TAB 9

2008 ONCA 587
Ontario Court of Appeal

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

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee
Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.
Peter F.C. Howard, 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, UBS AG
Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.
Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)
Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
Mario J. Forte for Caisse de Dépôt et Placement du Québec
John B. Laskin for National Bank Financial Inc., National Bank of Canada
Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.
Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank
Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
Neil C. Saxe for Dominion Bond Rating Service
James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., 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., Jazz Air LP
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.
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.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.D Miscellaneous cases

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

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

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

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s. 4 — considered

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

s. 6 — considered

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s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. 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 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 time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), 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.

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 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 Montréal Protocol — the parties committed 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 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 Article 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 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 cooperated 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 25th. The vote was overwhelmingly in support of the Plan — 96% 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% of those connected with the development of the Plan voted positively, as did 80% 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 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?

(1) Legal Authority for the Releases

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

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including 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 / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

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

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — 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] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) 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.

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 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, 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, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

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

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

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the 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 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.

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: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues*

Paid under s.47 (f) of Timber Regulations in the Western Provinces, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

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. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. 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), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

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

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

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

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

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial 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[6] *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;
>
> 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, just 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:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

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 Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. 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 Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — 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 Corp., 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 well-spring 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 *Steinberg Inc. c. Michaud*, [7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

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 *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, 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 Airlines Ltd.* 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. 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, Canada* 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:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 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.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [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, Canada* 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 Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* 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, Canada* 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 *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) 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 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), 21 C.B.R. (5th) 157 (Ont. 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 *Steinberg Inc. c. Michaud, 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):

> [42] 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.
>
> .....
>
> [54] 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.
>
> .....
>
> [58] 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 Inc.*, 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 appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* 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 Inc.* 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 Inc.* 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 Inc.* 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.
>
> **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.
>
> 1997, c. 12, s. 122.

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

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

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

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. 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 & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) 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 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; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: 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*.

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 Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada 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 the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

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: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) 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, 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, 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% 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 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.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada 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 A — 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

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, Sebastien 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.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. 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: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods, supra*, at pp.319-320.

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.*

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.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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TAB 10

1998 CarswellOnt 1145
Ontario Court of Justice, General Division [Commercial List]

Sammi Atlas Inc., Re

1998 CarswellOnt 1145, [1998] O.J. No. 1089, 3 C.B.R. (4th) 171, 59 O.T.C. 153, 78 A.C.W.S. (3d) 10

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

In The Matter of the Courts of Justice Act, R.S.O. 1990, c.C.43

In The Matter of a Plan of Compromise or Arrangement of Sammi Atlas Inc.

Farley J.

Heard: February 27, 1998
Judgment: February 27, 1998
Docket: 97-BK-000219, B230/97

Counsel: *Norman J. Emblem*, for the applicant, Sammi Atlas Inc.
James Grout, for Agro Partners, Inc.
Thomas Matz, for the Bank of Nova Scotia.
Jay Carfagnini and *Ben Zarnett*, for Investors' Committee.
Geoffrey Morawetz, for the Trade Creditors' committee.
Clifton Prophet, for Duk Lee.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

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

Corporation brought motion for approval and sanctioning of plan of compromise and arrangement under Companies' Creditors Arrangement Act — There must be strict compliance with all statutory requirements and adherence to previous orders of court — All materials filed and procedures carried out must be examined to determine whether anything has been done or purported to be done which is not authorized by Act — Plan must be fair and reasonable — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Corporation and majority of creditors approved plan of compromise and arrangement under Companies' Creditors Arrangements Act providing for distribution to creditors on sliding scale based on aggregate of all claims held by each claimant — Corporation brought motion for approval and sanctioning of plan — Creditor by way of assignment brought motion for direction that plan be amended — Motion for approval and sanctioning was granted, and motion for amendment was dismissed — Court should be reluctant to interfere with business decisions of creditors reached as a body — No exceptional circumstances supported motion to amend plan after it was voted on — No jurisdiction existed under Act to grant substantive change sought by creditor — Creditor and all unsecured creditors were treated fairly and reasonably — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Farley J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) — applied

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

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

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

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

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

Statutes considered:

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

MOTION for approval and sanctioning of plan of compromise and arrangement under *Companies' Creditors Arrangement Act*; MOTION by creditor for amendment of plan.

Farley J.:

1 This endorsement deals with two of the motions before me today:

1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and

2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

2 As to the Applicant's sanction motion, the general principles to be applied in the exercise of the court's discretion are:

1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act* ("CCAA"); and

3) the Plan must be fair and reasonable.

See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.); affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p.201; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p.506.

3 I am satisfied on the material before me that the Applicant was held to be a corporation as to which the CCAA applies, that the Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings, that the meetings were held in accordance with the directions of the court and that the Plan was approved by the requisite majority (in fact it was approved 98.74% in number of the proven claims of creditors voting and by 96.79% dollar value, with Argo abstaining). Thus it would appear that items one and two are met.

4 What of item 3 - is the Plan fair and reasonable? A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p.109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the Plan which a majority have approved - subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509. In the present case no one appeared today to oppose the Plan being sanctioned: Argo merely wished that the Plan be amended to accommodate its particular concerns. Of course, to the extent that Argo would be benefited by such an amendment, the other creditors would in effect be disadvantaged since the pot in this case is based on a zero sum game.

5 Those voting on the Plan (and I note there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p.510 of *Olympia & York Developments Ltd.*:

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

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests. The vote in the present case is even higher than in *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) where I observed at p.141:

> ... This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.

The Courts should not second guess business people who have gone along with the Plan....

6 Argo's motion is to amend the Plan - after it has been voted on. However I do not see any exceptional circumstances which would support such a motion being brought now. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) the Court of Appeal observed at p.15 that the court's jurisdiction to amend a plan should "be exercised sparingly and in exceptional circumstances only" even if the amendment were merely technical and did not prejudice the interests of the corporation or its creditors and then only where there is jurisdiction under the CCAA to make the amendment requested, I was advised that Argo had considered bringing the motion on earlier but had not done so in the face of "veto" opposition from the major creditors. I am puzzled by this since the creditor or any other appropriate party can always move in court before the Plan is voted on to amend the Plan; voting does not have anything to do with the court granting or dismissing the motion. The court can always determine a matter which may impinge directly and materially upon the fairness and reasonableness of a plan. I note in passing that it would be inappropriate to attempt to obtain a preview of the court's views as to sanctioning by brining on such a motion. See my views in *Central Guaranty Trustco Ltd., Re* at p.143:

> ... In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust *where no interest was adversely affected.* The same cannot be said here. FSTQ aside from s.11(c) of the CCAA also raised s.7. I am of the view that s.7 allows an amendment after an adjournment - *but not after a vote has been taken.* (emphasis in original)

What Argo wants is a substantive change; I do not see the jurisdiction to grant same under the CCAA.

7 In the subject Plan creditors are to be dealt with on a sliding scale for distribution purposes only: with this scale being on an aggregate basis of all claims held by one claimant:

> i) $7,500 or less to receive cash of 95% of the proven claim;
>
> ii) $7,501 - $100,000 to receive cash of 90% of the first $7,500 and 55% of balance; and;
>
> iii) in excess of $100,000 to receive shares on a formula basis (subject to creditor agreeing to limit claims to $100,000 so as to obtain cash as per the previous formula).

Such a sliding scale arrangement has been present in many proposals over the years. Argo has not been singled out for special treatment; others who acquired claims by assignment have also been affected. Argo has acquired 40 claims; all under $100,000 but in the aggregate well over $100,000. Argo submitted that it could have achieved the result that it wished if it had kept the individual claims it acquired separate by having them held by a different "person"; this is true under the Plan as worded. Conceivably if this type of separation in the face of an aggregation provision were perceived to be inappropriate by a CCAA applicant, then I suppose the language of such a plan could be "tightened" to eliminate what the applicant perceived as a loophole. I appreciate Argo's position that by buying up the small claims it was providing the original creditors with liquidity but this should not be a determinative factor. I would note that the sliding scale provided here does recognize (albeit imperfectly) that small claims may be equated with small creditors who would more likely wish cash as opposed to non-board lots of shares which would not be as liquidate as cash; the high percentage cash for those proven claims of $7,500 or under illustrates the desire not to have the "little person" hurt - at least any more than is necessary. The question will come down to balance - the plan must be efficient and attractive enough for it to be brought forward by an applicant with the realistic chance of its succeeding (and perhaps in that regard be "sponsored" by significant creditors) and while not being too generous so that the future of the applicant on an ongoing basis would be in jeopardy: at the same time it must gain enough support amongst the creditor body for it to gain the requisite majority. New creditors by assignment may provide not only liquidity but also a benefit in providing a block of support for a plan which may not have been forthcoming as a small creditor may not think it important to do so. Argo of course has not claimed it is a "little person" in the context of this CCAA proceeding.

8 In my view Argo is being treated fairly and reasonably as a creditor as are all the unsecured creditors. An aggregation clause is not inherently unfair and the sliding scale provisions would appear to me to be aimed at "protecting (or helping out) the little guy" which would appear to be a reasonable policy.

9 The Plan is sanctioned and approved; Argo's aggregation motion is dismissed.

Addendum:

10 I reviewed with the insolvency practitioners (legal counsel and accountants) the aspect that industrial and commercial concerns in a CCAA setting should be distinguished from "bricks and mortgage" corporations. In their reorganization it is important to maintain the goodwill attributable to employee experience and customer (and supplier) loyalty; this may very quickly erode with uncertainty. Therefore it would, to my mind be desirable to get down to brass tacks as quickly as possible and perhaps a reasonable target (subject to adjustment up or down according to the circumstances including complexity) would be for a six month period from application to Plan sanction.

Motion for approval granted; motion for amendment dismissed.

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TAB 11

Case Name:

Sino-Forest Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

[2012] O.J. No. 5958

2012 ONSC 7050

Court File No. CV-12-9667-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: December 7, 2012.
Judgment: December 10, 2012.
Released: December 12, 2012.

(79 paras.)

Counsel:

Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation.

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders.

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs.

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited.

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation.

John Pirie and David Gadsden, for Poyry (Beijing).

James Doris, for the Plaintiff in the New York Class Action.

David Bish, for the Underwriters.

Simon Bieber and Erin Pleet, for David Horsley.

James Grout, for the Ontario Securities Commission.

Emily Cole and Joseph Marin, for Allen Chan.

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon.

Paul Emerson, for ACE/Chubb.

Sam Sasso, for Travelers.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

2 The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

3 With the exception of one party, SFC's position is either supported or is not opposed.

4 Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11

"Settlement of Claims Against Third Party Defendants".

5 The defined terms have been taken from the motion record.

6 SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision") (2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

7 Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

8 The Plan has the support of the following parties:

- (a) the Monitor;
- (b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");
- (c) Ernst & Young LLP ("E&Y");
- (d) BDO Limited ("BDO"); and
- (e) the Underwriters.

9 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

10 The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

11 Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

12 SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

13 SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

14 SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

15 On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

16 SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

17 Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

18 The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings, preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

19 SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

20 On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

21 On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

22 As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

23 After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

24 *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

25 The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

26 In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

27 Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

28 The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

29 The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

30 The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

31 SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

32 On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

33 In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

34 On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

35 According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

36 Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

37 SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

38 SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

39 The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

40 Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust

Interests.

41 Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

42 With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

43 The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

44 The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

45 The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

46 The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	250	98.81%	$	1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$	414,087	0.03%
Total Claims Voting	253	100.00%	$	1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

e. E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

47 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

48 Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

49 Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

50 To establish the court's approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;
(b) nothing has been done or purported to be done that is not authorized by the CCAA; and
(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

51 SFC submits that there has been strict compliance with all statutory requirements.

52 On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

53 The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

54 SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

55 Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation.*

56 Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc.* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* [2009] O.J. No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

57 In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

58 I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

59 SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

60 In *Nelson Financial,* I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;
2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;
3. If other options or alternatives have been explored and rejected as workable, this will be significant;
4. Consideration of the oppression rights of certain creditors; and
5. Unfairness to shareholders.
6. The court will consider the public interest.

61 The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

62 In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

63 I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

64 The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

65 In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

66 In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

67 As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

68 With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation,* (2005) 14 C.B.R. (5th) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

69 Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

70 The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

71 In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

72 Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

73 In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial, Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

74 With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

75 It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

76 I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

77 Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

78 Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;
(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and
(iii) the Plan is fair and reasonable.

79 Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

G.B. MORAWETZ J.

TAB 12

2013 ONSC 2519
Ontario Superior Court of Justice [Commercial List]

SkyLink Aviation Inc., Re

2013 CarswellOnt 7670, 2013 ONSC 2519, [2013] O.J. No. 2664, 229 A.C.W.S. (3d) 24, 3 C.B.R. (6th) 83

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

In the Matter of a Plan of Compromise and Arrangement of Skylink Aviation Inc. Applicant

Morawetz J.

Heard: April 23, 2013
Oral reasons: April 23, 2013
Docket: CV-13-1003300CL

Counsel: Robert J. Chadwick, Logan Willis for SkyLink Aviation Inc.
Harvey Chaiton for Arbib, Babrar and Sunbeam Helicopters
Emily Stock for Certain Former and Current Directors, for Insured Claims
S.R. Orzy, Sean Zweig for Noteholders
Shayne Kukulowicz for Certain Directors and Officers
M.P. Gottlieb, A. Winton for Monitor, Duff & Phelps

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

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

Debtor entered protection under Companies' Creditors Arrangement Act for purpose of recapitalization — Plan sought to refinance first lien debt, cancel secured notes in exchange for consideration including new common shares and new debt, and compromise of certain unsecured liabilities — Settlements were arranged with certain claimants, including releases regarding potential claims — Debtor brought application for extension of stay and sanctioning plan of arrangement and compromise — Application granted — Plan was not opposed and had strong support from creditors — Debtor complied with procedural requirements of Act, and orders including initial order — Debtor acted in good faith and with due diligence — Plan was fair and reasonable — Releases were necessary part of plan and had been negotiated amongst appropriate parties.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval

Debtor entered protection under Companies' Creditors Arrangement Act for purpose of recapitalization — Plan sought to refinance first lien debt, cancel secured notes in exchange for consideration including new common shares and new debt, and compromise of certain unsecured liabilities — Settlements were arranged with certain claimants, including releases regarding potential claims — Debtor brought application for extension of stay and sanctioning plan of arrangement and compromise — Application granted — Plan was not opposed and had strong support from creditors — Debtor complied with procedural requirements of Act, and orders including initial order — Debtor acted in good faith and with due diligence — Plan was fair and reasonable — Releases were necessary part of plan and had been negotiated amongst appropriate parties.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Miscellaneous

Sealing confidential materials.

Table of Authorities

Cases considered by *Morawetz J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 257 O.A.C. 400 (note), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 390 N.R. 393 (note) (S.C.C.) — referred to

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

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

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

SkyLink Aviation Inc., Re (2013), 2013 CarswellOnt 2785, 2013 ONSC 1500 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

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

s. 19(2) — referred to

APPLICATION by debtor for approval of plan under *Companies' Creditors Arrangement Act* and to extend stay.

Morawetz J.:

1 SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), seeks an Order (the "Sanction Order"), among other things:

(a) sanctioning SkyLink Aviation's Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");

(b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and

(c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 [2013 CarswellOnt 2785 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 No party opposed the requested relief.

3 Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company's goal of a going-concern recapitalization transaction (the "Recapitalization") that minimizes any impact on operations and maximizes value for the Company's stakeholders.

4 Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company's stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

5 The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

The Facts

6 SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, "SkyLink"), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the "SkyLink Business").

7 SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk conflict zones.

8 SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the "Monitor").

9 The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. The Recapitalization involves: (i) the refinancing of the Company's first lien debt; (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders' claim that is treated as unsecured under the Plan.

10 On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers. SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

11 Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately $123.4 million.

12 The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

(a) $28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the "Secured Noteholders Allowed Secured Claim"); and

(b) $94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the "Secured Noteholders Allowed Unsecured Claim").

13 The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the "Valuation") prepared by Duff & Phelps Canada Limited.

14 The Claims Procedure resulted in $133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of $94.9 million and other unsecured Claims of $38.8 million, being filed against the Company.

15 In addition, ten claims were filed against the Directors and Officers totalling approximately $21 million. Approximately $13 million of these claims were also filed against the Company.

16 Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the "Original Plan").

Purpose and Effect of the Plan

17 In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company's stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

18 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

19 Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

20 Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

21 The Plan provides for the release of a number of parties (the "Released Parties"), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

22 The Plan does not release: (i) the right to enforce SkyLink Aviation's obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

Meetings of Creditors

23 At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

24 Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for approval of the Plan under the CCAA would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

25 Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the "New Shareholders' Agreement"), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will

collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

Requirements for Approval

26 The general requirements for court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

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

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)).

Canadian Airlines Corp., Re, 2000 ABQB 442 (Alta. Q.B.), at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed (2000), 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.).

27 Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

28 With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

29 Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

(a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;

(b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;

(c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;

(d) the Affected Creditors voted to approve the Plan at the Meetings;

(e) the Plan is economically feasible;

(f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the goingconcern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

30 In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]); affirmed 2008 ONCA 587 (Ont. C.A.) leave to appeal refused (2008), 257 O.A.C. 400 (note) (S.C.C.).

31 Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

32 Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

33 I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

(a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;

(b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;

(c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;

(d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;

(e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

34 I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

Sealing the Confidential Appendix

35 The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

36 The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

Extension of Stay Period

37 The Applicant also requests an extension of the Stay Period until May 31, 2013.

38 I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

Application granted.

TAB 13

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

In the Matter of a Plan of Compromise or Arrangement of 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.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, 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
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.vi Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted

— Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

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

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — followed

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "insolvent person" — considered

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

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in Stelco Inc. (Re), [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

APPLICATION for relief under *Companies' Creditors Arrangement Act.*

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately

$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

> a) Should the stay be extended to the Partnerships?
>
> b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
>
> c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
>
> d) Should the Court approve protections for employees?
>
> e) Is it appropriate to allow payment of certain pre-filing amounts?
>
> f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
>
> g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly

outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)]*, and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek

authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

End of Document

TAB 14

2003 CarswellQue 3404
Cour supérieure du Québec

Uniforêt inc., Re

2003 CarswellQue 3404, [2003] Q.J. No. 9328, 43 C.B.R. (4th) 254, J.E. 2003-1408, REJB 2003-42346

In the matter of the arrangement of: Uniforêt Inc., Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc. (collectively, Uniforêt), and Richter & Associés (Monitor), Monitor/mis en cause and Jolina Capital Inc. (Jolina), mise en cause c. Highland Capital Management, L.P. (Highland), ML CBO IV (Cayman) Ltd., Pamco Cayman, Ltd., Highland Legacy, Ltd., Pam Capital Funding, L.P., Prospect Street High Income and Portfolio Inc. (Prospect), Opposing creditors

Tingley J.C.S.

Heard: March 3 - May 9, 2003
Judgment: May 16, 2003
Docket: C.S. Qué. Montréal 500-05-064436-015

Counsel: Me Sylvain Rigaud, Me Louis Gouin, Me Bernard Quinn, for Petitioners
Me Denis Ferland, Me Philippe Buist, for the Monitor
Me Jean Fontaine, Me Simon Richard, for Jolina Capital Inc.
Me George Hendy, Me Martin Desrosiers, Me David Tardif-Latourelle, for the Opposing Creditors

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.D Miscellaneous cases

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Civil practice and procedure

XXI Practice on appeal
XXI.10 Leave to appeal
XXI.10.b Application
XXI.10.b.iii Grounds

Headnote

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

Forestry corporation made plan of arrangement under Companies' Creditors Arrangement Act — Plan contemplated seven classes of creditors with potential claims aggregating in excess of CAN$250,000,000 — Class 2 was composed of creditors holding CAN$195,000,000 of secured U.S. Notes, including J Inc. which was major shareholder of corporation and held more than two-thirds of U.S. Notes — Plan offered class 2 creditors US$25,000 cash and exchange of notes' balance for two new notes: CAN$60 millions of A notes due in 2009 and CAN$40 million of convertible B notes due in 2008 — All classes of creditors voted in favour of plan — Corporation brought motion to sanction plan — Minority creditors of class 2 opposed plan's approval, claiming plan was unfair for them as plan treated unsecured creditors, including J Inc., more favourably and was confiscatory — Motion allowed — Plan of arrangement can be more generous to some creditors and still be fair to all creditors — J Inc. was corporation's White Knight as it stepped in on several occasions to keep corporation afloat, by way of loans and purchases of U.S. Notes, and such creditor warranted special treatment — In view of several factors, it was folly to attempt to sell corporation's businesses almost two years after first plan was filed for so small possible yet unlikely gain — Corporation managed to survive under Act's protection in weak and difficult market conditions and deserved chance to prove it could survive and be profitable, which was in accordance with intent of Act — Only four minority creditors, speculators, would sustain legitimate loss under plan and loss would be much more in bankruptcy — Absent bad faith, Act should not be employed to permit cranky minority creditor to frustrate feasible and fair plan blessed by overwhelming majority of all creditors of debtor — Plan's offer of equity was not overly generous but was nevertheless adequate and fair — Minority creditors failed to show oppression by majority — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Compagnies --- Arrangements et compromis — En vertu de la Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et équitable »

Compagnie forestière a présenté un plan d'arrangement en vertu de la Loi sur les arrangements avec les créanciers des compagnies — Plan envisageait sept catégories de créanciers dont les réclamations potentielles excédaient 250 000 000 $CAN — Catégorie 2 était composée des créanciers détenteurs de billets libellés en dollars américains, valant 195 000 000 $CAN, et l'un d'entre eux, J inc., était actionnaire majoritaire de la compagnie et détenteur de plus des deux tiers des billets — Plan offrait aux créanciers de la catégorie 2 un paiement de 25 000 $US et l'échange du solde des billets pour deux nouveaux billets: 60 millions $CAN de billets A échéant en 2009 et 40 millions $CAN de billets convertibles B échéant en 2008 — Toutes les catégories de créanciers ont voté en faveur du plan — Compagnie a présenté une requête pour obtenir l'approbation du plan — Créanciers minoritaires de la catégorie 2 se sont opposés à l'approbation du plan, soutenant qu'il était injuste pour eux puisqu'il traitait plus favorablement des créanciers garantis, dont J inc., et qu'il était confiscatoire — Requête accueillie — Plan d'arrangement peut être plus généreux envers certains créanciers et être néanmoins équitable pour tous les créanciers — J inc. a été le sauveur de la compagnie parce qu'elle est intervenue à plusieurs reprises pour la maintenir à flot, grâce à des prêts et l'achat de billets, et, à ce titre, elle méritait un traitement spécial — À cause de plusieurs facteurs, il serait fou d'essayer de vendre les affaires de la compagnie plus de deux ans après le dépôt du premier plan pour un si petit et peu probable profit — Compagnie a réussi à survivre sous la protection de la Loi alors que le marché était faible et difficile et elle méritait d'avoir la chance de démontrer qu'elle pouvait survivre et être rentable, ce qui était conforme à l'objet de la Loi — Seulement quatre des six créanciers minoritaires, des spéculateurs, subirait des pertes légitimes en vertu du plan et leurs pertes seraient plus importantes dans le cadre d'une faillite — En l'absence de mauvaise foi, un créancier minoritaire grincheux ne devrait pas pouvoir utiliser la Loi pour faire échouer un plan faisable et juste qui a été accepté par une majorité écrasante de tous les créanciers du débiteur — Paiement offert par le plan n'était certes pas généreux, mais il était néanmoins juste et adéquat — Créanciers minoritaires n'ont pas réussi à prouver l'existence d'une oppression par la majorité — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Daniel H. Tingley J.C.S.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 1992 CarswellOnt 163 (Ont. C.A.) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

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

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — referred to

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161, 1996 CarswellOnt 316 (Ont. C.A.) — considered

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

Microcell Telecommunications Inc., Re (April 30, 2003), Deslauriers J. (Alta. Securities Comm.) — referred to

Ontario v. Canadian Airlines Corp. (2001), 2001 CarswellAlta 1488, 2001 ABQB 983, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124 (Alta. Q.B.) — referred to

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219, 1992 CarswellBC 502 (B.C. S.C.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 4151, 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) — considered

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

T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 191 — referred to

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

s. 6 — referred to

Forêts, Loi sur les, L.R.Q., c. F-4.1

s. 7 — referred to

MOTION by corporation to sanction plan of arrangement under *Companies' Creditors Arrangement Act.*

Tingley J.C.S.:

The Issues

1 Uniforêt asks the Court to sanction a Second Amended Plan of Arrangement (Plan) made after proof was completed on May 6, 2003 pursuant to the Companies' Creditors Arrangement Act (Act). [1] An Amended Plan (First Plan) was approved by each of seven classes of creditors to the extent of at least 92% in number and 72% in value. Six secured creditors from a class (Class 2) of some 125 noteholders (or 4.79% of all noteholders), representing almost 28% in value of the class, oppose the sanction application, alleging amongst other things, manipulation and irregularities of the voting process, [2] oppression of the minority (the Opposing Creditors) of the Class 2 creditors by the majority (Jolina), unfair and confiscatory treatment of the class 2 claims and the existence of preferential payments made to so-called "unaffected creditors" prejudicial to the mass of creditors. They add that the Plan is unreasonable, unfair and confiscatory. They conclude in their written contestation that the Court should accordingly refuse to sanction it and should instead order the sale of the assets and undertakings subject to the security [3] of Class 2 claims "as a going concern" or, subsidiarily, that the Class 2 creditors be given a single class of new notes in the aggregate amount of $100 million and 90% of the equity of Uniforêt, [4] rather than the 55% that is offered as a conversion feature tied to $40 million of the new debt or B Notes. [5]

2 Uniforêt denies any irregularities in the voting process or oppression of the Opposing Creditors by it or Jolina and relies on the Monitor's opinion that its Plan is both fair and reasonable. It adds that as all the classes of creditors have approved the Plan, in most cases overwhelmingly, the Court should sanction it. As to the request to sell the business as part of an orderly liquidation, Uniforêt stresses that such an alternative proposal (a) was considered and rejected by its management for lack of interest prior to the presentation of the First Plan, (b) comes far too late in the day and (c) poses a serious risk of prejudicing the implementation of the Plan and the expectations of the creditors who approved the First Plan in October, 2001.

The Facts

3 Uniforêt first obtained protection under the Act on April 17, 2001. It filed an amended plan of arrangement (First Plan) with the Court on July 23, 2001 contemplating seven classes of creditors with potential claims aggregating in excess of $250,000,000. This Plan proposed the following arrangements:

Class	Description	Plan of Arrangement
1	The Municipalities of Port-Cartier and of l'Ascension (for Municipal taxes)	Pursuant to existing agreements
2	US Noteholders [which include the Opposing creditors and Jolina]	First US $25,000 cash with remaining balance, if any, exchanged for two new US Secured Notes: Note "A" 9% due on March 15, 2009; Note "B" convertible due on September 15, 2008; the whole for a total of $100,000,000 CDN
3	Holders of Capital Leases	Pursuant to existing agreements and contracts
4	Forestry Contractors	75% of proven claims
5	Unsecured Creditors	The lesser of $2,500 and the proven claim or a prorata share of a fund of $5,000,000
6	Canadian Debentureholders	Choice of receiving 8% of face value in cash or conversion into voting common shares of Uniforêt at a conversion rate of $6.00 per share

7	[Jolina]'s unsecured shareholder loan	Repayable on March 15, 2009 without interest

4 The Opposing Creditors, members of Class 2 holding secured U.S. Notes in the face amount of $33.5 million U.S., applied to the Court on July 17, 2001 to modify the proposed Class 2. They asked amongst other things to be placed in a separate class from Jolina, a major shareholder of Uniforêt and the holder of more than two-thirds of the other U.S. Notes. A vote on the First Plan by Class 2 creditors was suspended pending the outcome of the Opposing Creditor's application. All of the other creditors approved the First Plan at meetings of creditors duly called and held on August 15, 2001. The Opposing Creditors' application was heard by Madame Justice Zerbisias over some 20 days. She rendered a lengthy judgment on October 23, 2002 dismissing the application and:

> 2) *AUTHORIZED* [Uniforêt] to call a meeting of creditors concerning Class 2 (U.S. Noteholders) to submit to them the amended plan (D-1) for voting purposes;
>
> 3) *ORDERED* [Uniforêt] and the Monitor to furnish to [the Opposing Creditors] whatever information they may possess as to the names, addresses, telephone and telecopier numbers of all beneficial owners of the U.S. notes within 5 days of this Judgment;
>
> 4) *ORDERED* provisional execution [...] notwithstanding appeal; [...]

5 Leave to appeal from this judgment was sought and refused on November 21, 2002 by Mr. Justice Nuss of the Court of Appeal who observed:

> [8] The issues of fairness and reasonableness of the plan can be fully canvassed and debated at the hearing before the [Superior] Court to consider the sanctioning of the plan once the vote of all the Classes of [creditors] has taken place. Indeed, [the Opposing Creditors] acknowledge, and urged during the hearing before me, that most of the issues raised in the Motion for leave to appeal deal with the fairness and reasonableness of the plan and that the proper time for considering them will be at the hearing before the Court for the sanctioning of the plan.

6 Four days later, the Class 2 creditors voted on the Plan. The results were as follows:

Cat.	**Montant total en capital des réclamations (US$)**		**% en nombre**		**% en valeur**	
	Oui	**Non**	**Oui**	**Non**	**Oui**	**Non**
2	87,918,000.00	33,505,000.00	95.21	4.79	72.41	27.59

7 Uniforêt's Motion to Sanction the First Plan was first presented to the Court on December 11, 2002. The Opposing Creditors appeared to oppose its approval. Mr. Justice Lévesque was designated to manage the dossier and bring the matter on for hearing. He responded to requests for the production of additional documents and expertises and heard opposing counsel on a variety of pre-trial issues, including a request by Uniforêt to strike certain allegations of the amended, particularized contestation of the Opposing Creditors. As this request came shortly before the scheduled hearing, Mr. Justice Lévesque judiciously referred it, amongst other requests, to the trial judge.

8 The Motion to Strike seems intended to prevent the reventilation of matters or issues already decided by Madame Justice Zerbisias in her judgment of October 23, 2002. The Court resisted the temptation to limit the debate to new issues. It informed counsel that objections to the introduction of "old" or repeat evidence would, for the most part, be taken under reserve and the legal issues arising from the Motion to Strike would if necessary be considered by this judgment. These issues were not addressed during oral argument and accordingly they will not be considered by this judgment.

9 The Plan, as twice amended, provides in part that:

Article 2Purpose and Effect of Plan

2.1 Purpose

The purpose of this Plan is to effect a reorganization of the liabilities, business and affairs of Uniforêt in order to enable its business to continue, in the expectation that all Persons with an interest in Uniforêt will derive a greater benefit from its continued operation than would result from the immediate forced liquidation of Uniforêt's assets and business.

2.2 Joint Plan

As explained in Uniforêt's Petition for the issuance of the Initial Order pursuant to the [Act], most of the financing of Uniforêt's business is with Uniforêt Inc., while the operations and fixed assets are with Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc. who, in many instances, guaranteed the debts and obligations of Uniforêt Inc. Therefore, the related operations of Petitioners justify [...] presenting a joint Plan, the whole as permitted by the CCAA and the Initial Order. None of Uniforêt's Creditors will be prejudiced by such a joint Plan.

2.3 Persons Affected

This Plan shall become effective on the Plan Implementation Date and shall, on and after the Plan Implementation Date, bind Uniforêt and all Uniforêt's Creditors affected by the Plan.

2.4 Obligations Not affected

This Plan shall not affect any Unaffected Obligations. [6]

Article 3Classification of Creditors, Valuation of Claims and Procedural Matters

3.1 Classification of Creditors

The Claims of the Creditors shall be grouped into the following Classes, and each Creditor in a designated Class shall, to the extent provided herein, be entitled to vote on the Plan as part of such Class:

Class 1	The Cities of Port-Cartier and l'Ascension (municipal taxes);
Class 2	US Noteholders;
Class 3	Holders of Capital Leases;
Class 4	Forestry Contractors;
Class 5	Unsecured Creditors;
Class 6	Canadian Debentureholders; and
Class 7	Jolina Capital Inc.'s unsecured shareholder loan.

3.2 Creditors Meetings

Following the filing of the Plan with the Court, Uniforêt will hold the necessary Creditors Meetings to vote on the Plan, the whole in accordance with the Initial Order. [...]

3.3 Creditors Votes Required

In order that the Plan be binding on all the Creditors of Uniforêt affected by the Plan, it must first be accepted within each and every Class of Creditors as prescribed by the Plan by a majority in number of the Creditors in such Class who actually vote on the Plan (in person, by voting letter or by proxy) at the Creditors Meeting held in respect of such Class, representing two-thirds in value of the Accepted Claims for Voting Purposes of the Creditors in such Class who actually vote on the Plan (in person, by voting letter or by proxy) at such Creditors Meeting. [...]

3.4 Valuation of Claims for Voting and Distribution Purposes

Each Creditor having a Proven Claim in a Class shall be entitled to attend and to vote at the Creditors Meeting for such Class. Each Creditor of a Class who is entitled to vote shall be entitled to that number of votes at the Creditors Meeting for such Class as is equivalent to the dollar amount of its Proven Claim. In the event that the Proven Claim of a Creditor is not finally determined prior to the Creditors Meeting Date of the Creditors Meeting for any Class in accordance with this Plan and any Order of the Court, the Creditor shall be entitled to vote at the Creditors Meeting for such Class based on its Accepted Claim for Voting Purposes as determined by the Monitor, without prejudice to Uniforêt's right or the Creditor's right to require the final determination by the Court of the Creditor's Proven Claim, which Proven Claim shall apply for all purposes in connection with the Plan, including, without limitation, the Creditor's entitlement to participate in distributions under the Plan.

3.5 Participation in Different Capacities

Creditors whose Claims are affected by this Plan may be affected in more than one capacity. Each such Creditor shall be entitled to participate hereunder separately in each such capacity, unless otherwise specified. Any action taken by a Creditor in any one capacity shall not affect the Creditor in any other capacity unless the Creditor agrees to otherwise in writing.

3.6 Confirmation of Plan by the Final Order

In the event that the Plan is approved by the required majority of Creditors provided in Section 3.3, Uniforêt will seek the Final Order for the sanction and approval of the Plan. Subject only to the Final Order being granted and the satisfaction of the conditions of the Plan described in Section 5.1, the Plan will be implemented by Uniforêt and will be binding on all Uniforêt's Creditors affected by the Plan.

Article 4The Compromise and Arrangement

4.1 Class 1 : Treatment of the Cities of Port-Cartier and l'Ascension (municipal taxes)

Uniforêt proposes to pay to the Cities of Port-Cartier and l'Ascension the full amounts which are due to them as municipal taxes pursuant to existing agreements, or as may be agreed between them.

4.2 Class 2 : Treatment of US Noteholders

Uniforêt proposes to all US Noteholders, holding US Secured Notes totalling approximately CDN$190,000,000, as final compromise and arrangement, the following:

4.2.1 Uniforêt will pay, on the Plan Implementation Date,[7] to each US Noteholder the lesser of US$25,000 or the amount of the US Secured Note held by such US Noteholder; and

4.2.2 Uniforêt will exchange, on the Plan Implementation Date, all outstanding US Secured Notes, after payment of the amounts provided in Section 4.2.1 for two (2) new secured notes for each outstanding US Secured Note, namely (1) 9% Note "A" due March 15, 2009 and one (1) Convertible Note "B" due September 15, 2008, to be issued under an indenture providing for the issuance of 9% Notes "A" due March 15, 2009, in an aggregate principal amount of CDN$60,000,000, and Convertible Notes "B" due September 15, 2008, in an aggregate principal amount of CDN $40,000,000, both Notes "A" and "B" totalling an aggregate principal amount of CDN$100,000,000, to be issued under commercially acceptable terms and having similar secured rights on Uniforêt's assets as those held by the US Noteholders under the US Indenture, the whole, on a *pro rata pari passu* basis. These Notes "A" and "B" will be subject to the following terms and conditions:

9% Notes "A":

from the Plan Implementation Date, 9% Notes "A" will bear an annual interest rate of 9%, payable in arrears on a semi-annual basis, on March 15 and September 15 of each year, with the first interest payment date being on March 15, 2002, and will provide for annual principal repayment on March 15 of each year, commencing on March 15, 2003, always on a *pro rata pari passu* basis, equal to 50% of Available Cash Flow for fiscal years 2002 and 2003, and 75% of Available Cash Flow for subsequent fiscal years until the earlier of the maturity date, namely March 15, 2009, at which time the balance thereof will be fully repaid, or refinancing thereof;

furthermore, at its sole discretion, Uniforêt can make, on any interest payment date, without penalty, additional principal repayments on the 9% Notes "A" and

Convertible Notes "B":

will bear no interest until September 15, 2004 and, thereafter, will bear an annual interest rate of 7.5%, payable in arrears on a semi-annual basis, on March 15 and September 15 of each year, with the first interest payment date being on March 15, 2005, and will provide for no annual principal repayment prior to September 15, 2008 and the full repayment of the principal thereof at maturity, namely on September 15, 2008;

furthermore, Convertible Notes "B" will, from the Plan Implementation Date until September 15, 2008, be convertible at any time into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $0.50 per share, such conversion right to expire at the close of business on September 15, 2008 and to be subject to a thirty (3) days prior written conversion notice to Uniforêt, which may then offer, prior to the expiry of such thirty (30) day period, to pay in cash to the noteholder, who will not be obliged to accept any such offer, an amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholder; [8]

"**Market Value**" of the Class A Subordinate Voting Shares of Uniforêt Inc. shall mean the weighted average trading price of the Class A Subordinate Voting Shares of Uniforêt Inc. on the Toronto Stock Exchange during the twenty (20) consecutive trading days preceding the date on which the conversion notice is given to Uniforêt.

US Noteholders have no Claim for interest outstanding as of the Plan Implementation Date under US Secured Notes and are not entitled to participate in any other Class for Claims related, in any manner whatsoever, to US Secured Notes.

4.3 Class 3 : Treatment of Holders of Capital Leases

Uniforêt proposes to pay to holders of Capital Leases the full amount which is due to them pursuant to existing agreements and contracts, or as may be agreed between them.

4.4 Class 4 : Treatment of Forestry Contractors

Uniforêt proposes to pay, at the latest on the Plan Implementation Date, to each Forestry Contractor, as final compromise and arrangement of their respective Proven Claim, 75% thereof.

4.5 Class 5 : Treatment of Unsecured Creditors

Uniforêt proposes to pay to Unsecured Creditors, as final compromise and arrangement of their respective Proven Claim, on the Plan Implementation Date, in accordance with their respective election, the following

4.5.1 the lesser of $2,500 <u>or</u> the Unsecured Creditor's Proven Claim;

<u>or</u>

4.5.2 a *pro rata pari passu* share in the Unsecured Creditors Fund for those Unsecured Creditors with Proven Claims as of the Plan Implementation Date who will not have elected to be paid in accordance with Section 4.5.1 of this Plan.

4.6 Class 6 : Treatment of Canadian Debentureholders

Uniforêt proposes to Canadian Debentureholders, as final compromise and arrangement, in accordance with their respective election, the following: On the Plan Implementation Date,

4.6.1 payment of an amount equal to 8% of the outstanding balance of the Canadian 8% Convertible Unsecured Subordinated Debentures held; or

4.6.2 conversion of Canadian 8% Convertible Unsecured Subordinated Debentures held by a Canadian Debentureholder into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $6.00 per share, being a rate of 16.667 Class A Subordinate Voting Shares per $100 principal amount of Canadian 8% Convertible Unsecured Subordinated Debentures held by a Canadian Debentureholder, for those Canadian Debentureholders who have not elected to be paid in accordance with Section 4.6.1 of this Plan.

Canadian Debentureholders have no Claim for interest outstanding as of the Plan Implementation Date under Canadian 8% Convertible Unsecured Subordinated Debentures and are not entitled to participate in any other Class for Claims related, in any manner whatsoever, to Canadian 8% Convertible Unsecured Subordinated Debentures.

4.7 Class 7 : Treatment of Jolina Capital Inc.'s unsecured shareholder loan

Uniforêt proposes to pay Jolina Capital Inc.'s unsecured shareholder loan in the amount of $5,405,000, as final compromise and arrangement thereof, by issuing, on the Plan Implementation Date, a promissory note for the same amount, bearing no interest and providing for the full repayment thereof on March 15, 2009.

10 Between July 23, 2001 and February 27, 2003, the Monitor produced four reports, two addressed to the creditors prior to their voting on the First Plan and two addressed to the Court in connection with the Motion to Sanction. These latter reports express the following opinions:

E) Analyse de Plan

23. L'acceptation du Plan par toutes les catégories de créanciers permettra à Uniforêt de restructurer son endettement ainsi que de poursuivre ses activités.

24. Le Contrôleur est d'avis que les Débitrices ont agi et continuent d'agir de bonne foi, avec toute la diligence voulue dans les circonstances. Aussi, le Contrôleur n'a constaté aucun fait qui nous porterait à croire que la conduite des Débitrices est ou a été répréhensible.

25. Le Contrôleur est d'avis que le Plan proposé fut préparé de façon sérieuse et diligente par Uniforêt.

26. Le Contrôleur est d'avis que le Plan d'Uniforêt est juste et raisonnable envers les créanciers en général et envers chacune des catégories de créanciers.

27. Le Contrôleur est d'avis que le Plan tient compte de la capacité financière d'Uniforêt de respecter les termes dudit Plan advenant son homologation par la Cour et sa mise en oeuvre.

28. Le Contrôleur, avec l'assistance d'autres conseillers professionnels et en se basant sur son expérience, a procédé à une analyse de la valeur probable des éléments d'actif d'Uniforêt dans un contexte de liquidation ordonnée.

29. Tel que déclaré dans le Premier Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, la valeur estimative des immobilisations d'Uniforêt pourrait se situer entre 60 000 000 $ et 80 000 000 $ après déduction des coûts de liquidation et des charges prioritaires (employés, droits de coupe impayés, etc.). Le montant ainsi réalisé ne serait suffisant pour assurer le remboursement intégral des sommes dues aux créanciers garantis qui totalisent 125 000 000 $ US (approximativement 200 000 000 $ CDN).

30. Tel que déclaré dans le Second Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, même en considérant la valeur aux livres en date du 30 septembre 2002, de l'encaisse, des comptes à recevoir, ainsi que des inventaires totalisant approximativement 43 000 000 $ la valeur des éléments d'actif d'Uniforêt ne s'est pas améliorée depuis juillet 2001. En fait, en tenant compte de l'état actuel du marché, des conditions de l'industrie ainsi que des facteurs externes qui sont hors du contrôle d'Uniforêt, nous sommes d'avis que les chances d'obtenir la valeur nette de réalisation estimative discutée au paragraphe 29 ont diminué.

31. Le Contrôleur est d'avis que, dans le cadre d'une liquidation forcée, la valeur estimative des immobilisations d'Unifôret serait réduite de 50%. Il semble que, dans le contexte actuel, une liquidation forcée serait plus vraisemblable.

32. Le Contrôleur est d'avis que l'acceptation du Plan est plus avantageuse pour les créanciers que la liquidation des éléments d'actif d'Uniforêt dont l'analyse se résume comme suit:

	Montant dû		Plan d'arrangement			Liquidation ordonnée (Valeur nette de réalisation estimée (a)			Liquidation ordon (Valeur nette de réalisation estimée	
1	298 971 $		298 271 $	100%		300 000 $	100%		300 000 $	10
2	195 337 500	(c)	100 000 000	51%		65 000 000	33%		30 000 000	1
					(e)	16 000 000	8%	(e)	16 700 000	
3	5 135 924		5 135 924	100%	(d)	5 150 000	100%	(d)	5 100 000	10
4	2 534 190	(f)	1 900 642	75%	(e)	300 000	12%	(e)	250 000	1
5	24 849 498	(g)	5 700 000	23%	(e)	3 000 000	12%	(e)	2 500 000	1
6	16 554 904	(h)	1 324 392	8%		néant	--%		néant	·
7	5 405 000	(i)	1 104 858	20%	(e)	650 000	12%	(e)	550 000	1
	250 115 987 $		115 464 087 $	46%		90 400 000 $	36%		55 400 000 $	2

(a) Assumant une valeur de liquidation de 20 000 000 $ pour les comptes à recevoir et les stocks et une valeur nette de 70 000 000 $ pour les immobilisations.

(b) Assumant une valeur de liquidation de 20 000 000 $ pour l'encaisse, les comptes à recevoir et les stocks et une valeur nette de 35 000 000 $ pour les immobilisations.

(c) Excluant le montant du premier 38 500 $ (25 000 US) à être reçu par chaque Porteur de Billets Américains.

(d) En assumant que les créanciers de premier rang paient les soldes dus en vertu des Contrats de Location-Acquisition afin de libérer les actifs visés.

(e) Calculé en partageant la valeur estimée de liquidation des comptes clients et des stocks entre les créanciers des catégories 2 (perte excédentaire seulement), 4, 5 et 7, sur la base *prorata et pari passu.*

(f) 75% du montant dû.

(g) Incluant un estimé des créanciers qui choisiront de recevoir le paiement comptant de 2 500 $.

(h) Assumant que la totalité de la catégorie choisit de recevoir un paiement comptant.

(i) Valeur actualisée du montant dû à un taux d'escompte de 18%.

33. Le Contrôleur est d'avis que l'acceptation et l'homologation du Plan est plus avantageuse pour les créanciers que la liquidation des actifs d'Uniforêt.

34. Le Contrôleur est d'avis que la continuité des opérations d'Uniforêt permettra à la majorité des créanciers d'avoir l'opportunité de poursuivre des relations avec Uniforêt qui, entre autres, vont permettre également le maintien d'emplois et d'une activité économique importante pour les municipalités de Péribonka et de Port-Cartier. De plus, certaines catégories de créanciers (catégories 2 et 3) pourront bénéficier d'un rendement continu de leurs investissements nonobstant la réduction de la valeur nominale de leur créance prévue par le Plan.

35. Le Contrôleur est d'avis qu'il est dans l'intérêt de l'ensemble des créanciers d'Uniforêt que le Plan soit homologué et approuvé par cette Cour.

11 The Monitor relied for some of its opinions upon the expertise of CIB World Markets Inc. prepared as of February 24, 2003. The key conclusions of this expertise are:

1. The current environment for selling assets in the pulp and lumber industry is poor. There are only a limited number of buyers, but numerous mills for sale.

2- With regard to the BCTMP mill, the lack of transactions at any meaningful price over the past several years is the best indicator of [...] poor market conditions - the market has spoken for itself.

3. With regard to the sawmills, even if a temporary resolution to the on-going trade dispute with the U.S. is negotiated, the economic fundamentals underlying the Canadian industry remain troubling. Once the uncertainty associated with the trade barriers is added to the oversupply situation, it is unlikely that reasonable bids could be expected for the sawmill over at least the next 12-18 months. This problem is compounded by the volume of sawmill capacity currently being offered for sale in Quebec (or deemed "non-core") by companies other than Uniforêt.

12 The Opposing Creditors retained Houlihan, Lokey Award & Zukin Financial Advisors Inc. (Houlihan) of New York to review the First Plan and the Monitor's report of July 23, 2001 and comment on the fairness of that plan to the Opposing Creditors. Houlihan concluded that the First Plan was "not fair and reasonable to the creditors in general or in relation to each other for [...] the following reasons:

• The Plan preserves the existing common equity ownership of [Uniforêt], and thereby allows common shareholders to maintain control [...] and to benefit from a significant de-leveraging. [...] **This is unfair to secured creditors who receive less than a 100% recovery.**

• The Plan provides for substantial recoveries to unsecured creditors that have claims that rank junior in priority to the secured creditors. **This is unfair to secured creditors who receive less than a 100% recovery.**

• The Plan provides for 100% recoveries in cash for the Class 3 secured creditors, but the Class 2 secured creditors will receive new debt securities with a face value of $100.0 million that approximates 51.2% of the Class 2 secured creditors claims of $195.5 million. **This is unfair to the Class 2 Claimholders.**

• The Plan provides an inadequate amount of value to the Class 2 Claimholders because the debt securities that are being offered in satisfaction of the Class 2 Claims will trade at a significant discount to face value. **This is unfair to the Class 2 Claimholders.**

• The Plan provides less value to the Class 2 Claimholders than they would receive in a liquidation based on the liquidation values provided in the Monitor's Report. **This is unfair to the Class 2 Claimholders.**

• The Plan deprives the Class 2 Claimholders of the value of the unsecured portion of their claim. **This is unfair to the Class 2 Claimholders.**

• The Plan is being proposed under the assumption that the Port-Cartier pulp Mill [...] on which the Class 2 Claimholders have a first lien), will not be in operation. [This] mill is a significant asset of [Uniforêt] in which over $200. million of capital expenditures have been invested since 1988. The Plan inhibits the Class 2 Claimholders from benefiting in the value that might be created in the event that the pulp mill is restarted, converted, sold or liquidated and transfers a majority of such benefits to junior creditors and common equity holders. **This is unfair to the Class 2 Claimholders.**

• The Plan provides for a highly leveraged capital structure that is sub-optimal from a corporate finance perspective. As a result, it is likely that both the debt and equity securities of [Uniforêt] will trade with limited liquidity and at significant discounts to their intrinsic values. **This is unfair to the Class 2 Claimholders.**

• The Plan consolidates all U.S. Noteholders in Class 2 for voting purposes. The purported holder of approximately 66.9% of the Class 2 Claims (Jolina Capital) is also a holder of a majority of the Class 3 Claims, certain Class 5 Claims, 100%, 100% of the Class 7 Claims and is also the largest shareholder of [Uniforêt]. [Thus], Jolina will recover a portion of the value that the Plan transfers from the Class 2 Claimholders to holders of Class 3, Class 5 and Class 7 Claims as well as the equity. Accordingly, Jolina has a different recovery profile than other Class 2 Claimholders and an economic conflict of interest with respect to voting as a Class 2 Claimholder. **This is unfair to the non-Jolina Class 2 Claimholders.**

13 This report, prepared on October 8, 2001, was filed at the hearing before Madam Justice Zerbisias together with a previous report Houlihan had submitted dated May 15, 2000. Mr. Slonecker, one of their authors, spoke to them. Madam Justice Zerbisias had this to say about those parts of the Houlihan reports that concerned her:

[72] Houlihan's first report, of May 15, 2000, assesses the value of the assets of Uniforêt at **U.S. $123 to $134** million, excluding the assets of Tripap, but including the Port Cartier pulpmill whose assets are therein evaluated at U.S. $38 to 41 million. On that basis, the report and Mr. Slonecker concluded that the recovery rate relative to the face value of the notes is approximately **49 to 56%**, compared to the current market trading price between 27 to 30%.

[73] Houlihan's second report, of October 8, 2001, was prepared by Houlihan at Petitioner's request as a reply to the Report of the Monitor on the Debtor's financial affairs and on the fairness of the plan. Mr. Slonecker and the report re-evaluate the assets of Uniforêt at **CND $90** million. No value whatsoever is attributed to the assets of the Port Cartier pulpmill because it was not operating. Mr. Slonecker in his report, then evaluates the new securities, redeemable or convertible at a future date being provided to the Class 2 noteholders under the plan, at CDN $56.4 million, which implies a recovery rate of **51.2%** of the total face value of the Class 2 claims. After discounting for the delay in payment, he concludes that this implies a real recovery rate of only 28.9%. He adds that the trading value of the Class A notes is 74% of face value, whereas the trading value of the class B notes is 31% of face value.

[74] Jolina, as a Class 2 creditor is affected by the same determinations as to its potential recovery on its U.S. notes. In addition, Houlihan and Mr. Slonecker evaluate the trading value of Jolina's new note under the plan in payment of its claim for its shareholder loan of CND $5.4 million at 18.8% of face value, i.e. worth approximately $1 million Canadian when discounted, for the delay in payment.

[75] Thus, Houlihan and Mr. Slonecker conclude on the basis of two completely different scenarios as set forth in the two reports, that the recovery rate on the U.S. notes is approximately the same: 49 to 56% on the first report and 51.2% on the second report, without attributing any value to the Port Cartier pulpmill, absent any discount for delays in payment.

Similarly, the Monitor concludes that the recovery rate for Class 2 claimants is 51% under the plan, or 33% on a forced liquidation. Thus it appears that Petitioners will gain more under the plan and less on liquidation.

14 The Opposing Creditors obtained Court permission to produce another expertise prepared by Price Waterhouse Coopers (PWC). Completed on February 7, 2003, this expertise concludes that:

141. In summary, in our view, the Plan:

(i) Does not treat secured creditors in accordance with their existing rights and priorities;

(ii) Provides significantly higher recoveries to certain unsecured creditors than is being offered to the secured US Noteholders, including the ultimate payment of 100¢ on the dollar in respect of Jolina's unsecured shareholder loan;

(iii) Requires Class 5 creditors to make an election in respect of their treatment under the Plan without being able to assess the economic impact of the alternatives available;

(iv) Provides for a recovery to Class 6 creditors, notwithstanding that such creditors have contractually subordinated themselves to all other creditors;

(v) Treats the claim of Bank of Montreal (BoM) as an Unaffected Obligation,[9] with no benefit or advantage to [Uniforêt or its] arms-length creditors, but with the significant disadvantage that $4 million that would otherwise be available for the purposes of making additional payments to Affected Creditors, funding operations or servicing debt will be paid to this unsecured creditor; and;

(vi) Contrary to established practice in CCAA restructurings, leaves substantially all of the post-restructuring equity in [Uniforêt] in the hands of the existing shareholders without any additional funding or support being provided by such shareholders, with the result that the consequences of [Uniforêt's involvency] are being suffered by the creditors, while the benefits of the compromises by creditors and a successful restructuring will accrue to the existing shareholders.

142. The Plan was approved by the Class 2 creditors only as a result of Jolina, the largest shareholder of Uniforêt, voting in favour of the Plan. Based on the Monitor's records, the Plan would not have been approved if 373 [10] had been included in the CCAA filing and Jolina, as a result, had been prevented from exercising its hypothecary rights over the US Notes held by 373. Furthermore, based on our experience, we believe it is unlikely that an arm's length creditor holding the majority of the Class 2 claims would have voted in favour of the Plan.

143. The sale of the business as a going concern appears to be a commercially viable alternative to the Plan that could improve overall recoveries available to creditors by approximately $26.4 million to $42.4 million, representing an increase of approximately 31.7% to 50.6%.

144. The creditors most prejudiced by the Plan are the Class 2 creditors that would share in Notes A and Notes B, primarily Jolina and the minority US Noteholders. If the business were sold as a going concern and the proceeds distributed in the same manner as the cash payments that would be made to affected creditors under the plan, we estimate that such Class 2 creditors would recover $26.4 million to $42.4 million, more than they will recover under the Plan. These amounts would be reduced by any amount that would be needed to make a fair and reasonable distribution on account of the Class 7 Jolina shareholder loan. Under the Plan, Jolina retains its existing equity in Uniforêt while no equity is offered to the Minority US Noteholders. In these circumstances, the compromise being required of the Minority U.S. Noteholders is disproportionately large and cannot be considered reasonable.

145. As previously noted, the Monitor, in its July 23 Report, its October 28 Report and its December 11 Report, concluded that the Plan was fair and reasonable. Having given due consideration to the foregoing issues, the other

matters discussed in this report, and all of the considerations outlined by Madam Justice Paperny in *Re. Canadian Airlines*, [11] we respectfully disagree with the conclusion of the Monitor and we have concluded that the Plan is not fair and reasonable.

15 Following completion of most of the proof on May 2[nd], 2003, the Court shared with the parties and their counsel its principal preoccupation concerning the fairness of the Plan in circumstances where, as here, secured creditors are asked to reduce the face amount of their notes by almost half and to accept, eventually, reduced interest on these reduced notes. The Court asked why the Plan failed to replace what was to be taken from them by equity, [12] unencumbered by a repurchase option. [13] Uniforêt responded to this enquiry on May 6, 2003 by further amending the Plan to effectively remove the repurchase option and to extend the delay during which a noteholder can exercise the conversion rights attaching to the B Notes from 2004 to 2008, coincidental with the maturity date of such notes. If exercised, the Class 2 creditors would hold 55% of the equity of Uniforêt.

16 On the same morning, the Opposing Creditors submitted a "Re-Amended Particularized Contestation" to further amend their conclusions to ask for an "Alternate Plan" in the event a "going concern sale" cannot profitably be concluded. The Alternate Plan would differ from the Plan in that:

(a) Class 2 creditors would receive one class of New Notes in an aggregate amount of $100 million having the same repayment and interest terms as Notes A under the Plan and 90% of the equity of Uniforêt following a reorganization of its capital structure pursuant to S.191 of the Canada Business Corporations Act (CBCA), [14] and

(b) Jolina's claim as a Class 3 creditor would be disallowed and put into Class 5. The Bank of Montreal claim would also be added to Class 5 and disallowed as an "unaffected obligation".

Legal Principles

17 Counsel for the Opposing Creditors remind the Court that shareholders do not have an economic stake in an insolvent company seeking relief under the CCAA. [15] They add that a plan of arrangement should offer more to creditors than would be available to them under a liquidation. [16] In assessing fairness of a plan, the Court must consider alternatives to it that are commercially available, [17] in particular a sale of the enterprise as a going concern. Moreover, they point to the inherent jurisdiction of the Court either to amend the plan for compelling reasons [18] or to order a sale of assets before a plan is presented to the creditors. [19]

18 Counsel for Uniforêt and the Monitor acknowledged that generally, a plan of arrangement is consensual and results from negotiations leading to agreement. [20] They remind the Court that its role on a sanction hearing "is to consider whether the plan fairly balances the interests of all the stakeholders" [21] including the public interest. [22] Perfection is not required. [23] They add that there is a heavy burden upon Opposing Creditors in their quest to upset the Plan [24] and conclude that the Court should be reluctant to interfere with the business decisions of a majority of creditors "reached as a body". [25]

Discussion

A. The Plan is prejudicial to the Class 2 Creditors

1. Two Fundamental Reasons

19 The Opposing Creditors and their experts criticize the First Plan on several fronts. On the one hand they assert that the First Plan treats some unsecured creditors more favourably than the Class 2 secured creditors. They point out that Jolina will receive the entire amount of both its $5.4 million shareholder loan (Class 7) and its $3.5 million advance towards the acquisition and installation of a planer in the Peribonka sawmill (Class 3) and that the forestry contractors will realize 75% of their claims (Class 4). On the other hand, they argue that the Plan is confiscatory in that the Class 2 creditors will only receive 51% of

the face amount of their old U.S. notes two years later than promised at a lower interest rate while they wait to be paid and they will not receive any meaningful equity to replace what has been taken from them, nor are they entitled to recover unpaid interest accrued on the U.S. Notes.

2. Too fair to other creditors, especially Jolina

20 There is no doubt Jolina has been relatively well treated under both the First Plan and the Plan. Jolina is Uniforêt's White Knight. [26] It has been a shareholder and involved in the affairs of Uniforêt since 1994. It financed a new planer for the Péribonka sawmill in late 1999. It ultimately provided the funding to acquire the majority of the U.S. Notes in Uniforêt's initial attempt to rationalize its debt through a public offering for all the U.S. Notes at 30% of their principal amount in early 2000. This initiative attracted about 50% of the U.S. Notes at a cost of $33 million, or 53¢. Jolina then acquired another 16% of the U.S. Notes in the market, enough to control the outcome of the vote by the Class 2 creditors. It helped to backstop an $11M short term or bridge loan from the Bank of Montreal to pay wages and other pressing payables. Uniforêt repaid over $6 million of this loan and shortly thereafter applied to the Court for relief under the C.C.A.A. The balance due on this loan is treated as an "unaffected obligation. [27] Accordingly, the White Knight's several claims have received generous treatment under the Plan, as well they should. After all, Jolina is Uniforêt's largest and most important creditor, quite apart from being a major shareholder. Plans of arrangement cannot hope to succeed without the approval of such a creditor. The Plan proposes, in effect, to make Jolina more or less whole, at least eventually. [28]

21 For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debentureholders (Class 6). It does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. A plan can be more generous to some creditors and still fair to all creditors. [29] A creditor like Jolina that has stepped into the breach on several occasions to keep Uniforêt afloat in the 4 years preceding the filing of the First Plan warrants special treatment.

22 The Forresters' claims, although unsecured, are another special case. The Forresters had to be encouraged to bring their equipment back into the bush after the winter thaw. Without logs, the sawmills have nothing to cut. Similarly, if government permits (stumpage duties) are not paid in one year, they will not be issued in a subsequent year. [30] This explains why the cost of permits are quite properly treated in the Plan as "unaffected obligations".

3. Unfair to Class 2 Creditors

23 The minority Class 2 creditors complain that Jolina wears too many hats in this dossier. They argue that if Jolina, like them, [31] was nothing more than a holder of U.S. Notes, it would not have voted in favour of the proposed treatment for Class 2 creditors. It did so, they add, only because of the generous treatment proposed for its unsecured claims under classes 3, 5 and 7 and the fact it was already a major shareholder. This is, of course, a purely hypothetical argument that nevertheless invites an analysis of the treatment actually accorded to the Class 2 creditors.

24 The experts and Uniforêt agree that the "enterprise" or "going concern" values of the businesses of Uniforêt lie somewhere between $90 million (Houlihan in 2001) and $112 million (PWC in 2003). [32] There is also general agreement that Uniforêt cannot support debt in excess of $60 million from its current and projected cash flows. [33] This explains why the old U.S. Notes are to be exchanged for two classes of notes, $60 million of "A" notes and $40 million of "B" notes ($100 million in the aggregate) and why there is a conversion feature into shares attached to the "B" notes.

25 Thus, Uniforêt proposes to give the Class 2 creditors its assessment of its entire enterprise value backed by the same security the U.S. noteholders enjoyed under their Trust Indenture. [34] If the workout over the next four to five years is successful, the holders of "B" notes will be able to share, to the extent of 55%, any future equity accruing to the shares of Uniforêt, in excess of $40 million. Mathematically, 55% of nothing is no different than 90% of nothing. However, a successful workout combined

with improved economic conditions for the Canadian forestry industry - capital intensive, highly cyclical and beetle infested - may permit the "B" noteholders to recover something of what has been lost from the face amount of their old U.S. notes.

26 The experts further agree that the orderly liquidation values of the assets of Uniforêt in a bankruptcy scenario will not realize more than $90.4 million at best.[35] Most estimates are well below this figure, including that of PWC. The one area where the experts differ is what they think might be realized, and when, if the enterprise were offered for sale "as a going concern" while under the protection of the CCAA. The Monitor and Mr. Roberts of CIB World Markets doubt such a sale would attract a price any more favourable than what is offered in the Plan anytime sooner than 18 months, if ever. Mr. Meakin of PWC thinks a carefully orchestrated sale culminating in an auction while under the umbrella of the CCAA could result in a return to the Class 2 creditors in the next 6 months of up to $42 million more than what they are to receive under the Plan. The Monitor views any such result as entirely "illusoire, irréaliste et utopique". His views are shared by Mr. Moreau, the president and chief executive officer of Uniforêt, expressed even more succinctly. Mr. Roberts observed that ever since Uniforêt applied for relief from the Court, competitors in the industry have considered it to be "for sale", yet no serious buyer has as yet surfaced. He suggests that competitors are waiting to acquire a bargain in an industry beset with overcapacity compounded by punishing countervailing duties imposed by our southern neighbours. Worse, one such competitor holds a right of first refusal affecting a key asset.

27 Mr. Meakin's "utopian" views as to a possible outcome from a sale of the enterprise fails to account for some $19.5 million of payments due to the creditors of unaffected obligations, presupposes that (a) the payment of $6 million to the Bank of Montreal is an avoidable transaction, (b) the balance of $4 million due on its loan is a Class 5 claim and (c) omits contracts that would have to be assumed by a buyer of at least $2.3 million. This reduces a best case scenario from a sale of the business to less than a possible $10 million improvement for the Class 2 Creditors, before expenses. The Opposing Creditors' share of this theoretical sum would not exceed $2.8 million before expenses. Further, Mr. Meakin's proposal to sidestep the right of first refusal is unconvincing. This right, together with long term fiber procurement contracts, if not revoked, "would hamper significantly any kind of divestiture process" according to Mr. Meakin's partner, Mr. Leblanc.

28 There are serious risks associated with any attempted sale of an insolvent enterprise over an unspecified period of time. Employees who are key to Uniforêt's business operations but not necessarily to a buyer's operations will almost certainly begin looking for safe havens. Customers will look to other sources for their wood products. Suppliers will tighten credit facilities and look for other customers. There will almost certainly be erosion on several fronts. Added to all this, it should not be forgotten that those creditors of Uniforêt who have voted in favour of the First Plan have implicitly agreed that current management and direction should remain unchanged.

29 Given all of these factors, the Court concludes that it would be folly to attempt a sale of Uniforêt's businesses - even to test the market - almost 2 years after the First Plan was filed for so small a possible yet unlikely gain. Uniforêt has so far managed to survive under CCAA protection in weak and difficult market conditions all the while fighting this litigation. It deserves a chance to prove to its stakeholders that it can both survive and return to profitability. This is what the CCAA was designed to encourage and facilitate.

B. Who really gets hurt

30 For those Opposing Creditors who acquired their notes for 28¢ in the dollar like Prospect, there will be no "haircut". Rather, the issue for them is the size of their gain and the yield on their investment to maturity. Only those U.S. noteholders who paid more in the after market for their U.S. Notes than they stand to receive from the Plan will suffer any loss under it. Jolina's average cost for the U.S. Notes it holds amounts to about 53¢ in the dollar. Its haircut will be modest. Accordingly it should come as no surprise to anyone that it does not insist on equity in circumstances where it will recover almost all it had to pay for its U.S. Notes. Add to this the fact it already holds 40% of the existing equity in Uniforêt. If it converts the "B" Notes it will receive under the Plan, it will increase its equity position in Uniforêt to about 63%, allowing for dilution.

31 Highland acquired its U.S. Notes from Prospect, one of the funds it manages, at a cost of 80¢, after Uniforêt had applied for relief under the CCAA. The market at the time for the U.S. Notes was in the region of 28¢. Thus, Prospect has already realized a tidy gain on the sale of $3 million of the principal amount of the U.S. Notes it then held. It is left with $20 million

of U.S. Notes. The explanation for this generous transaction - at a price more than twice the market price - leaves as many questions unanswered as were answered. Without any U.S. Notes, Highland would have no standing in these proceedings as a Class 2 creditor. The price Highland elected to pay for its U.S. Notes reflects what it hoped to achieve for all its clients in its forthcoming negotiations with Uniforêt. Highland believed that its group would control the claims of the U.S. noteholders in any Chapter 11 type proceedings and assumed that Jolina, being a shareholder of Uniforêt, would not be permitted to vote on any of its claims as Uniforêt's creditor. In this it was mistaken, as Highland's President, Mr. Dondero, readily conceded. Canadian rules do not prevent a shareholder of an insolvent company from voting on its claims as a creditor.

32 Thus, only four of the six Opposing Creditors will sustain a real loss if the Plan is approved. Together they hold $12.5 million of U.S. Notes purchased at prices ranging from 96¢ to 66¢. Highland's loss is self inflicted. It is also Prospect's initial gain. In addition, Prospect will gain from the Plan itself, having purchased its $20 million U.S. Notes for only about 28¢. In the giant scheme of things, four holders of 10% of the $125 million U.S. Notes will sustain a legitimate loss if the Plan is approved. They will lose much more in a bankruptcy.

33 Arguably, the question the Court might ask is whether a Plan thought by the Monitor to be both fair and reasonable - feasible and workable - and to have been approved by the required majority of all the creditors of Uniforêt should nevertheless be sacrificed to please four speculators.[36] Of course not. Their actual losses will not exceed 45¢ in the dollar[37] if the Plan succeeds, perhaps less if the conversion option is exercised. Absent bad faith, the CCAA should not be employed to permit a cranky minority creditor to frustrate a feasible and fair plan that has been blessed by an overwhelming majority of all the creditors of a debtor.[38]

C. The Equity Issue

34 It became evident during the hearing that a serious bone of contention between the Opposing Creditors and Uniforêt centered on the unwillingness of the latter to give sufficient equity to the former. While the First Plan provided for a conversion option exercisable before September 15, 2004, it came with a very short fuse, or repurchase option.[39] By the amendments made to the Plan on May 6, 2003, the repurchase option has been dropped and the conversion of the "B" Notes may be exercised anytime before September 15, 2008. This puts a serious dent into the oppression argument advanced by the Opposing Creditors concerning the lack of an equity kicker for the Class 2 creditors.

35 Arguably, the issue now becomes how much equity ought to have been made available to the Class 2 creditors. Jolina accepted its share of a potential 55% of the equity subject to the repurchase option. Uniforêt has removed that option and extended the conversion period by 4 years. The shareholders of Uniforêt, *qua* shareholders, are not involved in the Plan. Nothing was offered to them and one consequence of the Plan is that whatever interest they now have is going to be diluted. In all the circumstances of this case, the Court concludes that the offer of equity, while perhaps not overly generous when compared to some other recently sanctioned plans,[40] is nevertheless adequate and fair.

D. Bad Faith

36 The good faith of the Opposing Creditors has been called into question by Madam Justice Zerbisias.[41] The Opposing Creditors assert that Uniforêt "and its allies [...] have shown bad faith of the kind which should convince any reasonable observer that the Plan is neither fair nor reasonable". They point to the treatment accorded the Bank of Montreal $11 million loan, the repayment of part of it,[42] a loan by Jolina of $1.1 million[43] repaid by Uniforêt on March 6, 2001 and Jolina's claim for the purchase of the planer (Class 3).[44]

37 Suffice it to say that there has been aggressive behaviour displayed by all the parties in the course of this affair, at least some of the time. The Court has already commented on the transactions impugned by the Opposing Creditors.[45] Absent a bankruptcy, these claims will all be resolved eventually, just like the claims of the Opposing Creditors, either in accordance with their terms or subject to the Plan. Again, absent a bankruptcy, the impugned claims don't add any value to the Petitioners'

enterprise. However, had the planer never been acquired, the Peribonka mill would not have been as profitable as it was in the 18 months preceding the CCAA filing.

38 Aggressive behaviour is to be expected in proceedings of this kind.[46] The CCAA favours the survival of businesses and the jobs that go with them. Where, as here, it has been amply demonstrated that the creditors as a whole will fare much better under the Plan than in a liquidation, the solution is obvious. The issue in this case was to decide if a minority group of secured creditors has been materially oppressed by the behaviour of the majority. That case has not been made out. The U.S. noteholders are offered the entire enterprise value of Uniforêt in the form of reconstituted notes and they will receive annual yields on these notes for the next five years varying between some 10% and 17%.

E. The Alternate Plan

39 While the Court may have the authority to adopt a Plan different from that sought to be sanctioned, it should only exercise that authority if it is satisfied that the proposed Plan is unfair. Moreover, the Alternate Plan proposed by the Opposing Creditors calls for a reorganization of the capital structure of Uniforêt Inc. requiring confiscation of the rights of existing shareholders without their approval being required. The Court has qualified the Plan as both fair and reasonable. The shareholders of Uniforêt have already offered control of their company to the U.S. noteholders. That is quite enough in the circumstances of this case.

For these Reasons, The Court:

41 *MAINTAINS* Petitioners' Motion to Sanction a Plan of Arrangement;

42 *DISMISSES* the Opposing Creditors Re-Amended Particularized Contestation;

43 *SANCTIONS* and *APPROVES* the Second Amended Plan of Compromise and Arrangement (Plan);

44 *PERMITS* Petitioners to replace the U.S. Secured Notes, as defined in paragraph 1.1 of the Plan, by two new secured notes for each unpaid U.S. Note, a Note "A" and a Note "B" as described in paragraph 4.2 of the Plan and in virtue of two Trust Agreements previously approved by the Securities and Exchange Commissions of the United States;

45 *DECLARES* that the American Trust Indenture, as defined in paragraph 1.1 of the Plan, be amended and updated by the said two Trust Agreements;

46 *DECLARES* that all of the Executory Contracts, as defined in paragraph 1.1 of the Plan, save those terminated or repudiated by Petitioners before the "Plan Implementation Date", are in full force and effect as at the Plan Implementation Date, notwithstanding:

a) that Petitioners have obtained relief under the CCAA;

b) the effect on Petitioners of the completion of any one of the transactions contemplated by the Plan;

c) any compromises or arrangements effected pursuant to the Plan;

d) any default with respect to such a contract by Petitioners prior to the Plan Implementation Date; or

e) any automatic termination of any such contract or any purported termination thereof by any Person other than Petitioners

the whole in conformity with paragraph 6.7 of the Plan.

47 *DECLARES* that no party to an Executory Contract, as defined in paragraph 1.1 of the Plan, shall be entitled to accelerate the obligations of Petitioners or terminate, rescind or repudiate such other party's obligations under an Executory Contract following the Plan Implementation Date on the sole ground:

a) of any event that occurred on or prior to the Plan Implementation Date which would have entitled such party to accelerate Petitioners' obligations under such Executory Contract;

b) that Petitioners have obtained relief under the CCAA;

c) of the effect on Petitioners of the completion of any of the transactions contemplated by the Plan; or

d) of any compromises or arrangements effected pursuant to the Plan.

the whole in conformity with paragraph 6.7 of the Plan.

48 *DECLARES* that the date for the implementation of the Plan will be deemed to be the date specified in a Certificate to be filed in the Court record by Petitioners and the Monitor as soon as all the conditions specified in paragraph 5.1 of the Plan have been fulfilled or satisfied.

49 *EXEMPTS* Petitioners from furnishing any security;

50 *ORDERS* provisional execution of this judgment notwithstanding appeal;

51 *THE WHOLE* with costs against the Opposing Creditors and in favour of Petitioners, the Monitor and Jolina Capital Inc.

Motion allowed.

Solicitors of record:
Ogilvy Renault, for Petitioners.
Davies Ward Phillips & Vineberg, for the Monitor.
Stikeman Elliott, for Jolina Capital Inc..
Osler Hoskin Harcourt, for the Opposing Creditors.

Footnotes

1 R.S.C., 1985, c.C-36, section 6 which provides that: *6. [Compromises to be sanctioned by court] Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company, and (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the* Bankruptcy and Insolvency Act *or is in the course of being wound up under the* Winding-up and Restructuring Act, on *the trustee in bankruptcy or liquidator and contributories of the company.*

2 Addressed in large part in the Court's judgment of October 23, 2002 rendered by Madame Justice Zerbisias dealing primarily with classification issues.

3 Essentially all the assets and undertakings of Uniforêt's operating companies excluding receivables and inventory and specified equipment under capital leases.

4 Contemplating a reorganization of the capital structure of Uniforêt pursuant to the provisions of Section 191 of the Canada Business Corporations Act, R.S.C., 1985, c. C-44, as amended.

5 Infra, paragraph [9]. See paragraph 4.2.2 of the Plan.

6 Defined in the Plan as: *a. Interim Period Debts, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the respective Interim Creditors; b. Uniforêt Scierie-Pâte Inc.'s obligations towards the Municipalité Régionale de Comté de Sept-Rivières to build and maintain roads, as provided in the agreement dated April 3, 2001, and the related Hydro-Québec's claim in*

the amount of $5,000,000 referred to therein; c. Claims of legal, accounting and financial advisors to Uniforêt, including the Monitor and its counsel, in respect of any debt incurred or to be incurred by Uniforêt for the purposes of reorganizing Uniforêt's liabilities, business and affairs including, without limitation, pursuant to the Plan, which monies shall be paid by Uniforêt in accordance with the Initial Order; d. Claims for indemnity pursuant to the indemnities provided by Uniforêt to directors or officers of Uniforêt; e. Claims of Employee Creditors, which monies shall be paid by Uniforêt in the ordinary course of business; f. [...] g. Dues owing to the Quebec Minister of Natural Resources pursuant to the Forests Act, R.S.Q., c. F-4.1, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the Quebec Minister of Natural Resources; h. Monies, if any, owing to National Bank of Canada, Bank of Montreal and La Société d'hypothèque CIBC, which shall be paid by Uniforêt in accordance with existing agreements and contracts, or as may be agreed between each of them; i. Claims for goods on consignment, which monies shall be paid by Uniforêt in accordance with terms previously agreed upon with the Creditors of such Claims; and j. Claims for warehousing contracts, which monies shall be paid by Uniforêt in accordance with terms previously agreed upon with the Creditors of such Claims.

7 Described in the Plan as: *the date on which all conditions contained in Section 5.1 of this Plan are satisfied.* These conditions, save those subject to the discretion of the Court, have all been satisfied.

8 The highlighted portions represent the changes made to the First Plan on May 6, 2003. Prior to these changes, this paragraph read: *furthermore, Convertible Notes "B" will, from the Plan Implementation Date until September 15, 2004, be convertible at any time into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $0.50 per share, such conversion right to expire at the close of business of September 15, 2004 and to be subject to a thirty (30) days prior written conversion notice to Uniforêt, which may then elect, prior to the expiry of such thirty (30) day period, to pay in cash to the noteholder an amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholder*; effectively giving to Uniforêt a repurchase option.

9 Supra, Note 6, paragraph (h).

10 Infra, see paragraph [18] below. A wholly owned subsidiary of Uniforêt Inc., 3735061 Canada Inc. (373) offered to purchase all the U.S. Notes for 30% of their principal amounts. The funds to satisfy this offer were borrowed from a bank syndicate and the syndicate loans were guaranteed by Jolina. 373 defaulted under the syndicate loans. Jolina stepped into the shoes of the bank syndicate and took the U.S. Notes acquired by 373 in lieu of payment of the syndicate loan.

11 (2000) 20 C.B.R. (4th) 1, at page 36: *Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company:* Royal Oak Mines Ltd., supra, *para. 4., Re Cadillac Fairview Inc. (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and* T. Eaton Company, supra. *To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of its constituents. It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.*

12 As was done for example in Plans approved in *Re Skeena Cellulose Inc.*, (100% of the equity offered to the secured creditors); *Re Silcorp Limited*, (75%); *Re Pioneer Companies Inc.*, (57%); *Re Microcell Telecommunications Inc.*, 500-11-019761-036; 2003-04-30 (99.9% to the creditors); *Re White Rose*, (94.4%); *Re Royal Oak Mines Inc.*, 14 C.B.R. (4th) 279 (99%); *Re Eagle Precision*, (90.3%);

Bluestar Battery, (83%); *Re Algoma Steel Inc.*, 30 C.B.R. (4th) 1 (100%); *Re McWatters Mining (2002)*, (75% to unsecured creditors); *Re 360 Networks*, (100%); *Re Kmart*, (50% to secured creditors). See as well Jolina's Exhibits J-28 and 29 and the Monitor's Exhibit M-1.

13 Supra, Note 8.

14 Supra, Note 4.

15 Supra, Note 11, and see *Re Central Capital Corp.*, 38 C.B.R. (3rd) 1 (Ont. C.A.), at page 37, paragraph 90 where Mr. Justice Finlayson observed that: *In the case of an insolvency where the debts to creditors clearly exceed the assets of the company, the policy of federal insolvency legislation appears to be clear that shareholders do not have the right to look to the assets of the corporation until the creditors have been paid.*; *Re T. Eaton Co.*, 15 C.B.R. (4th) 311 (Ont. S.C.J.), at page 314, paragraphs 9 to 13 inclusive and *Re Royal Oak Mines Inc.*, 14 C.B.R. (4th) 279 (Ont. S.C.J.), at page 281, paragraph 2 where Mr. Justice Farley, prior to approving a proposal contemplating the sale of a business, observed that: *[...] the shareholders would have to appreciate that, when viewed as to the hierarchy of interests to receive value in a liquidation related transaction, they are at the bottom. Further in these particular circumstances there are, in relation to the available tax losses (which is in itself a conditional asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation achieving a turnaround to profitability without restructuring, would have to wait a long while before their interests saw the light of day.*

16 Supra, Note 1, at page 26, paragraph 96, where Madam Justice Paperny reminds us that: *The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters: a. The composition of the unsecured vote; b. What creditors would receive on liquidation or bankruptcy as compared to the Plan; c. Alternatives available to the Plan and bankruptcy; d. Oppression; e. Unfairness to Shareholders of CAC; and f. The public interest.*

17 See *Re T. Eaton Co.*, Supra, Note 15, at page 314, paragraphs 8 and 9.

18 See *Ontario v. Canadian Airlines Corp.*, (2001) 29 C.B.R. (4th) 236 (Alb. Q.B.), at paragraph 61.

19 See *Re Canadian Red Cross Society*, 5 C.B.R. (4th) 299 (Ont. S.C.J.), at page 315, paragraphs 43 and 45.

20 See *Algoma Steel Corp. v. Royal Bank*, (1992) 11 C.B.R. (3d) 11 (Ont. C.A.), at page 14, paragraph 7.

21 Supra, Note 11, at page 5, paragraph 3, where Madam Justice Paperny adds: *Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.*

22 Ibid, at pages 42 to 44 inclusive, paragraphs 171 to 177.

23 Ibid, at page 44, pages 178 and 179, citing with approval the remarks of Mr. Justice Farley in *Re Sammi Atlas Inc.*, (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), at page 173: *A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.* And see *Re Quintette Coal Ltd.*, (1992) 13 C.B.R. (3d) 146, at page 165, paragraph 93.

24 See *Re Central Guaranty Trustco Ltd.* (1993), 21 C.B.R. (3d) 139, at page 141, where Mr. Justice Farley observed that: *The Revised Plan of Arrangement had required that there be a vote on the proposed compromise re these Claims (with a majority in number representing three-quarters in value of the proven Claims). That vote was even more overwhelming as only FSTQ voted against. 92.54% by number (96.16%) by value) were in favour and 7.46% by number (3.84% by value) were opposed. This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.* But see also *Re Quintette Coal Ltd.*, ibid, at pages 168 and 169, paragraphs 108 to 116.

25 See *Re Sammi Atlas Inc.*, supra, Note 23, at page 174, paragraph 5.

26 Defined in *Dictionary of Finance and Investment Terms*, Barron's, 1985, at p. 470 as: *WHITE KNIGHT acquirer sought by the target of an unfriendly TAKEOVER to rescue it from the unwanted bidder's control. The white knight strategy is an alternative to SHARK REPELLENT tactics and is used to avert an extended or bitter fight for control.*

27 Supra, Note 6 (h).

28 Ignoring any discount for projected delays in payment.

29 See *Algoma Steel v. Royal Bank*, Supra, Note 20, at page 9 where Mr. Justice Farley notes: *What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.*

30 See Section 7 of the Forest Act, supra, Note 6 (g).

31 That is, the proverbial "reasonable person".

32 This is the top of a range of between $90 and $112 million.

33 Or more accurately, its earnings before interest, taxes, depreciation and amortisation (EBITDA).

34 Supra, Note 3.

35 Estimated by the Monitor in paragraph 32 of his February 27, 2003 report reproduced above in paragraph [10] and based on the rosiest of assumptions.

36 That is, investors in below investment grade securities acquired in the after market.

37 In most cases, much less.

38 Supra, Note 24.

39 Supra, Note 8.

40 Supra, Note 12.

41 Supra, Note 2, at pages 29 and 30; paragraphs 95 and 96.

42 Which the Opposing Creditors say is a $6 million preferential payment.

43 Used to settle wage claims of an affiliate company for which Messrs Perron and Mercier, as directors of the affiliate, were legally liable.

44 Jolina's security position in respect of its advances to acquire the planer is in some doubt.

45 See paragraphs [19], [20], [22] and [23] above.

46 See *Re T. Eaton Co.*, Supra, Note 15, where at page 258, paragraph 6, Mr. Justice Farley observed:
The Act clearly contemplates rough-and tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, <u>but on the best terms they can get</u>, [...].

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., *et al.*

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
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BOOK OF AUTHORITIES OF THE APPLICANTS

(Plan Sanction Hearing)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
Shawn Irving (LSUC #: 50035U)
Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785