n'est pas appropriée. Le Tribunal rappelle cependant qu'il demeure loisible à la Débitrice de formuler une nouvelle proposition dans le contexte de la faillite si un compromis acceptable peut être trouvé avec tous les intéressés.

POUR CES MOTIFS, LE TRIBUNAL :

[120] **REJETTE** la demande de la débitrice d'approuver la proposition concordataire amendée du 25 février 2010.

[121] **LE TOUT**, avec dépens contre la masse.

ÉTIENNE PARENT, J.C.S.

Me Marc Germain (casier 14)
Stein Monast, S.E.N.C.R.L.
Procureurs du Séquestre intérimaire

Me Jean-François Bertrand
Me Sylvain Tassé (casier 7)
Tassé & avocats
Procureurs de la Débitrice

[26] Article 61(2)a) LFI.

Me Louis Carrière (casier 130)
Heenan Blaikie Aubut S.E.N.C.R.L., S.R.L.
Procureurs de Compagnie d'Assurance Jevco

Me Claude Marchand (casier 92)
Ogilvy Renault
Procureurs de AXA Assurance inc.

Me Pierre-Yves Ménard (casier 49)
Morency, société d'avocats
Procureurs Signalisation SMG2 inc. et de Pavage Nordic inc.

Me J. Patrick Bédard (casier 207))
Bédard Poulin
Procureurs de Grues J.L.R. inc.

Me Alain Pard
Étude légale Alain Pard inc.
7, rue des Buttes
Warwick (Québec) J0A 1M0
Procureurs de Armatures Bois-Francs inc.

Me Louis Hénaire
983, rue Hart
Trois-Rivières (Québec) G9A 4S3
Procureurs de Noé Veillette inc.

Me Reynald Poulin
Beauvais Truchon
Procureur de Béton Provincial

Date d'audience : 1er avril 2010

Domaine de droit : Faillite et insolvabilité

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C.36 as am.
and in the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Applicants

Court File No: CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES
OF THE M&K RESPONDING LANDLORDS
Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)

McLEAN & KERR LLP
Barristers & Solicitors
130 Adelaide Street West, Suite 2800
Toronto, ON M5H 3P5

Linda Galessiere / LSUC#: 34678A
Tel: 416-369-6609
Email: lgalessiere@mcleankerr.com

Gus Camelino/LSUC#: 45607S
Tel: 416-369-6621
Email: gcamelino@mcleankerr.com

Lawyers for Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc. and SmartREIT (formerly Calloway Real Estate Investment Trust)