Court File No: CV-17-11785-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EXPRESS FASHION APPAREL CANADA INC. AND EXPRESS CANADA GC GP, INC.

BOOK OF AUTHORITIES OF THE APPLICANT

(Motion for the Granting of the Sanction and Vesting Order)

September 20, 2017

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Case Law

TAB 1

2011 BCSC 450
British Columbia Supreme Court [In Chambers]

Angiotech Pharmaceuticals Inc., Re

2011 CarswellBC 841, 2011 BCSC 450, [2011] B.C.W.L.D. 4126, [2011] B.C.W.L.D. 4127, [2011] B.C.W.L.D. 4132, 201 A.C.W.S. (3d) 334, 76 C.B.R. (5th) 210

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 Angiotech Pharmaceuticals, Inc. and the other Petitioners Listed on Schedule "A" (Petitioners)

Paul Walker J.

Heard: April 6, 2011
Oral reasons: April 6, 2011
Docket: Vancouver S110587

Counsel: J. Dacks, M. Wasserman, D. Gruber, R. Morse for Angiotech Pharmaceutics, Inc.
S. Jones for Angiotech Pharmaceutics
J. Grieve, K. Jackson for Alvarez & Marsal Canada Inc.
R. Chadwick, L. Willis for Consenting Noteholders
M. Buttery for U.S. Bank National Association

Subject: Corporate and Commercial; Insolvency

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Meetings — General principles

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

Debtor company sought protection of Companies' Creditors Arrangement Act — Petitioners proposed amended plan to effect settlement of claims; implement recapitalization of subordinated notes; and enable petitioners to sustain sufficient current and future liquidity — Plan was unanimously approved by creditors and monitor — Petitioners brought application for order to sanction amended plan — Application granted — Plan should be sanctioned because it met statutory criteria set out in s. 61 of Act; it was fair and reasonable; and it was in best interests of creditors and public — Plan would enable petitioners to keep operating as going concerns; promote continued employment of many of petitioners' employees; allow creditors and others with economic interest in petitioners to derive far greater benefit than would result from bankruptcy or liquidation; and permit important medical products sold and distributed by petitioners to continue to be made available — Amendments to plan contemplating distribution of new common shares in aggregate amount of 3.5 per cent afforded greater benefit to all creditors who chose to and were qualified to take them — Amendments to plan calling for liquidity election provided greater benefits to creditors who were not able, or chose not, to participate in share offering — Proposed release contained in plan was rationally connected to purpose of plan, was necessary for implementation of plan, and met tests set out in jurisprudence.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

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Debtor company sought protection of Companies' Creditors Arrangement Act ("CCAA") — Petitioners proposed amended plan to effect settlement of claims; implement recapitalization of subordinated notes; and enable petitioners to sustain sufficient current and future liquidity — Plan was unanimously approved by creditors and monitor — Petitioners brought application for order to sanction amended plan — Application granted on other grounds — Court has jurisdiction pursuant to CCAA and Business Corporations Act to dispense with calling of meeting of existing shareholders in order to amend articles of Canadian petitioner — Section 6(8) of CCAA prohibits plan that calls for distribution to pay equity claim where non-equity claims cannot be paid in full — Evidence disclosed that this was not possible in present case — Even if it could be said that combined effect of ss. 6(8) and 6(2) of CCAA did not remove requirement for shareholders' meeting, requirement should be dispensed with in circumstances of case — To do otherwise, so that meeting was held, would cause persons who no longer had economic interest in company to acquire functional veto.

Table of Authorities

Cases considered by *Paul Walker J.*:

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.) — followed

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

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — followed

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — followed

Xillix Technologies Corp., Re (June 21, 2007), Doc. Vancouver S066835 (B.C. S.C.) — referred to

Statutes considered:

Business Corporations Act, S.B.C. 2002, c. 57
Generally — referred to

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

s. 6(2) — considered

s. 6(8) — considered

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s. 61 — considered

APPLICATION for order to sanction plan proposed by petitioners in proceeding under *Companies' Creditors Arrangement Act*.

***Paul Walker J.*:**

1 The application before me is for an order to sanction the plan (as amended) proposed by the petitioners and approved by the monitor in the Angiotech CCAA proceeding.

2 I find that the proposed plan has several purposes, which include:

(a) effecting a compromise, settlement, and payment of all affected claims;

(b) implementing a recapitalization of subordinated notes; and

(c) enabling the petitioners to sustain sufficient current and future liquidity in order to enhance their short and long term viability.

3 The plan was unanimously approved at a plan approval meeting of the creditors ("creditors' meeting") held and conducted by the monitor in Vancouver on April 4, 2011. I am satisfied that notice of the plan, the amended plan, and the creditors' meeting was widely disseminated in accordance with my previous orders.

4 The total value of the notes held by subordinated noteholders is approximately $266 million. It is noteworthy that the noteholders which held subordinated notes having a value of approximately $234 million voted in favour of the plan at the creditors' meeting.

5 No objection to the plan has been taken by any employee, past or present, or the existing common shareholders whose interests will be extinguished by the plan.

6 The plan as amended contains the following key elements, which are set out in the affidavit of K. Thomas Bailey sworn on March 31, 2011 at para. 31:

(a) New Common Shares will be issued to Affected Creditors with Distribution Claims who have not made valid Cash Elections or Liquidity Elections (as defined below) and distributions of cash will be made to Convenience Class Creditors and Affected Creditors that have made valid Liquidity Elections;

(b) the Subordinated Notes, the Subordinated Note Indenture and all Subordinated Note Obligations will be irrevocably and finally cancelled and eliminated except for the limited purposes provided in section 4.5 of the Plan;

(c) all Affected Claims will be discharged and released;

(d) the Existing Shares and options and the Shareholder Rights Agreement will be cancelled without any liability, payment or other compensation to Existing Shareholders in respect thereof;

(e) Angiotech US will repay to Wells Fargo and the DIP Lender, as applicable, any and all outstanding Secured Lender Obligations;

(f) Angiotech will make payment to the KEIP Participants of amounts owing under the KEIP at the time specified and in accordance with the terms of the KEIP;

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(g) Angiotech will make grants of New Common Shares and options to acquire New Common Shares pursuant to the terms of the MIP;

(h) Angiotech's Notice of Articles will be amended to, among other things, create an unlimited number of New Common Shares in order to provide flexibility for the recapitalized Angiotech on a going forward basis;

(i) Angiotech will transfer to the Monitor the aggregate of all Cash Elected Amounts and Liquidity Election Payments (as defined below) to be held in escrow in one or more separate interest-bearing accounts for distributions to Convenience Class Creditors and Affected Creditors that have made valid Liquidity Elections, as applicable;

(j) the Board of Directors of Angiotech will be replaced by a new Board of Directors; and

(k) the Petitioners, the Monitor, Blackstone, the Subordinated Note Indenture Trustee, the Advisors, Wells Fargo, the DIP Lender, the Subordinated Noteholders and, among others, present and former shareholders, affiliates, subsidiaries, directors, officers and employees of the foregoing will be granted a release and discharge from liability in connection with, among other things, the CCAA proceeding and the Plan.

7 I am satisfied from my review of the evidence that the plan, if implemented, would:

(a) enable the petitioners to continue to operate as going concerns;

(b) facilitate and promote continued employment of a substantial number of the petitioners' employees;

(c) allow creditors and other persons with an economic interest in the petitioners to derive a far greater benefit than would result from a bankruptcy or liquidation; and

(c) permit important medical products sold and distributed by the petitioners to continue to be made available to the public worldwide.

8 The amendments to the plan that now contemplate distribution of newly issued common shares in an aggregate amount of 3.5% afford greater benefit to all affected creditors who choose to and are qualified to take them.

9 As well, the amendments to the plan calling for a liquidity election provide greater benefits to creditors who are not able, or choose not, to participate in the share offering.

10 I am also satisfied that the Court has jurisdiction to dispense with the calling of a meeting of existing shareholders in order to amend the articles of the Canadian petitioner. I am satisfied that I have that jurisdiction pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and the *Business Corporations Act*, S.B.C. 2002, c. 57. I say that because I am of the view that s. 6(8) of the *CCAA* prohibits a plan that calls for a distribution to pay an equity claim where non-equity claims cannot be paid in full: *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at paras. 143 and 145, aff'd at 2000 ABCA 238 (Alta. C.A. [In Chambers]). The evidence discloses that this is not possible in this case.

11 Even if it could be said that the combined effect of ss. 6(8) and 6(2) of the *CCAA* do not remove the requirement for a shareholders' meeting, I am satisfied that the requirement should be dispensed with in the circumstances of this case. To do otherwise, so that a meeting is held, would cause persons who no longer have an economic interest in the company to acquire a functional veto: *Xillix Technologies Corp., Re* (June 21, 2007), Doc. Vancouver S066835 (B.C. S.C.).

12 I am also satisfied that the proposed release contained in the plan is rationally connected to the purpose of the plan, it is necessary for the implementation of the plan, and it meets the tests set out in *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.); *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*

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(2008), 92 O.R. (3d) 513 (Ont. C.A.); and *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]).

13 The creditors who are protected by the the release were instrumental in facilitating the reorganization of the petitioners' affairs as a going concern. Further, their efforts led to the development of a plan that meets the objectives set out in the *CCAA*.

14 The reorganization facilitated by those creditors provides greater benefits to all of the creditors than would otherwise be realized if the petitioners had been liquidated.

15 In conclusion, I am satisfied that the plan should be sanctioned because:

(a) it meets the statutory criteria set out in s. 61 of the *CCAA*;

(b) it is fair and reasonable; and

(c) it is in the best interests of the creditors and the public.

Application granted.

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TAB 2

2014 CarswellMan 825
Manitoba Court of Queen's Bench

Arctic Glacier Income Fund, Re

2014 CarswellMan 825, 249 A.C.W.S. (3d) 573

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

In the Matter of a Proposed Plan of Compromise or Arrangement With Respect to
Arctic Glacier Income Fund, Arctic Glacier Inc., Arctic Glacier International Inc. and
the Additional Applicants Listed on Schedule "A" Hereto, (collectively, the "Applicants")

Spivak J.

Judgment: May 21, 2014
Docket: Winnipeg Centre CI 12-01-76323

Counsel: Counsel — not provided

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

Headnote

Debtors and creditors --- Miscellaneous

Initial order was made under Companies' Creditors Arrangement Act ("CCAA") — Applicants brought application for order extending stay period; authorizing creditors meeting; authorizing recording of vote of affected creditors; authorizing unitholders meeting; and order disseminating monitor's report to affected creditors and unit holders — Application allowed — Stay was extended to September 26, 2014 — Monitor's report was approved and it was to be disseminated to affected creditors and unit holders — Consolidated CCAA plan was accepted for filing and notice was to be provided to affected creditors and unit holders in form provided — Procedure for delivery of proxies to monitor was set out — Creditors meeting was to be called for purpose of voting on resolution to approve consolidated CCAA plan — Special meeting of unit holders was to be called for purpose of voting on resolution to approve consolidated CCAA plan — Voting procedures were set out.

Table of Authorities

Cases considered by *Spivak J.*:

Arctic Glacier Income Fund, Re (2012), 2012 CarswellMan 827 (Man. Q.B.) — referred to

Arctic Glacier Income Fund, Re (2012), 2012 CarswellMan 838 (Man. Q.B.) — referred to

Statutes considered:

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

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APPLICATION by applicants for order extending stay period; authorizing creditors meeting; authorizing recording of vote of affected creditors; authorizing unitholders meeting; and order disseminating monitor's report to affected creditors and unit holders.

***Spivak J.*:**

1 *THIS MOTION* made by the Applicants for an Order: (i) extending the Stay Period as defined in paragraph 30 of the Order of the Honourable Madam Justice Spivak made February 22, 2012 [2012 CarswellMan 827 (Man. Q.B.)] (the "*Initial Order*") until September 26, 2014; (ii) authorizing the Applicants and Glacier Valley Ice Company, L.P. (together, the "*Arctic Glacier Parties*") to call a meeting of their Affected Creditors (the "*Creditors' Meeting*") that will be deemed to occur on the date specified herein; (iii) authorizing the recording of a vote of Affected Creditors who will be deemed to have voted in favour of a resolution to approve the Consolidated CCAA Plan (as defined herein) at the Creditors' Meeting; (iv) authorizing Arctic Glacier Income Fund to call, hold and conduct a meeting of the Unitholders of Arctic Glacier Income Fund (the "*Unitholders' Meeting*") to consider and vote on a resolution to, among other things, approve the Consolidated CCAA Plan; (v) approving notice to be given and the procedures to be followed with respect to the calling and conduct of the Creditors' Meeting and the Unitholders' Meeting; and (vi) declaring that the Fifteenth Report of Alvarez & Marsal Canada Inc., in its capacity as monitor of the Applicants (the "*Monitor*"), dated May 14, 2014 (the "*Fifteenth Report*") be disseminated to Affected Creditors with Proven Claims or Unresolved Claims (collectively, the "*Known Affected Creditors*") and Unitholders in accordance with this Meeting Order and that no further information is required to be provided to Unitholders, including any information required to be delivered pursuant to applicable securities law, other than information required by this Meeting Order in connection with the Consolidated CCAA Plan was heard this day at the Law Courts Building at 408 York Avenue, in the City of Winnipeg, in the Province of Manitoba.

2 *ON READING* the Notice of Motion and the Fifteenth Report, and on hearing the submissions of counsel for the Arctic Glacier Parties, counsel for the Monitor, counsel for the Trustees of Arctic Glacier Income Fund, Counsel for Peggy Johnson, Counsel for Keith Burrows and Robert Nagy, Counsel for US Direct Purchaser Antitrust Settlement Class, Counsel for Martin McNulty and the Chief Process Supervisor, no one appearing for any other party although duly served as appears from the Affidavit of Service, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of this Motion and the Fifteenth Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

STAY EXTENSION

2. **THIS COURT ORDERS** that the Stay Period is hereby extended until September 26, 2014.

MONITOR'S ACTIVITIES AND REPORTS

3. **THIS COURT ORDERS** that the Fifteenth Report and the activities described therein are hereby approved.

DEFINITIONS

4. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Meeting Order shall have the meanings ascribed to them in the Consolidated CCAA Plan of Compromise or Arrangement of the Arctic Glacier Parties dated May 21, 2014, as amended, supplemented and restated from time to time in accordance with the terms therein (the **"Consolidated CCAA Plan"**) and the Claims Procedure Order dated September 5, 2012.

PLAN OF COMPROMISE OR ARRANGEMENT

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5. **THIS COURT ORDERS** that the Fifteenth Report (including a copy of the Consolidated CCAA Plan attached thereto as an appendix) shall be disseminated to Known Affected Creditors and Unitholders in accordance with this Meeting Order and that no further information is required to be provided to Unitholders, including any information required to be delivered pursuant to applicable securities law, other than information required by this Meeting Order in connection with the Consolidated CCAA Plan.

6. **THIS COURT ORDERS** that the Consolidated CCAA Plan is hereby accepted for filing, and the Arctic Glacier Parties are hereby authorized to seek approval of the Consolidated CCAA Plan from their Affected Creditors and Unitholders, as the case may be, in the manner set forth herein.

7. **THIS COURT ORDERS** that the Arctic Glacier Parties, with the consent of the Monitor, may at any time and from time to time amend, restate, modify and/or supplement the Consolidated CCAA Plan provided that any such amendment, restatement, modification and/or supplement shall be (a) made in accordance with the Consolidated CCAA Plan; (b) contained in a written document filed with this Honourable Court; and (c) communicated to the Known Affected Creditors and the Unitholders by posting a copy of such amendment, restatement, modification and/or supplement on the Monitor's website maintained for this proceeding at: http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries (the **"Website"**) and emailing a notice to the Service List informing them of such posting, and such posting and email notification shall constitute adequate notice of, and delivery to, Affected Creditors and Unitholders of such amendment, restatement, modification and/or supplement.

8. Any amendment, restatement, modification or supplement to the Consolidated CCAA Plan made and communicated in accordance with paragraph 7 above shall, for all purposes, be deemed to be part of and incorporated in the Consolidated CCAA Plan.

FORMS OF DOCUMENTS

9. **THIS COURT ORDERS** that the Notice to Affected Creditors substantially in the form attached hereto as Schedule "B" (the **"Notice to Affected Creditors"**); the Notice to Unitholders substantially in the form attached hereto as Schedule "C" (the **"Notice to Unitholders"**); the Voting Instructions to Unitholders substantially in the form attached hereto as Schedule "D" (the **"Voting Instructions to Unitholders"**); the Proxy to be used by certain Unitholders (as set out herein) substantially in the form attached hereto as Schedule "E" (the **"Unitholders' Proxy"**); the Master Ballot substantially in the form attached hereto as Schedule "F" (the **"Master Ballot"**); the Nominee Ballot substantially in the form attached hereto as Schedule "G" (the **"Nominee Ballot"**); and the Voting Instruction Form for Beneficial Unitholders substantially in the form attached hereto as Schedule "H" (the **"VIF"**) are each hereby approved and the Arctic Glacier Parties are authorized and directed to make such changes, with the consent of the Monitor, as they consider necessary or desirable to conform the content thereof to the terms of the Consolidated CCAA Plan or this Meeting Order.

NOTICE TO AFFECTED CREDITORS

10. **THIS COURT ORDERS** that on or about May 27, 2014, the Monitor shall send by regular pre-paid mail, courier, fax or e-mail, copies of the Notice to Affected Creditors to each Known Affected Creditor to the address provided by each such Affected Creditor in its Proof of Claim, or to such other address subsequently provided by such Affected Creditor to the Monitor.

11. **THIS COURT ORDERS** that the materials delivered to Known Affected Creditors shall not include a form of proxy.

NOTICE TO UNITHOLDERS

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12. **THIS COURT ORDERS** that the record date for the purposes of determining which Unitholders are entitled to receive notice of the Unitholders' Meeting and vote at the Unitholders' Meeting shall be 5:00 p.m. (Toronto time) on June 16, 2014 (the **"Unitholder Record Date"**).

13. **THIS COURT ORDERS** that as soon as reasonably practicable following the Unitholder Record Date, the Transfer Agent shall send by regular pre-paid mail, courier, or e-mail copies of the Notice to Unitholders to Broadridge Financial Solutions Inc. **("Broadridge")** and to each Registered Unitholder, as of the Unitholder Record Date, that the Transfer Agent is aware of and has contact information in respect of (a) for such Registered Unitholders, in respect of Trust Units held by any such Registered Unitholder solely for and on behalf of itself; or (b) for distribution by Broadridge to the Beneficial Unitholders, as of the Unitholder Record Date.

14. **THIS COURT ORDERS** that as soon as reasonably practicable following the Unitholder Record Date and receipt of the Notice to Unitholders from the Transfer Agent pursuant to paragraph 13 herein, Broadridge shall send by regular prepaid mail, courier, fax or e-mail, the Notice to Unitholders and the VIFs to the Beneficial Unitholders as of the Unitholder Record Date.

Meeting Materials, Advertising of Meetings and Service

15. **THIS COURT ORDERS** that the Monitor shall no later than May 30, 2014 post electronic copies of the Consolidated CCAA Plan, the Meeting Order, the Notice to Affected Creditors, the Notice to Unitholders, the Voting Instructions to Unitholders, a blank copy of the form of Unitholders' Proxy, a blank copy of the form of Master Ballot, a blank copy of the form of Nominee Ballot, a blank copy of the form of VIF and the Fifteenth Report (collectively, the **"Meeting Materials"**) on the Website and the Monitor shall provide written copies of such materials to those Affected Creditors and Unitholders that so request. The Monitor shall ensure that the Meeting Materials remain posted on the Website until at least the Business Day following the Plan Implementation Date.

16. **THIS COURT ORDERS** that the Monitor shall: (a) in no event later than May 30, 2014; and (b) on or about July 16, 2014; cause the Notice to Affected Creditors and the Notice to Unitholders, or shortened versions thereof in form and substance satisfactory to the Monitor, to be published, in each instance, for a period of one (1) calendar day in *The Globe and Mail* (National Edition), the *Wall Street Journal* (National Edition) and the *Winnipeg Free Press.*

17. **THIS COURT ORDERS** that the delivery of the Notice to Affected Creditors to Known Affected Creditors in the manner set out in paragraph 10 hereof; the delivery of the Notice to Unitholders in the manner set out in paragraphs 13 and 14 hereof; the posting of the Meeting Materials on the Website in accordance with paragraph 15 hereof; and the publication of the Notice to Affected Creditors and the Notice to Unitholders, or shortened versions thereof in form and substance satisfactory to the Monitor, in accordance with paragraph 16 hereof; shall constitute good and sufficient service of this Meeting Order, the Consolidated CCAA Plan and the Fifteenth Report, and good and sufficient notice of the Creditors' Meeting and Unitholders' Meeting on all Persons who may be entitled to receive notice thereof or of these proceedings or who may wish to be present in person or by proxy at the Creditors' Meeting or the Unitholders' Meeting or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons, and no other document or material need be served on such Persons in respect of these proceedings.

DELIVERY OF PROXIES TO THE MONITOR

18. **THIS COURT ORDERS** that:

(a) any Unitholders' Proxy in respect of the Unitholders' Meeting (or any adjournment thereof) must be received by the Transfer Agent by 5:00 p.m. (Toronto time) on August 7, 2014, or two (2) Business Days prior to the date of any adjourned Unitholders' Meeting;

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(b) any Nominee Ballot in respect of the Unitholders' Meeting (or any adjournment thereof) must be received by the Transfer Agent by 5:00 p.m. (Toronto time) on August 7, 2014, or two (2) Business Days prior to the date of any adjourned Unitholders' Meeting; and

(c) the Master Ballot in respect of the Unitholders' Meeting (or any adjournment thereof) must be received by the Monitor by 5:00 p.m. (Toronto time) on August 8, 2014, or one (1) Business Day prior to the date of any adjourned Unitholders' Meeting.

19. **THIS COURT ORDERS** that the Monitor may in its discretion waive in writing the time limits imposed on the Unitholders, Broadridge, the Transfer Agent and the Nominees as set out in this Meeting Order and the Meeting Materials for the deposit of the Master Ballot, Unitholders' Proxies, the Nominee Ballots and the VIFs and all other procedural matters if the Monitor deems it advisable to do so (without prejudice to the requirement that all of the other Unitholders and Persons, as applicable, must comply with this Meeting Order and the other procedures set out in the Meeting Materials).

CONDUCT AND VOTING AT THE CREDITORS' MEETING

20. **THIS COURT ORDERS** that the Arctic Glacier Parties are hereby authorized to call the Creditors' Meeting for the purpose of voting on a resolution to approve the Consolidated CCAA Plan and that such Creditors' Meeting shall be deemed to have been duly called and held on August 11, 2014.

21. **THIS COURT ORDERS** that for the purposes of voting on a resolution to approve the Consolidated CCAA Plan there shall be one consolidated class of Creditors established in the Consolidated CCAA Plan, which shall be comprised of all Affected Creditors.

22. **THIS COURT ORDERS** that every Affected Creditor shall be deemed to have voted in favour of a resolution to approve the Consolidated CCAA Plan at the Creditors' Meeting on August 11, 2014.

23. **THIS COURT ORDERS** that the vote on the Consolidated CCAA Plan at the Creditors' Meeting shall be deemed to have been decided unanimously in favour of the resolution to approve the Consolidated CCAA Plan.

24. **THIS COURT ORDERS** that the result of the deemed vote at the Creditors' Meeting in favour of the resolution to approve the Consolidated CCAA Plan shall be binding on all Affected Creditors.

CONDUCT AT THE UNITHOLDERS' MEETING

25. **THIS COURT ORDERS** that the Trustees are hereby deemed to have called a special meeting of Unitholders, and the Unitholders are hereby authorized to hold and conduct such special meeting on August 11, 2014 in Toronto, Ontario, at the time and place to be determined by the Monitor and set out in the Notice to Unitholders, for the purpose of considering and voting on a resolution to, among other things, approve the Consolidated CCAA Plan.

26. **THIS COURT ORDERS** that notwithstanding anything to the contrary in the Second Amended and Restated Declaration of Trust of Arctic Glacier Income Fund made as of December 6, 2004, as amended (the **"Declaration of Trust"**), the Unitholders' Meeting shall be called, held and conducted, notice of the Unitholders' Meeting shall be given, and the Consolidated CCAA Plan shall be voted upon and, if approved by the Unitholders, ratified and given full force and effect, in accordance with the provisions of this Meeting Order, the Consolidated CCAA Plan, the CCAA and any further order of this Honourable Court.

27. **THIS COURT ORDERS** that a representative of the Monitor, designated by the Monitor, shall preside as the chair (the **"Chair"**) of the Unitholders' Meeting and, subject to this Meeting Order and any further order of this Honourable Court, shall decide all matters relating to the conduct of the Unitholders' Meeting.

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28. **THIS COURT ORDERS** that the Chair is hereby authorized to accept and rely upon the Master Ballot substantially in the form attached hereto as Schedule "F", or such other form as is acceptable to the Chair.

29. **THIS COURT ORDERS** that the quorum required at the Unitholders' Meeting shall be one (1) Registered Unitholder present at such meeting in person (or represented by proxy) or one (1) Beneficial Unitholder represented by proxy, and in each case entitled to vote on the resolution to approve, among other things, the Consolidated CCAA Plan.

30. **THIS COURT ORDERS** that the Monitor may appoint scrutineers (the **"Scrutineers"**) for the supervision and tabulation of the attendance at, quorum at and votes cast at the Unitholders' Meeting. A Person designated by the Monitor shall act as secretary (the **"Secretary"**) at the Unitholders' Meeting.

31. **THIS COURT ORDERS** that if (a) the requisite quorum is not present at the Unitholders' Meeting, or (b) the Unitholders' Meeting is postponed by the vote of the majority in number of the total Trust Units held by Unitholders present in person or by proxy and entitled to vote at such Unitholders' Meeting, then the Unitholders' Meeting shall be adjourned by the Chair to a date thereafter and to such time and place as may be determined by the Chair.

32. **THIS COURT ORDERS** that the Unitholders' Meeting need not be convened in order to be adjourned and that the Chair shall be entitled to adjourn and further adjourn the Unitholders' Meeting or any adjourned Unitholders' Meeting provided that any such adjournment or adjournments shall be for a period of not more than thirty (30) days in total and, in the event of any such adjournment, the Monitor shall not be required to deliver any notice of adjournment of the Unitholders' Meeting or adjourned Unitholders' Meeting other than announcing the adjournment at the Unitholders' Meeting or posting notice at the originally designated time and location of the Unitholders' Meeting or adjourned Unitholders' Meeting, and posting a notice of the adjournment on the Website.

33. **THIS COURT ORDERS** that the only Persons entitled to attend the Unitholders' Meeting are the Monitor and its legal counsel; the Arctic Glacier Parties and their legal counsel; 7088418 Canada Inc. o/a Grandview Advisors and any successor thereto appointed by the CCAA Court; those Persons, including Registered Unitholders, Beneficial Unitholders and holders of Unitholders' Proxies entitled to vote on the Consolidated CCAA Plan and their legal counsel and advisors; the holder of the Master Ballot and its legal counsel; the Trustees and their respective legal counsel and advisors; the Auditors (as defined in the Declaration of Trust); the Transfer Agent; the Chair; the Secretary; and the Scrutineers. Any other Person may be admitted to the Unitholders' Meeting on invitation of the Chair, acting in its sole discretion.

34. **THIS COURT ORDERS** that, subject to any restrictions contained in Applicable Laws, Unitholders may transfer or assign their Trust Units provided that the Arctic Glacier Parties, the Transfer Agent and the Monitor shall not be obliged to deal with any transferee or assignee of a Unitholder in respect thereof for purposes of their eligibility to consider and vote on the Consolidated CCAA Plan unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment has been given to and received by the Arctic Glacier Parties, the Transfer Agent and the Monitor by 5:00 p.m. (Toronto time) on the Business Day immediately prior to the Unitholder Record Date.

35. **THIS COURT ORDERS** that, in the event of receipt of such notice of transfer or assignment prior to the Unitholder Record Date (as provided for in the immediately preceding paragraph), the transferee or assignee shall, for all purposes, be treated as the Unitholder of the assigned or transferred Trust Units, will be bound by any and all notices previously given to the transferor or assignor in respect of such Trust Units and shall be bound, in all respects, by any and all notices given and steps taken, and by the Orders of the CCAA Court in the CCAA Proceedings. For greater certainty, the Arctic Glacier Parties and the Transfer Agent shall not recognize partial transfers or assignments of Trust Units.

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36. **THIS COURT ORDERS** that under no circumstances shall the Arctic Glacier Parties, the Transfer Agent or the Monitor be obliged to deal with any transferee or assignee of a Unitholder for purposes of their eligibility to consider and vote on the Consolidated CCAA Plan who is not reflected as a Unitholder on the Unitholder Record Date.

VOTING PROCEDURE AT THE UNITHOLDERS' MEETING

37. **THIS COURT ORDERS** that for the purposes of voting to approve the Consolidated CCAA Plan, there shall be one consolidated class of Unitholders established in the Consolidated CCAA Plan who are entitled to vote, which shall be comprised of all Unitholders.

38. **THIS COURT ORDERS** that each Registered Unitholder that holds Trust Units solely for and on behalf of itself may vote either by (i) completing the Unitholders' Proxy and returning such Unitholders' Proxy to the Transfer Agent prior to the deadline set out herein; or (ii) attending the Unitholders' Meeting.

39. **THIS COURT ORDERS** that each Beneficial Unitholder may deliver voting instructions and instructions in respect of the appointment of a proxy by completing the VIF provided to such Beneficial Unitholder by Broadridge (in accordance with the instructions attached thereto).

40. **THIS COURT ORDERS** that each Beneficial Unitholder that wishes to deliver voting instructions and instructions with respect to the appointment of a proxy in respect of any amendments or variations to the matters that are properly before the Unitholders' Meeting (or an adjournment or postponement thereof) must complete the applicable sections of the VIF (in accordance with the instructions attached thereto) so that the voting and proxy instructions of the Beneficial Unitholders as provided therein can be compiled and transferred by Broadridge to a form containing such information for transmittal to the applicable intermediary (an **"Intermediary"**) or, in instances where the Beneficial Unitholders hold their beneficial interests in the Trust Units directly through a participant that holds interest in the Trust Units (a **"Participant"**), the applicable Participant (the Intermediary and the Participant in each such case, the **"Nominee"**), or the applicable Nominee's agent.

41. **THIS COURT ORDERS** that each Nominee or its agent shall transfer the Beneficial Unitholder voting and proxy instructions received from Broadridge to a Nominee Ballot (substantially in the form of the Nominee Ballot, and in accordance with the instructions attached thereto) and return the Nominee Ballot to the Transfer Agent (in accordance with the instructions attached thereto).

42. **THIS COURT ORDERS** that a Beneficial Unitholder's vote will not be counted at the Unitholders' Meeting unless a Master Ballot reflecting such Beneficial Unitholder's vote is received by the Monitor prior to 5:00 p.m. (Toronto time) on August 8, 2014, or one (1) Business Day prior to the date of any adjourned Unitholders' Meeting.

43. **THIS COURT ORDERS** that the Chair shall direct a vote on a resolution to, among other things, approve the Consolidated CCAA Plan and any amendments thereto as the Monitor and the Arctic Glacier Parties may consider appropriate.

44. **THIS COURT ORDERS** that for the purposes of voting at the Unitholders' Meeting, the votes recorded on the Master Ballot shall be accepted as if voted in person by the Unitholders at the Unitholders' Meeting. All votes made pursuant to the Master Ballot shall be deemed to be votes for or against the resolution to, among other things, approve the Consolidated CCAA Plan, as applicable and as set out in the Master Ballot.

45. **THIS COURT ORDERS** that only Unitholders or their proxies shall be entitled to vote at the Unitholders' Meeting and that the holders of such proxies are entitled to rely on the proxies as valid.

46. **THIS COURT ORDERS** that in accordance with the terms of the Consolidated CCAA Plan, each of the Unitholders entitled to vote on the Consolidated CCAA Plan is entitled to one vote for each Trust Unit held by such Unitholder on the Unitholder Record Date.

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47. **THIS COURT ORDERS** that the Consolidated CCAA Plan shall be approved by the Unitholders if at the Unitholders' Meeting the proposed resolution to, among other things, approve the Consolidated CCAA Plan, receives the affirmative votes of more than 66 2/3% of the votes attached to the Trust Units represented at the Unitholders' Meeting and cast in accordance with this Meeting Order (the **"Required Unitholder Majority"**).

48. **THIS COURT ORDERS** that following the vote at the Unitholders' Meeting, the Monitor shall tally the votes and determine whether the Consolidated CCAA Plan has been accepted by the Required Unitholder Majority.

49. **THIS COURT ORDERS** that the result of any vote at the Unitholders' Meeting shall be binding on all Unitholders, whether or not any such Unitholder is present at the Unitholders' Meeting, in person or by proxy.

SANCTION HEARING

50. **THIS COURT ORDERS** that the Monitor shall provide a report to this Honourable Court at least ten (10) calendar days prior to the CCAA Sanction Motion (as defined herein) (the **"Monitor's Report Regarding the Meetings"**) with respect to:

(a) the deemed vote at the Creditors' Meeting with respect to the resolution to approve the Consolidated CCAA Plan;

(b) the results of the voting at the Unitholders' Meeting on the resolution to, among other things, approve the Consolidated CCAA Plan; and

(c) whether the Required Unitholder Majority approved the Consolidated CCAA Plan.

51. **THIS COURT ORDERS** that an electronic copy of the Monitor's Report Regarding the Meetings, including any amendments and variations thereto, and a draft sanction order in respect of the Consolidated CCAA Plan shall be posted on the Website prior to the CCAA Sanction Motion.

52. **THIS COURT ORDERS** that in the event that the Consolidated CCAA Plan has been approved by the Required Unitholder Majority, the Applicants may bring a motion before this Honourable Court on September 5, 2014, or such later date as is set by this Honourable Court upon motion by the Applicants, seeking a sanctioning of the Consolidated CCAA Plan pursuant to the CCAA (the **"CCAA Sanction Motion"**).

53. **THIS COURT ORDERS** that service of this Meeting Order by the Monitor to the parties on the Service List; delivery of the Notice to Affected Creditors to Known Affected Creditors in accordance with paragraph 10 hereof; delivery of copies of the Notice to Unitholders pursuant to paragraphs 13 and 14 hereof; the publication of the Notice to Affected Creditors and the Notice to Unitholders, or shortened versions thereof in form and substance satisfactory to the Monitor, in accordance with paragraph 16 hereof; and the posting of the Meeting Materials on the Website in accordance with paragraph 15 hereof shall constitute good and sufficient service of notice of the CCAA Sanction Motion on all Persons entitled to receive such service and no other form of notice or service need be made and no other materials need be served in respect of the CCAA Sanction Motion, except that the Arctic Glacier Parties and the Monitor shall serve the Service List with any additional materials to be used in support of the CCAA Sanction Motion.

54. **THIS COURT ORDERS** that any party who wishes to oppose the CCAA Sanction Motion shall serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the CCAA Sanction Motion at least two (2) Business Days before the date set for the CCAA Sanction Motion, or such shorter time as this Honourable Court, by order, may allow.

55. **THIS COURT ORDERS** that, in the event that the CCAA Sanction Motion is adjourned, only those Persons who are on the Service List shall be served with notice of the adjourned date.

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56. **THIS COURT ORDERS** that subject to any further order of this Honourable Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Consolidated CCAA Plan and this Meeting Order, the terms, conditions and provisions of the Consolidated CCAA Plan shall govern and be paramount, and any such provision of this Meeting Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

MONITOR'S ROLE

57. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order, the Claims Procedure Order, the Claims Officer Order dated March 7, 2013, the Transition Order dated July 12, 2012 [2012 CarswellMan 838 (Man. Q.B.)], and any other order of this Honourable Court in the CCAA Proceedings, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Meeting Order or incidental thereto.

58. **THIS COURT ORDERS** that (i) in carrying out the terms of this Meeting Order, the Monitor shall have all of the protections given to it by the CCAA, the Initial Order, other Orders in the CCAA Proceeding, and this Meeting Order, or as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of the carrying out of the provisions of this Meeting Order; (iii) the Monitor shall be entitled to rely on the books and records of the Arctic Glacier Parties, and any information provided by the Arctic Glacier Parties, any Person having a Claim, the Unitholders, the Canadian Depository for Securities Limited and its successors, Broadridge, the Trustees and the Transfer Agent, all without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records, or other information.

GENERAL PROVISIONS

59. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, including the United States Bankruptcy Court for the district of Delaware, or in any other foreign jurisdiction, to give effect to this Meeting Order and to assist the Arctic Glacier Parties, the Monitor and their respective agents in carrying out the terms of this Meeting Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Arctic Glacier Parties and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Meeting Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Arctic Glacier Parties and the Monitor and their respective agents in carrying out the terms of this Meeting Order.

Achedule "A"

Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

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Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "B"

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

NOTICE TO AFFECTED CREDITORS OF THE APPLICANTS and GLACIER VALLEY ICE COMPANY, L.P. (collectively, the "ARCTIC GLACIER PARITES")

Notice of Creditors' Meeting

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NOTICE IS HEREBY GIVEN that the Applicants have filed with the Manitoba Court of Queen's Bench (Winnipeg Centre) (the "*CCAA Court*") a plan of compromise or arrangement dated May 21, 2014 (as amended, supplemented or restated from time to time in accordance with the terms thereof, the "*Consolidated CCAA Plan*") pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "*CCAA*").

The Consolidated CCAA Plan contemplates, among other things, the complete satisfaction of all Proven Claims of Affected Creditors, plus the payment of applicable interest on certain Proven Claims, pursuant to and in accordance with the Consolidated CCAA Plan. Affected Creditors constitute one (1) class, as established in the Consolidated CCAA Plan (the "*Affected Creditors' Class*").

NOTICE IS ALSO HEREBY GIVEN that a meeting of the Affected Creditors (the "*Creditors' Meeting*") will be deemed to have been duly called and held on August 11, 2014, for the purpose of voting on a resolution to approve the Consolidated CCAA Plan. The deemed Creditors' Meeting is being held pursuant to an Order of the CCAA Court made on May 21, 2014 by the Honourable Madam Justice Spivak (the "*Meeting Order*").

Pursuant to the Meeting Order, every Affected Creditor shall be deemed to have voted in favour of the Consolidated CCAA Plan at the Creditors' Meeting on August 11, 2014 and, as a result, the vote on the Consolidated CCAA Plan at the Creditors' Meeting shall be deemed to have been decided unanimously in favour of the resolution to approve the Consolidated CCAA Plan. Please note that the deemed vote by Affected Creditors in favour of the resolution to approve the Consolidated CCAA Plan does not affect the ability of any Affected Creditor to make submissions at any motion to sanction the Consolidated CCAA Plan, including in respect of the quantum of the Unresolved Claims Reserve or in respect of the proposed treatment of interest afforded to the Proven Claims that will be set out in the order being sought to sanction the Consolidated CCAA Plan.

To become effective, in respect of the Affected Creditors' Class, the Consolidated CCAA Plan must be sanctioned by a final order of the CCAA Court under the CCAA. The Consolidated CCAA Plan must also, among other things, be approved by the Required Unitholder Majority at a duly convened Unitholders' Meeting.

NOTICE IS ALSO HEREBY GIVEN that the order sanctioning the Consolidated CCAA Plan will be sought in a motion to be brought on September 5, 2014, or such later date as is set by the CCAA Court, which date shall also be posted on the website of the court-appointed Monitor as set out below. At that time, the Applicants will also seek the other relief specified in the Consolidated CCAA Plan. Subject to the satisfaction of the conditions to implementation of the Consolidated CCAA Plan, all Affected Claims of Affected Creditors will then receive the treatment set out in the Consolidated CCAA Plan unless otherwise ordered by the CCAA Court.

The Monitor's address for the purpose of obtaining any additional information or materials related to the Creditors' Meeting, or asking any questions regarding the process, is:

Alvarez & Marsal Canada Inc., Court-Appointed Monitor of the Arctic Glacier Parties

Royal Bank Plaza, South Tower

200 Bay Street, Suite 2900

P.O. Box 22

Toronto ON M5J 2J1

Canada

Attention: Melanie MacKenzie

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Tel: 416-847-5158

Fax: 416-847-5201

mmackenzie@alvarezandmarsal.com

This notice is given by the Arctic Glacier Parties pursuant to the Meeting Order.

You may view copies of the documents relating to this process on the Monitor's website (the "*Website*") at: http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries.

Please continue to monitor the Monitor's website for updates regarding this CCAA proceeding.

Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Consolidated CCAA Plan.

DATED this • day of •, 2014.

Schedule "A"

Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

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Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "C"

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

Notice to Unitholders of Arctic Glacier Income Fund Notice of Meeting

NOTICE IS HEREBY GIVEN that the Applicants have filed with the Manitoba Court of Queen's Bench (Winnipeg Centre) (the "*CCAA Court*") a plan of compromise or arrangement dated May 21, 2014 (as amended from time to time, the "*Consolidated CCAA Plan*") pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA").

The Consolidated CCAA Plan contemplates, among other things, a distribution of any surplus of the Available Funds to Unitholders of Arctic Glacier Income Fund, based on their respective Pro Rata Shares, free and clear of any Claims of Affected Creditors.

NOTICE IS ALSO HEREBY GIVEN that a meeting of the Unitholders (the "*Unitholders' Meeting*") will be held at [location•], on August 11, 2014 beginning at 10:00 a.m. (Toronto time), for the purpose of considering and, if thought advisable by Unitholders, voting in favour of, with or without variation, a resolution to approve the Consolidated CCAA Plan and to transact such other business as may properly come before the Unitholders' Meeting or any adjournment thereof. The Unitholders' Meeting is being held pursuant to an Order of the Court made on May 21, 2014 by the Honourable Madam Justice Spivak (the "*Meeting Order*").

The quorum for the Unitholders' Meeting has been set by the Meeting Order as one (1) Registered Unitholder present at such meeting in person (or represented by proxy) or one (1) Beneficial Unitholder represented by proxy, and in each case entitled to vote on the resolution to approve, among other things, the Consolidated CCAA Plan.

To become effective, in respect of the Unitholders, the proposed resolution to, among other things, approve the Consolidated CCAA Plan, must receive the affirmative votes of more than 66 2/3% of the votes attached to the Trust Units represented at the Unitholders' Meeting and cast in accordance with the Meeting Order. Pursuant to the Meeting Order, the vote on the Consolidated CCAA Plan at the Creditors' Meeting is deemed to have been decided unanimously in

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favour of the resolution to approve the Consolidated CCAA Plan. The Consolidated CCAA Plan must also be sanctioned by a final order of the CCAA Court under the CCAA.

Please note that the deemed vote by Affected Creditors in favour of the resolution to approve the Consolidated CCAA Plan does not affect the ability of any Affected Creditor to make submissions at any motion to sanction the Consolidated CCAA Plan, including in respect of the quantum of the Unresolved Claims Reserve or in respect of the proposed treatment of interest afforded to the Proven Claims that will be set out in the order being sought to sanction the Consolidated CCAA Plan.

ALSO PLEASE NOTE THAT MS. PEGGY JOHNSON HAS SPECIFICALLY SOUGHT AN INCREASE IN THE QUANTUM OF THE UNRESOLVED CLAIMS RESERVE DESCRIBED IN THE MONITOR'S FIFTEENTH REPORT IN THE AMOUNT OF APPROXIMATELY CDN$12 MILLION. SUCH AN INCREASE WOULD RESULT IN AN UNRESOLVED CLAIMS RESERVE OF APPROXIMATELY US$16.83 MILLION AND APPROXIMATELY CDN$23.5 MILLION. THIS ISSUE WILL BE DEALT WITH AT THE SANCTION HEARING SCHEDULED FOR SEPTEMBER 5, 2014.

NOTICE IS ALSO HEREBY GIVEN that the order sanctioning the Consolidated CCAA Plan will be sought in a motion to be brought by the Applicants on September 5, 2014, or such later date as is set by the CCAA Court, which date shall also be posted on the website of the court-appointed Monitor as set out below. At that time, the Applicants will also seek the other relief specified in the Consolidated CCAA Plan. Subject to the satisfaction of the conditions to implementation of the Consolidated CCAA Plan, all Unitholders will then receive the treatment set out in the Consolidated CCAA Plan unless otherwise ordered by the CCAA Court.

Accompanying this notice is a Unitholders' Proxy or Voting Instruction Form that you will need to vote by proxy.

The following documents (collectively, "*Proxy Materials*") should be reviewed by Unitholders and can be accessed through the website maintained by the Monitor at http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries (the "*Website*"*):*

1. Voting Instructions to Unitholders;

2. Unitholders' Proxy;

3. the Consolidated CCAA Plan proposed by the Applicants;

4. the Monitor's Fifteenth Report; and

5. the Meeting Order.

All Unitholders are reminded to review the Proxy Materials before voting.

Additional Information

The Monitor's address for the purpose of obtaining any additional information or materials related to the Unitholders' Meeting or asking any questions regarding the process is:

Alvarez & Marsal Canada Inc., Court-Appointed Monitor of the Arctic Glacier Parties

Royal Bank Plaza, South Tower

200 Bay Street, Suite 2900

P.O. Box 22

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Toronto ON M5J 2J1

Canada

Attention: Melanie MacKenzie

Tel: 416-847-5158

Fax: 416-847-5201

mmackenzie@alvarezandmarsal.com

This notice is given by the Arctic Glacier Parties pursuant to the Meeting Order.

You may view copies of the documents relating to this process on the Website. Please continue to monitor the Website for updates regarding this CCAA proceeding.

Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Consolidated CCAA Plan.

DATED this • day of •, 2014.

Schedule "a"

Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

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Arctic Glacier Services Inc.

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Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

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Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "A"

Voting Instructions to Unitholders

•, 2014

TO: UNITHOLDERS OF ARCTIC GLACIER INCOME FUND

RE: Meeting of the Unitholders to consider and vote on a resolution to, among other things, approve the Applicants' consolidated plan of compromise or arrangement dated May 21, 2014 (as amended, supplemented or restated from time to time in accordance with the terms therein) pursuant to the Companies' Creditors Arrangement Act (Canada) (the "Consolidated CCAA Plan")

The following documents should be reviewed, as applicable, and can be accessed through the website maintained by the Monitor at http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries:

1. Notice to Unitholders;

2. a blank form of Unitholders' Proxy and completion instructions;

3. the Consolidated CCAA Plan proposed by the Applicants;

4. the Monitor's Fifteenth Report; and

5. the Meeting Order.

Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Consolidated CCAA Plan.

The purpose of these materials is to provide you with the documents required to facilitate the determination and settlement of what you may be entitled to pursuant to the Consolidated CCAA Plan and to enable you to consider the Consolidated CCAA Plan and vote to accept or reject the Consolidated CCAA Plan at the meeting of the Unitholders to be held at [location •], on August 11, 2014 beginning at 10:00 a.m. (Toronto time) (the "*Unitholders' Meeting*").

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Proxy

For Registered Unitholders that hold Trust Units solely for and on behalf of themselves that wish to vote at the Unitholders' Meeting and are not individuals or are individuals who will not be attending the Unitholders' Meeting in person, please complete and return the Unitholders' Proxy (in accordance with the instructions included therein). You are required to complete and return a Unitholders' Proxy (in accordance with the instructions included therein) if you wish to appoint a proxy to cast your vote at the Unitholders' Meeting. However, your failure to vote at the Unitholders' Meeting will not affect any right you have to receive any distribution that may be made to Unitholders under the Consolidated CCAA Plan.

For Beneficial Unitholders, please complete the Beneficial Unitholder voting instruction form(s) (each a "*VIF*") provided to you by your Nominee(s). You are required to complete and return the VIF(s) (in accordance with the instructions included therein) if you wish to cast your vote at the Unitholders' Meeting. However, your failure to vote at the Unitholders' Meeting will not affect any right you have to receive any distribution that may be made to Unitholders under the Consolidated CCAA Plan.

Further Information

If you have any questions regarding the process or any of the enclosed forms, please contact Alvarez & Marsal Canada Inc. at the following address:

Alvarez & Marsal Canada Inc., Court-Appointed Monitor of the Arctic Glacier Parties

Royal Bank Plaza, South Tower

200 Bay Street, Suite 2900

P.O. Box 22

Toronto ON M5J 2J1

Canada

Attention: Melanie MacKenzie

Tel: 416-847-5158

Fax: 416-847-5201

mmackenzie@alvarezandmarsal.com

This notice is given by the Arctic Glacier Parties pursuant to the Meeting Order. You may view copies of the documents relating to this process on the Monitor's website: http://www.alvarezandmarsal.com/arctic-glacier-incame-fund-arctic-glacier-inc-and-subsidiaries Please continue to monitor the Monitor's website for updates regarding this CCAA proceeding.

Schedule "A"

Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

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Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "E"

Proposed form of Unitholders' Proxy

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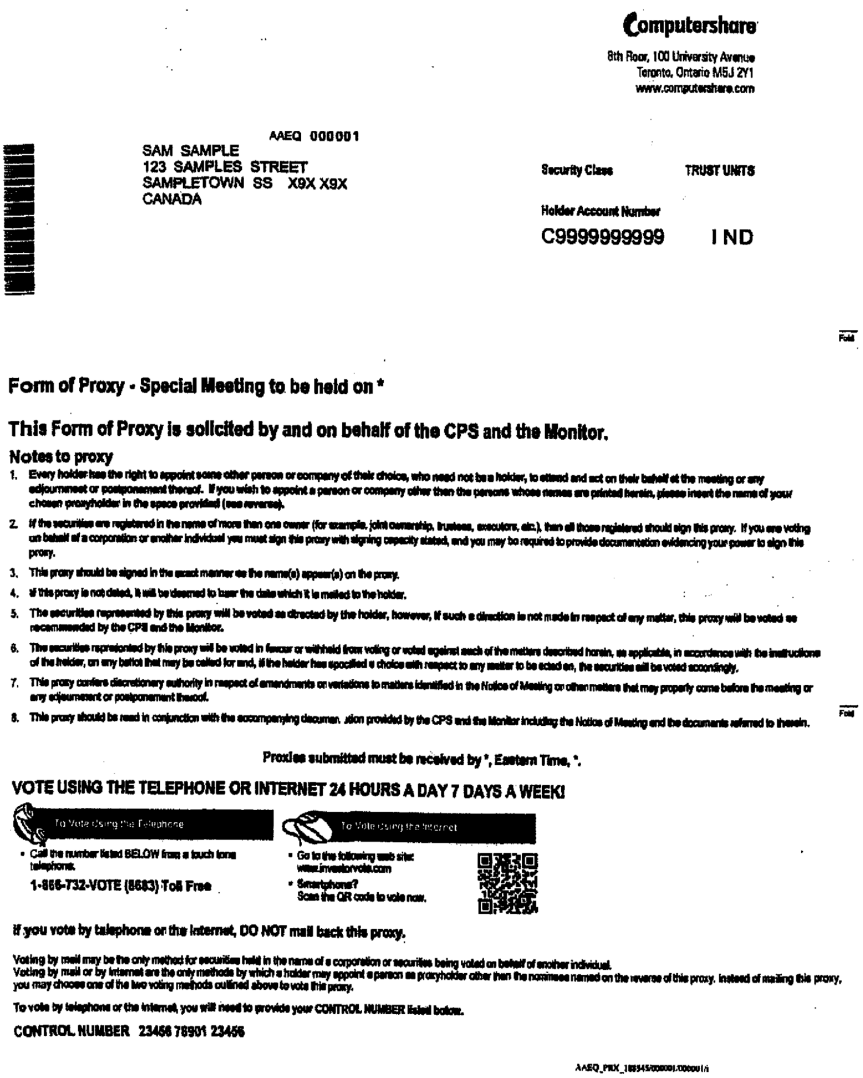

Computershare
8th Floor, 100 University Avenue
Toronto, Ontario M5J 2Y1
www.computershare.com

AAEQ 000001
SAM SAMPLE
123 SAMPLES STREET
SAMPLETOWN SS X9X X9X
CANADA

Security Class TRUST UNITS
Holder Account Number
C9999999999 IND

Fold

Form of Proxy - Special Meeting to be held on *

This Form of Proxy is solicited by and on behalf of the CPS and the Monitor.

Notes to proxy

1. Every holder has the right to appoint some other person or company of their choice, who need not be a holder, to attend and act on their behalf at the meeting or any adjournment or postponement thereof. If you wish to appoint a person or company other than the persons whose names are printed herein, please insert the name of your chosen proxyholder in the space provided (see reverse).
2. If the securities are registered in the name of more than one owner (for example, joint ownership, trustees, executors, etc.), then all those registered should sign this proxy. If you are voting on behalf of a corporation or another individual you must sign this proxy with signing capacity stated, and you may be required to provide documentation evidencing your power to sign this proxy.
3. This proxy should be signed in the exact manner as the name(s) appear(s) on the proxy.
4. If this proxy is not dated, it will be deemed to bear the date on which it is mailed to the holder.
5. The securities represented by this proxy will be voted as directed by the holder, however, if such a direction is not made in respect of any matter, this proxy will be voted as recommended by the CPS and the Monitor.
6. The securities represented by this proxy will be voted in favour or withheld from voting or voted against each of the matters described herein, as applicable, in accordance with the instructions of the holder, on any ballot that may be called for and, if the holder has specified a choice with respect to any matter to be acted on, the securities will be voted accordingly.
7. This proxy confers discretionary authority in respect of amendments or variations to matters identified in the Notice of Meeting or other matters that may properly come before the meeting or any adjournment or postponement thereof.
8. This proxy should be read in conjunction with the accompanying documen ation provided by the CPS and the Monitor including the Notice of Meeting and the documents referred to therein.

Fold

Proxies submitted must be received by *, Eastern Time, *.

VOTE USING THE TELEPHONE OR INTERNET 24 HOURS A DAY 7 DAYS A WEEK!

To Vote Using the Telephone

- Call the number listed BELOW from a touch tone telephone.

1-866-732-VOTE (8683) Toll Free

To Vote Using the Internet

- Go to the following web site: www.investorvote.com
- Smartphone? Scan the QR code to vote now.

If you vote by telephone or the Internet, DO NOT mail back this proxy.

Voting by mail may be the only method for securities held in the name of a corporation or securities being voted on behalf of another individual.
Voting by mail or by Internet are the only methods by which a holder may appoint a person as proxyholder other than the nominees named on the reverse of this proxy. Instead of mailing this proxy, you may choose one of the two voting methods outlined above to vote this proxy.

To vote by telephone or the Internet, you will need to provide your CONTROL NUMBER listed below.

CONTROL NUMBER 23456 78901 23456

AAEQ_PRX_[illegible]

Graphic 1

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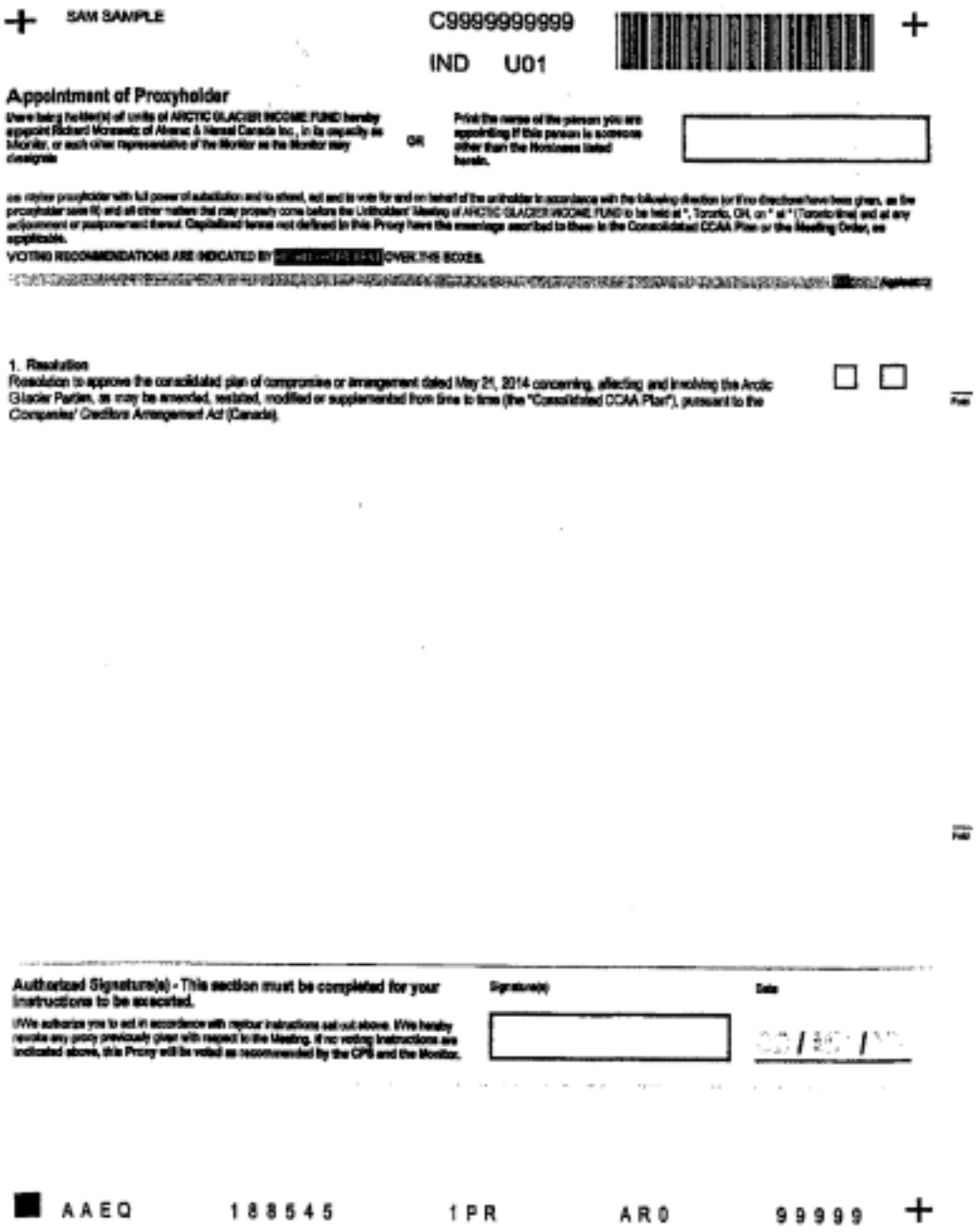
SAM SAMPLE

C9999999999

IND U01

Appointment of Proxyholder

OR

Print the name of the person you are appointing if this person is someone other than the Nominees listed herein.

1. Resolution

Resolution to approve the consolidated plan of compromise or arrangement dated May 21, 2014 concerning, affecting and involving the Arctic Glacier Parties, as may be amended, restated, modified or supplemented from time to time (the "Consolidated CCAA Plan"), pursuant to the Companies' Creditors Arrangement Act (Canada).

Authorized Signature(s) - This section must be completed for your instructions to be executed.

Signature(s)

Date

AAEQ 188545 1PR ARO 99999

Graphic 2

Schedule "F"

Proposed Form of Master Ballot.

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

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MASTER BALLOT FOR ACCEPTING OR REJECTING THE CONSOLIDATED PLAN OF COMPROMISE OR ARRANGEMENT OF THE APPLICANTS

MASTER BALLOT FOR VOTING TRUST UNITS ISSUED BY ARCTIC GLACIER INCOME FUND pursuant to the Second Amended and Restated Declaration of Trust made as of December 6, 2004

(CUSIP Number 039675)

THE *VOTING DEADLINE* BY WHICH THIS MASTER BALLOT MUST BE *ACTUALLY RECEIVED* BY THE MONITOR, ALVAREZ & MARSAL CANADA INC., *IS 5:00 P.M., TORONTO TIME ON AUGUST 8, 2014 OR ONE (1) BUSINESS DAY PRIOR TO THE DATE OF ANY ADJOURNED UNITHOLDERS' MEETING.* IF YOUR MASTER BALLOT IS NOT *ACTUALLY RECEIVED* ON OR BEFORE THE VOTING DEADLINE, THE VOTES REPRESENTED BY YOUR MASTER BALLOT MAY *NOT* BE COUNTED.

This Master Ballot is to be used by you, the Transfer Agent, on behalf of beneficial owners ("*Beneficial Unitholders*") of the units (the "*Trust Units*") issued by Arctic Glacier Income Fund pursuant to the Second Amended and Restated Declaration of Trust made as of December 6, 2004 to transmit the votes of such Beneficial Unitholders in respect of their Trust Unite to accept or reject the consolidated plan of compromise or arrangement of the Applicants dated May 21, 2014 (as amended, supplemented or restated from time to time in accordance with the terms therein) under the *Companies' Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36, as amended (the "*Consolidated CCAA Plan*"). Capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Consolidated CCAA Plan or the Meeting Order, as applicable. The Consolidated CCAA Plan can be accessed through the website maintained by the Monitor at: http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-inc-and-subsidiaries. Before you transmit such votes, please review the Monitor's Fifteenth Report carefully, along with the voting procedures explained in the Notice to Unitholders, the Meeting Order and this Master Ballot.

PLEASE READ AND FOLLOW THE ATTACHED INSTRUCTIONS CAREFULLY. COMPLETE, SIGN, AND DATE THIS MASTER BALLOT, AND RETURN IT SO THAT IT IS ACTUALLY RECEIVED BY THE MONITOR, ALVAREZ & MARSAL CANADA INC., ON OR BEFORE THE VOTING DEADLINE OF 5:00 P.M., TORONTO TIME ON AUGUST 8. 2014 OR ONE (1) BUSINESS DAY PRIOR TO THE DATE OF ANY ADJOURNED UNITHOLDERS' MEETING. IF THIS MASTER BALLOT IS NOT COMPLETED, SIGNED, AND ACTUALLY RECEIVED BY THE MONITOR PRIOR TO THE EXPIRATION OF THE VOTING DEADLINE, THEN THE VOTES TRANSMITTED BY THIS MASTER BALLOT MAY NOT BE COUNTED.

Item 1. Authority of the Transfer Agent. Pursuant to the Meeting Order, (a) Beneficial Unitholders that wish to vote shall complete a VIF (in accordance with the instructions attached thereto), which Nominees will use to complete Nominee Ballots; (b) Registered Unitholders that hold Trust Units solely for and on behalf of themselves may vote by completing a Unitholders' Proxy; and (c) the Transfer Agent shall transfer the information contained in the Nominee Ballots and the Unitholders' Proxies to this Master Ballot and return this Master Ballot by courier or email to the Monitor.

Item 2. Transmittal of Voting Instructions. The undersigned transmits the following votes of Unitholders, in respect of their Trust Units, and certifies that votes reflected below were cast by Unitholders of such securities as of June 16, 2014, the Unitholder Record Date, whose votes are reflected in the Nominee Ballots and Unitholders' Proxies received by the Transfer Agent. (Indicate in the appropriate column the aggregate principal number of Trust Units voted to accept or reject the Consolidated CCAA Plan).

Please note: Each Beneficial Unitholder must vote all of his, her, or its Trust Units either to accept or reject the Consolidated CCAA Plan, and may not split such vote.

Number of Trust Units Voted to ACCEPT the Plan	*Number of Trust Unite Voted to REJECT the Plan*

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Item 3. Certification. By signing this Master Ballot, the undersigned certifies that each Beneficial Unitholder of Trust Units reflected in Item 2 above has been provided with a copy of the Notice to Unitholders and acknowledges that the solicitation of votes is subject to all the terms and conditions set forth in the Meeting Order.

Transfer Agent:

_____

(Print or Type)

Signature: _____

Name of Signatory: _____

Title: _____

Street Address: _____

City: _____

Province/State: _____

Postal Code/Zip Code: _____

Telephone Number: _____

Date Completed: _____

Instructions for Completing the Master Ballot

THIS MASTER BALLOT MUST BE FORWARDED IN AMPLE TIME TO BE ACTUALLY RECEIVED BY THE MONITOR, ALVAREZ & MARSAL CANADA INC., ON OR BEFORE THE VOTING DEADLINE OF 5:00 P.M., TORONTO TIME ON AUGUST 8, 2014 OR ONE (1) BUSINESS DAY PRIOR TO THE DATE OF ANY ADJOURNED UNITHOLDERS' MEETING. IF THIS MASTER BALLOT IS NOT COMPLETED, SIGNED, AND ACTUALLY RECEIVED BY THE MONITOR PRIOR TO THE EXPIRATION OF THE VOTING DEADLINE, THEN THE VOTES TRANSMITTED BY THIS MASTER BALLOT MAY NOT BE COUNTED.

THE MASTER BALLOT MAY BE FORWARDED TO THE MONITOR IN ANY OF THE FOLLOWING WAYS:

BY MAIL, OVERNIGHT COURIER OR HAND DELIVERY TO ALVAREZ & MARSAL CANADA INC., COURT APPOINTED MONITOR OF THE ARCTIC GLACIER PARTIES, ROYAL BANK PLAZA, SOUTH TOWER, 200 BAY STREET, SUITE 2900, P.O. BOX 22, TORONTO, ONTARIO, M5J 2J1, ATTENTION: MELANIE MACKENZIE; OR

BY E-MAIL AT MMACKENZIE@ALVAREZMARSAL.COM (PLEASE CONFIRM RECEIPT BY CALLING 416-847-5158).

IF YOU HAVE ANY QUESTIONS CONCERNING THE PROCEDURES FOR VOTING ON THE CONSOLIDATED CCAA PLAN, PLEASE CALL THE MONITOR AT 416-847-5158.

Voting Deadline:

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The Voting Deadline is *5:00 P.M., TORONTO TIME ON AUGUST 8. 2014 or one (1) Business Day prior to the date of any adjourned Unitholders' Meeting.* You must complete, sign, and return this Master Ballot so that it is *ACTUALLY RECEIVED* on or before the Voting Deadline by Alvarez & Marsal Canada Inc., at:

Alvarez & Marsal Canada Inc.

Court-Appointed Monitor of the Arctic Glacier Parties

Royal Bank Plaza, South Tower

200 Bay Street, Suite 2900

P.O. Box 22

Toronto ON M5J 2J1

Canada

Attention: Melanie MacKenzie

Tel: 416-847-5158

Fax: 416-847-5201

mmackenzie@alvarezandmarsal.com

This Master Ballot may also be transmitted via e-mail. If you are sending your Master Ballot by e-mail, please e-mail it to: mmackenzie@alvarezandmarsal.com and confirm receipt by calling: 416-847-5158. If you send your Master Ballot by e-mail, promptly send your original Master Ballot to Alvarez & Marsal Canada Inc. at the address listed above.

How to Vote:

With respect to all Nominee Ballots and Unitholders' Proxies sent to you, you must property complete the Master Ballot, as follows:

a. Indicate the votes to accept or reject the Consolidated CCAA Plan in Item 2 of this Master Ballot, as transmitted to you by the Nominee Ballots and Unitholders' Proxies. *IMPORTANT: UNITHOLDERS MAY NOT SPLIT THEIR VOTES. EACH UNITHOLDER MUST VOTE ALL HIS, HER, OR ITS TRUST UNITS EITHER* TO ACCEPT OR REJECT THE CONSOLIDATED CCAA PLAN. IF ANY UNITHOLDER HAS ATTEMPTED TO SPLIT SUCH VOTE, PLEASE CONTACT THE MONITOR IMMEDIATELY;

b. Review the certification in Item 3 of the Master Ballot;

c. Sign and date the Master Ballot and provide the remaining information requested in Item 3;

d. If additional space is required to respond to any item on the Master Ballot, please use additional sheets of paper clearly marked to indicate the applicable Item of the Master Ballot to which you are responding; and

e. Deliver the completed and executed Master Ballot so that it is *actually received* by the Monitor on or before the Voting Deadline. For each completed and executed Nominee Ballot or Unitholders' Proxy sent to you, forward such Nominee Ballot or Unitholders' Proxy (along with your Master Ballot) to Alvarez & Marsal Canada Inc. and retain a copy of such Nominee Ballot or Unitholders' Proxy in your files for at least one (1) year from the Voting Deadline.

Please Note:

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This Master Ballot is not a letter of transmittal and may not be used for any purpose other than to transmit votes to accept or reject the Consolidated CCAA Plan.

No Nominee Ballot, Unitholders' Proxy or Master Ballot shall constitute or be deemed a proof of claim, an assertion of a Claim or an admission by the Arctic Glacier Parties of the nature, validity or amount of any Claim or interest.

NOTHING CONTAINED HEREIN OR IN THE MEETING MATERIALS SHALL RENDER YOU OR ANY OTHER PERSON THE AGENT OF ANY ARCTIC GLACIER PARTY OR ALVAREZ & MARSAL CANADA INC., OR AUTHORIZE YOU OR ANY OTHER PERSON TO USE ANY DOCUMENT OR MAKE ANY STATEMENTS ON BEHALF OF ANY OF THEM WITH RESPECT TO THE CONSOLIDATED CCAA PLAN, EXCEPT FOR THE STATEMENTS CONTAINED IN THE MEETING MATERIALS.

IF YOU HAVE ANY QUESTIONS CONCERNING THE PROCEDURES FOR VOTING ON THE CONSOLIDATED CCAA PLAN, PLEASE CALL THE MONITOR AT 416-847-5158.

NO PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR ADVICE, OR TO MAKE ANY REPRESENTATION, OTHER THAN WHAT IS INCLUDED IN THE MEETING MATERIALS

Schedule "A"

Additional Applicants

Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

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Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "G"

Proposed form of Nominee Ballot

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

NOMINEE BALLOT FOR ACCEPTING OR REJECTING THE CONSOLIDATED PLAN OF COMPROMISE OR ARRANGEMENT OF THE APPLICANTS

NOMINEE BALLOT FOR VOTING TRUST UNITS ISSUED BY ARCTIC GLACIER INCOME FUND pursuant to the Second Amended and Restated Declaration of Trust made as of December 6, 2004

(CUSIP Number 039675)

THE *VOTING DEADLINE* BY WHICH THIS NOMINEE BALLOT MUST BE *ACTUALLY RECEIVED* BY THE TRANSFER AGENT IS 5:00 P.M., *TORONTO TIME ON AUGUST 7, 2014.* IF YOUR NOMINEE BALLOT IS NOT *ACTUALLY RECEIVED* ON OR BEFORE THE VOTING DEADLINE, THE VOTES REPRESENTED BY YOUR NOMINEE BALLOT MAY *NOT* BE COUNTED.

This Nominee Ballot is to be used by you, as a Nominee or a Nominee's agent, for beneficial owners ("*Beneficial Unitholders*") of the units (the "*Trust Units*") issued by Arctic Glacier Income Fund pursuant to the Second Amended and Restated Declaration of Trust made as of December 6, 2004, to transmit the votes of such Beneficial Unitholders in respect of their Trust Units to accept or reject the Plan of Compromise or Arrangement of the Applicants dated May 21, 2014 (as amended, supplemented or restated from time to time in accordance with the terms therein) under the *Companies' Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36, as amended (the "*Consolidated CCAA Plan*"). Capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Consolidated CCAA Plan or the Meeting Order, as applicable. The Consolidated CCAA Plan can be accessed through the website maintained by the Monitor at: http://www.alvarezandmarsal.com/arctic-glacier-income-fund-arctic-glacier-

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inc-and-subsidiaries. Before you transmit such votes, please review the Monitor's Fifteenth Report carefully, along with the voting procedures explained in the Notice to Unitholders, the Meeting Order and this Nominee Ballot.

PLEASE READ AND FOLLOW THE ATTACHED INSTRUCTIONS CAREFULLY. COMPLETE, SIGN, AND DATE THIS NOMINEE BALLOT, AND RETURN IT SO THAT IT IS ACTUALLY RECEIVED BY THE TRANSFER AGENT ON OR BEFORE THE VOTING DEADLINE OF 5:00 P.M., TORONTO TIME ON AUGUST 7. 2014 OR TWO (2) BUSINESS DAYS PRIOR TO THE DATE OF ANY ADJOURNED UNITHOLDERS' MEETING. IF THIS NOMINEE BALLOT IS NOT COMPLETED, SIGNED, AND ACTUALLY RECEIVED BY THE TRANSFER AGENT PRIOR TO THE EXPIRATION OF THE VOTING DEADLINE, THEN THE VOTES TRANSMITTED BY THIS NOMINEE BALLOT MAY NOT BE COUNTED.

Item 1. Certification. The undersigned certifies that as of June 16, 2014, the Unitholder Record Date, the undersigned (please check the applicable box):

- Is a broker, bank, or other nominee for the Beneficial Unitholders of the aggregate number of Trust Units listed in Item 2 below, or

- Is acting under a power of attorney and/or agency (a copy of which will be provided upon request) granted by a broker, bank, or other nominee for the Beneficial Unitholders of the aggregate number of Trust Units listed in Item 2 below, or

- Has been granted a proxy (an original of which is attached hereto) from a broker, bank or other nominee for the Beneficial Unitholders of the aggregate number of Trust Units listed in Item 2 below,

and, accordingly, has full power and authority to transmit the votes of the applicable Beneficial Unitholders to accept or reject the Consolidated CCAA Plan, on behalf of the Beneficial Unitholders of the Trust Units described in Item 2 below.

Item 2. The undersigned transmits the following votes of Beneficial Unitholders, in respect of their Trust Units, and certifies that votes reflected below were cast by Beneficial Unitholders of such securities as of June 16, 2014, the Unitholder Record Date, whose votes are reflected in the VIF tabulation provided to the Nominee by Broadridge Financial Services Inc. (Indicate in the appropriate column the aggregate principal number of Trust Units voted to accept or reject the Consolidated CCAA Plan).

Please note: Each Beneficial Unitholder must vote all his, her, or its Trust Units either to accept or reject the Consolidated CCAA Plan, and may not split such vote.

Number of Trust Units Voted to ACCEPT the Consolidated CCAA Plan	*Number of Trust Units Voted to REJECT the Consolidated CCAA Plan*

Item 3. Certification. By signing this Nominee Ballot, the undersigned certifies that each of the Beneficial Unitholders of Trust Units reflected in Item 2 above has been provided with a copy of the Notice to Unitholders and acknowledges that the solicitation of votes is subject to all the terms and conditions set forth in the Meeting Order.

Name of Nominee:

_____

(Print or Type)

Name of Proxy Holder or Agent for Nominee (if applicable):

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_____

(Print or Type)

Participant No.: _____

Signature: _____

Name of Signatory: _____

Title: _____

Street Address: _____

City: _____

Province/State: _____

Postal Code/Zip Code: _____

Telephone Number: _____

Date Completed: _____

Instructions for Completing the Nominee Ballot

THIS NOMINEE BALLOT MUST BE FORWARDED IN AMPLE TIME TO BE ACTUALLY RECEIVED BY THE TRANSFER AGENT, ON OR BEFORE THE VOTING DEADLTNE OF 5:00 P.M., TORONTO TIME ON AUGUST 7. 2014 OR TWO (2) BUSINESS DAYS PRIOR TO THE DATE OF ANY ADJOURNED UNITHOLDERS' MEETING. IF THIS NOMINEE BALLOT IS NOT COMPLETED, SIGNED, AND ACTUALLY RECEIVED BY THE TRANSFER AGENT PRIOR TO THE EXPIRATION OF THE VOTING DEADLINE, THEN THE VOTES TRANSMITTED BY THIS NOMINEE BALLOT MAY NOT BE COUNTED.

THIS NOMINEE BALLOT MAY BE FORWARDED TO THE TRANSFER AGENT IN ANY OF THE FOLLOWING WAYS;

•

IF YOU HAVE ANY QUESTIONS CONCERNING THE PROCEDURES FOR VOTING ON THE CONSOLIDATED CCAA PLAN, PLEASE CALL THE MONITOR AT 416-847-5158.

Voting Deadline:

The Voting Deadline is *5:00 P.M., TORONTO TIME ON AUGUST 7. 2014 or two (2) Business Days prior to the date of any adjourned Unitholders' Meeting*. You must complete, sign, and return this Nominee Ballot so that it is *ACTUALLY RECEIVED* on or before the Voting Deadline by the Transfer Agent at:

•

How to Vote:

With respect to voting information returned to you, you must properly complete the Nominee Ballot as follows:

a. Check the appropriate box in Item 1 on the Nominee Ballot;

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b. Indicate the votes to accept or reject the Consolidated CCAA Plan in Item 2 of this Nominee Ballot, as transmitted to you by Broadridge. *IMPORTANT: BENEFICIAL UNITHOLDERS MAY NOT SPLIT THEIR VOTES. EACH BENEFICIAL UNITHOLDER MUST VOTE ALL HIS, HER, OR ITS TRUST UNITS EITHER* TO ACCEPT OR REJECT THE CONSOLIDATED CCAA PLAN. IF ANY BENEFICIAL UNITHOLDER HAS ATTEMPTED TO SPLIT SUCH VOTE, PLEASE CONTACT THE MONITOR IMMEDIATELY. Any VIF which is validly executed but which does not indicate acceptance or rejection of the Consolidated CCAA Plan by the indicated Beneficial Unitholder or which impermissibly attempts to split a vote will not be counted;

c. Review the certification in Item 3 of the Nominee Ballot;

d. Sign and date the Nominee Ballot and provide the remaining information requested in Item 3;

e. If additional space is required to respond to any item on the Nominee Ballot, please use additional sheets of paper clearly marked to indicate the applicable Item of the Nominee Ballot to which you are responding;

f. Multiple Nominee Ballots may be completed and delivered to the Transfer Agent. Votes reflected by multiple Nominee Ballots will be counted except to the extent that the votes thereon are duplicative of other Nominee Ballots, If two or more Nominee Ballots are inconsistent, the latest Nominee Ballot actually received prior to the Voting Deadline will, to the extent of such inconsistency, supersede and revoke any prior Nominee Ballot. If more than one Nominee Ballot is submitted and the later Nominee Ballot supplements rather than supersedes the earlier Nominee Ballot(s), please mark the subsequent Nominee Ballot with the words "Additional Vote" or such other language as you customarily use to indicate an additional vote that is not meant to revoke an earlier vote; and

g. Deliver the completed and executed Nominee Ballot so that it is *actually received* by the Transfer Agent on or before the Voting Deadline.

Please Note:

This Nominee Ballot is not a letter of transmittal and may not be used for any purpose other than to transmit votes to accept or reject the Consolidated CCAA Plan. Holders should not surrender, at this time, certificates representing their Trust Units. The Monitor and the Transfer Agent will not accept delivery of any such certificates surrendered together with this Nominee Ballot.

No VIF or Nominee Ballot shall constitute or be deemed a proof of claim, an assertion of a Claim or an admission by the Arctic Glacier Parties of the nature, validity or amount of any Claim or interest.

NOTHING CONTAINED HEREIN OR IN THE MEETING MATERIALS SHALL RENDER YOU OR ANY OTHER PERSON THE AGENT OF ANY ARCTIC GLACIER PARTY OR THE MONITOR, OR AUTHORIZE YOU OR ANY OTHER PERSON TO USE ANY DOCUMENT OR MAKE ANY STATEMENTS ON BEHALF OF ANY OF THEM WITH RESPECT TO THE CONSOLIDATED CCAA PLAN, EXCEPT FOR STATEMENTS IN THE MEETING MATERIALS.

IF YOU HAVE ANY QUESTIONS CONCERNING THE PROCEDURES FOR VOTING ON THE PLAN, PLEASE CALL THE MONITOR AT 416-847-5158.

NO PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR ADVICE, OR TO MAKE ANY REPRESENTATION, OTHER THAN WHAT IS INCLUDED IN THE MATERIALS REFERRED TO IN THIS BALLOT.

Schedule "A"

Additional Applicants

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Arctic Glacier California Inc.

Arctic Glacier Grayling Inc.

Arctic Glacier Lansing Inc.

Arctic Glacier Michigan Inc.

Arctic Glacier Minnesota Inc.

Arctic Glacier Nebraska Inc.

Arctic Glacier Newburgh Inc.

Arctic Glacier New York Inc.

Arctic Glacier Oregon Inc.

Arctic Glacier Party Time Inc.

Arctic Glacier Pennsylvania Inc.

Arctic Glacier Rochester Inc.

Arctic Glacier Services Inc.

Arctic Glacier Texas Inc.

Arctic Glacier Vernon Inc.

Arctic Glacier Wisconsin Inc.

Diamond Ice Cube Company Inc.

Diamond Newport Corporation

Glacier Ice Company, Inc.

Ice Perfection Systems Inc.

ICEsurance Inc.

Jack Frost Ice Service, Inc.

Knowlton Enterprises, Inc.

Mountain Water Ice Company

R&K Trucking, Inc.

Winkler Lucas Ice and Fuel Company

Wonderland Ice, Inc.

Schedule "H"

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Proposed form of VIF

BROKER LOGO

BROKER ADDRESS
123 ANY STREET
ANY CITY/PROVINCE
A1A 1A1

1 OF 2
S91970 01 010 E: C
S:3 E:2 1/1 W
A:A V: 1

JOHN A. SAMPLE
123 ANY STREET
ANYCITY PR A1A 1A1
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

UNITHOLDERS' MEETING
ARCTIC GLACIER INCOME FUND

WHEN:
TUESDAY, AUGUST 12, 2014

WHERE:
BULLET POINT
TORONTO, ONTARIO

STEP 1 REVIEW YOUR VOTING OPTIONS

ONLINE: VOTE AT **PROXYVOTE.COM** USING YOUR COMPUTER OR MOBILE DATA DEVICE. YOUR CONTROL NUMBER IS LOCATED BELOW.

SCAN TO VIEW MATERIAL AND VOTE NOW →

BY TELEPHONE: YOU MAY ENTER YOUR VOTING INSTRUCTIONS BY TELEPHONE AT: **ENGLISH: 1-800-474-7493 OR FRENCH: 1-800-474-7501**

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REMINDER: PLEASE REVIEW THE FIFTEENTH REPORT BEFORE VOTING.

WE NEED TO RECEIVE YOUR VOTING INSTRUCTIONS AT LEAST ONE BUSINESS DAY BEFORE THE PROXY DEPOSIT DATE.

CONTROL NO.:→ 9999 9999 9999 9999 **PROXY DEPOSIT DATE:**

Dear Client:

A meeting is being held for securityholders of the above noted issuer.

1. You are receiving this Voting Instruction Form and the enclosed meeting materials as a beneficial owner of securities. You are a beneficial owner because we, as your intermediary, hold the securities in an account for you but not registered in your name.
2. **Votes are being solicited by or on behalf of the CPS and the Monitor.**
3. Even if you have declined to receive materials, a reporting issuer is entitled to deliver these materials to you and it is our responsibility to forward them. These materials are being sent at no cost to you.
4. Unless you attend the meeting and vote in person, your securities can only be voted by us as your Nominee in accordance with your instructions. We cannot vote for you if we do not receive your voting instructions. Please complete and return (or provide by one of the alternative available methods) the information requested in this form to provide your voting instructions to us promptly. We will issue a proxy on your behalf according to the voting instructions you provide, unless you elect to attend the meeting and vote in person.
5. When you give us your voting instructions, you acknowledge that:
   - You are the beneficial owner;
   - You are authorized to provide these voting instructions; and
   - You have read the material and the voting instructions on this form and the Meeting Materials.
   - This Voting Instruction Form revokes all other Voting Instruction Forms previously submitted in connection with the instructions to vote in this resolution.
6. You may not present this voting instruction form at the meeting in order to vote.
7. To attend the meeting and vote your units in person:
   - Write your name or the name of your designate to act on your behalf on the "Appointee" line on the other side of this form, sign and date the form, and return it by mail, or
   - Go to ProxyVote.com (if available) and insert the name in the "Appointee" section on the electronic ballot.

   You, or your designate, as the named "Appointee", must attend the meeting for your vote to be counted. When you or your designate arrive at the meeting, please register with the scrutineer or proxy tabulator. Unless you instruct otherwise, the person whose name is written in the space provided will have full authority to attend and otherwise act at, and present matters to, the meeting and any adjournment or postponement thereof, and vote on all matters that are brought before the meeting or any adjournment or postponement thereof, even if these matters are not set out in this form or the Fifteenth Report. Consult a legal advisor if you wish to modify the authority of that person in any way. If you require assistance, please contact the person who services your account.
8. If these voting instructions are given on behalf of a body corporate, set out the full legal name of the body corporate, the name and position of the person giving voting instructions on behalf of the body corporate and the address for service of the body corporate.
9. If the items listed in the Fifteenth Report are different from the items listed on the other side of this form, the Fifteenth Report will be considered correct.
10. In the absence of any specific instructions as to voting being provided by you on this form, the item(s) will be voted as recommended on the reverse of this form or as stated in the Fifteenth Report, except in the case of your appointment of an Appointee.
11. To ensure that your instructions are received in sufficient time to be processed, please ensure that the Voting Instruction Form is returned for processing or voted online at least one business day before the proxy deposit date noted above. Voting instructions received on the proxy deposit date or later may not be able to be included in the final tabulation.

If you have any questions or require help, please contact the person who services your account.

Disclosure of Information – Requesting Meeting Materials

By requesting meeting materials, your name and address may be provided to the issuer (or its agent) for mailing purposes.

Capitalized terms not defined in this Proxy have the meanings ascribed to them in the Consolidated CCAA Plan or the Meeting Order, as applicable.

PLEASE SEE OVER

Graphic 3

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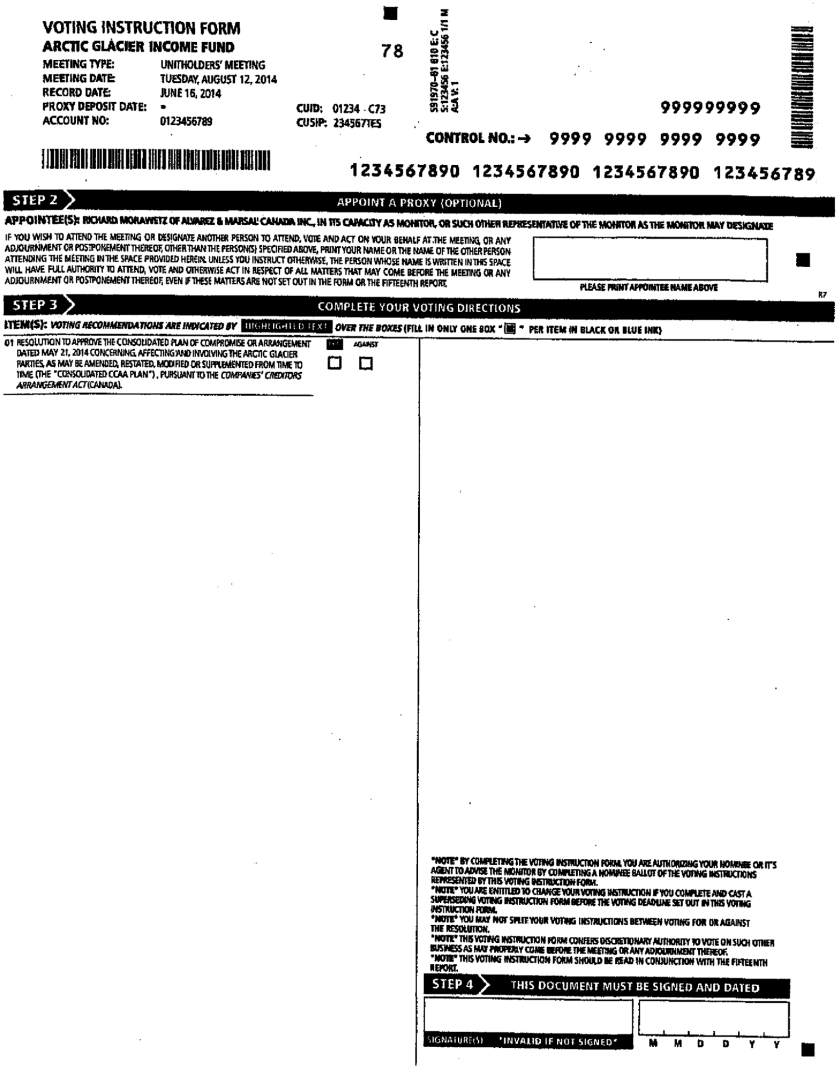

VOTING INSTRUCTION FORM
ARCTIC GLACIER INCOME FUND
MEETING TYPE: UNITHOLDERS' MEETING
MEETING DATE: TUESDAY, AUGUST 12, 2014
RECORD DATE: JUNE 16, 2014
PROXY DEPOSIT DATE: •
ACCOUNT NO: 0123456789
78
CUID: 01234 C73
CUSIP: 2345671ES
999999999
CONTROL NO.: → 9999 9999 9999 9999
1234567890 1234567890 1234567890 123456789

STEP 2 APPOINT A PROXY (OPTIONAL)

APPOINTEE(S): RICHARD MORAWETZ OF ALVAREZ & MARSAL CANADA INC., IN ITS CAPACITY AS MONITOR, OR SUCH OTHER REPRESENTATIVE OF THE MONITOR AS THE MONITOR MAY DESIGNATE

IF YOU WISH TO ATTEND THE MEETING OR DESIGNATE ANOTHER PERSON TO ATTEND, VOTE AND ACT ON YOUR BEHALF AT THE MEETING, OR ANY ADJOURNMENT OR POSTPONEMENT THEREOF, OTHER THAN THE PERSON(S) SPECIFIED ABOVE, PRINT YOUR NAME OR THE NAME OF THE OTHER PERSON ATTENDING THE MEETING IN THE SPACE PROVIDED HEREIN. UNLESS YOU INSTRUCT OTHERWISE, THE PERSON WHOSE NAME IS WRITTEN IN THIS SPACE WILL HAVE FULL AUTHORITY TO ATTEND, VOTE AND OTHERWISE ACT IN RESPECT OF ALL MATTERS THAT MAY COME BEFORE THE MEETING OR ANY ADJOURNMENT OR POSTPONEMENT THEREOF, EVEN IF THESE MATTERS ARE NOT SET OUT IN THE FORM OR THE FIFTEENTH REPORT.

PLEASE PRINT APPOINTEE NAME ABOVE

R7

STEP 3 COMPLETE YOUR VOTING DIRECTIONS

ITEM(S): *VOTING RECOMMENDATIONS ARE INDICATED BY* HIGHLIGHTED TEXT *OVER THE BOXES* (FILL IN ONLY ONE BOX "■" PER ITEM IN BLACK OR BLUE INK)

	FOR	AGAINST
01 RESOLUTION TO APPROVE THE CONSOLIDATED PLAN OF COMPROMISE OR ARRANGEMENT DATED MAY 21, 2014 CONCERNING, AFFECTING AND INVOLVING THE ARCTIC GLACIER PARTIES, AS MAY BE AMENDED, RESTATED, MODIFIED OR SUPPLEMENTED FROM TIME TO TIME (THE "CONSOLIDATED CCAA PLAN"), PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* (CANADA).	☐	☐

"NOTE" BY COMPLETING THE VOTING INSTRUCTION FORM, YOU ARE AUTHORIZING YOUR NOMINEE OR IT'S AGENT TO ADVISE THE MONITOR BY COMPLETING A NOMINEE BALLOT OF THE VOTING INSTRUCTIONS REPRESENTED BY THIS VOTING INSTRUCTION FORM.
"NOTE" YOU ARE ENTITLED TO CHANGE YOUR VOTING INSTRUCTION IF YOU COMPLETE AND CAST A SUPERSEDING VOTING INSTRUCTION FORM BEFORE THE VOTING DEADLINE SET OUT IN THIS VOTING INSTRUCTION FORM.
"NOTE" YOU MAY NOT SPLIT YOUR VOTING INSTRUCTIONS BETWEEN VOTING FOR OR AGAINST THE RESOLUTION.
"NOTE" THIS VOTING INSTRUCTION FORM CONFERS DISCRETIONARY AUTHORITY TO VOTE ON SUCH OTHER BUSINESS AS MAY PROPERLY COME BEFORE THE MEETING OR ANY ADJOURNMENT THEREOF.
"NOTE" THIS VOTING INSTRUCTION FORM SHOULD BE READ IN CONJUNCTION WITH THE FIFTEENTH REPORT.

STEP 4 THIS DOCUMENT MUST BE SIGNED AND DATED

SIGNATURE(S) *INVALID IF NOT SIGNED* M M D D Y Y

Graphic 4

Application allowed.

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TAB 3

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J. No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

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

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

Paperny J.

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

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.
S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.
F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.
G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.
C.J. Shaw, Q.C., for Unionized Employees.
T. Mallett and *C. Feasby*, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency

Headnote

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

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not

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oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Table of Authorities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

s. 167(1)(e) — considered

s. 167(1)(f) — considered

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

s. 183 — considered

s. 185 — considered

s. 185(2) — considered

s. 185(7) — considered

s. 234 — considered

Canada Transportation Act, S.C. 1996, c. 10
Generally — referred to

s. 47 — referred to

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

s. 2 "debtor company" — referred to

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

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

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

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

s. 12 — referred to

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

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

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and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

***Paperny J.*:**

I. Introduction

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

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

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

II. Background

Canadian Airlines and its Subsidiaries

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

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

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

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

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

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

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

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

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

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating

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lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

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

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

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

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

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *oneworldTM* Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

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

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

Initial Discussions with Air Canada

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

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

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

Offer by Onex

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

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

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

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

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

Offer by 853350

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

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million

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(as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

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

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

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

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

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
>
> b) sales for future air travel were down by approximately 10% compared to 1998;
>
> c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

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

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

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

38 Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest

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in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

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

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

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

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

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

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

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

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

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

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

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

The Restructuring Plan

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50 The Plan has three principal aims described by Canadian:

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

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

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

51 The proposed treatment of stakeholders is as follows:

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

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

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

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

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

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

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.

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

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

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

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

The Affected Unsecured Creditors fall into the following categories:

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

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

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

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

e. Claims of tax authorities against Canadian; and

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

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

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

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

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to

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the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

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

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

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

III. Analysis

59 Section 6 of the CCAA provides that:

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

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

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

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

1. Statutory Requirements

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

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
>
> (b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
>
> (c) the notice calling the meeting was sent in accordance with the order of the court;
>
> (d) the creditors were properly classified;
>
> (e) the meetings of creditors were properly constituted;
>
> (f) the voting was properly carried out; and
>
> (g) the plan was approved by the requisite double majority or majorities.

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

> (a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.
>
> (b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.
>
> (c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.
>
> (d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.
>
> (e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview*

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Inc. (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

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

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

> a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
>
> b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

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

> (a) consolidating all of the issued and outstanding common shares into one common share;
>
> (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
>
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
>
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
>
> (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
>
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

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

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

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

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

71 The relevant portions of section 167 provide as follows:

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

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

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

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

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

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

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

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

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

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

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without

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shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

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

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

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

Section 183 of the ABCA

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

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

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

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

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

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

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

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

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

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

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

3. Fair and Reasonable

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

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

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

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

a. The composition of the unsecured vote;

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

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

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e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

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

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

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

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);

2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and

3. Abstentions: 15 representing $968,036 in value.

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

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

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

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

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

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

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

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

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

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with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

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

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

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

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

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

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

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

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

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

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

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

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

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

CRAL

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

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed

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that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

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

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

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

International Routes

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

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

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

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

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The

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Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

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

Capital Loss Pools

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

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on

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speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

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

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

d. Oppression

Oppression and the CCAA

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

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

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

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

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

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak*

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Mines Ltd., *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

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

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

Oppression allegations by Resurgence

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

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

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

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

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

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

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proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

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

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

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

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

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

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

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

e. Unfairness to Shareholders

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

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

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

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

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

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

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

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Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

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

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

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

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

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

e. The Public Interest

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

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

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

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

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

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

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

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which

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addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

Application granted; counter-applications dismissed.

Footnotes

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

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TAB 4

2010 ONSC 4209
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5510, 2010 ONSC 4209, 191 A.C.W.S. (3d) 378, 70 C.B.R. (5th) 1

IN THE MATTER OF SECTION 11 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 CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities
David Byers, Marie Konyukhova for Monitor
Robin B. Schwill, Vince Mercier for Shaw Communications Inc.
Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for Special Committee of the Board of Directors
Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

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

Debtors were group of related companies that successfully applied for protection under Companies' Creditors Arrangement Act — Competitor agreed to acquire all of debtors' television broadcasting interests — Acquisition price was to be used to satisfy claims of certain senior subordinated noteholders and certain other creditors — All of television company's equity-based compensation plans would be terminated and existing shareholders would not receive any compensation — Remaining debtors would likely be liquidated, wound-up, dissolved, placed into bankruptcy, or otherwise abandoned — Noteholders and other creditors whose claims were to be satisfied voted overwhelmingly in favour of plan of compromise, arrangement, and reorganization — Debtors brought application for order sanctioning plan and for related relief — Application granted — All statutory requirements had been satisfied and no unauthorized steps had been taken — Plan was fair and reasonable — Unequal distribution amongst creditors was fair and reasonable in this case — Size of noteholder debt was substantial and had been guaranteed by several debtors — Noteholders held blocking position in any restructuring and they had been cooperative in exploring alternative outcomes — No other alternative transaction would have provided greater recovery than recoveries contemplated in plan — Additionally, there had not been any oppression of creditor rights or unfairness to shareholders — Plan was in public interest since it would achieve going concern outcome for television business and resolve various disputes.

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s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — referred to

s. 36 — considered

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for related relief.

***Pepall J.*:**

1 This is the culmination of the *Companies' Creditors Arrangement Act* [1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

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3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16 th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting

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preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

> (a) there must be strict compliance with all statutory requirements;
>
> (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (c) the Plan must be fair and reasonable.
>
> See *Canadian Airlines Corp., Re* [2]

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in

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respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Canadian Airlines Corp., Re*[3].

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Canadian Airlines Corp., Re*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

> (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
>
> (b) what creditors would have received on bankruptcy or liquidation as compared to the plan;
>
> (c) alternatives available to the plan and bankruptcy;
>
> (d) oppression of the rights of creditors;
>
> (e) unfairness to shareholders; and
>
> (f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is

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not unheard of. In *Armbro Enterprises Inc., Re*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

23 Similarly, in *Uniforêt inc., Re*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further

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safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* [8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. 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.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Air Canada, Re* [10] and *Calpine Canada Energy Ltd., Re* [11] I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods Inc., Re* [12] and *Laidlaw, Re* [13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;

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

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *A&M Cookie Co. Canada, Re*[14] and *MEI Computer Technology Group Inc., Re*[15]

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Application granted.

Footnotes

1 R.S.C. 1985, c. C-36 as amended.

2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

3 Ibid,at para. 64 citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993] O.J. No. 545 (Ont. Gen. Div.) and *Cadillac Fairview Inc., Re*, [1995] O.J. No. 274 (Ont. Gen. Div. [Commercial List]).

4 Ibid, at para. 3.

5 (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.).

6 *Ibid*, at para. 6.

7 (2003), 43 C.B.R. (4th) 254 (C.S. Que.).

8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).

9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

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10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).

12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).

13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).

14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/

15 [2005] Q.J. No. 22993 (C.S. Que.) at para. 9.

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TAB 5

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])

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Bank USA, National Association, Merrill Lynch International, Merill Lynch Capital Services, Inc., Swiss Re Financial Products Corporation, UBS AG
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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

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.

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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.

Table of Authorities

Cases considered by *R.A. Blair J.A.*:

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

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.) — considered

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 (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

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Cineplex Odeon Corp., Re (2001), 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) — followed

Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — followed

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

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Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

Fotinis Restaurant Corp. v. White Spot Ltd. (1998), 1998 CarswellBC 543, 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) — referred to

Guardian Assurance Co., Re (1917), [1917] 1 Ch. 431 (Eng. C.A.) — referred to

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

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — considered

NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CarswellOnt 4077, 1 B.L.R. (3d) 1, 181 D.L.R. (4th) 37, 46 O.R. (3d) 514, 47 C.C.L.T. (2d) 213, 127 O.A.C. 338, 15 C.B.R. (4th) 67 (Ont. C.A.) — distinguished

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

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

Pacific Coastal Airlines Ltd. v. Air Canada (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — distinguished

Quebec (Attorney General) v. Bélanger (Trustee of) (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue)* 8 C.B.R. 579 (Canada P.C.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1933), [1934] 1 D.L.R. 43, 1933 CarswellNat 47, [1933] S.C.R. 616 (S.C.C.) — referred to

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo &*

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Rizzo Shoes Ltd. (Bankrupt), Re 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — considered

Royal Penfield Inc., Re (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (C.S. Que.) — referred to

Skydome Corp., Re (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

Steinberg Inc. c. Michaud (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229, 1993 CarswellQue 2055, 42 C.B.R. (5th) 1 (C.A. Que.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Stelco Inc., Re (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

T&N Ltd., Re (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

Statutes considered:

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

Business Corporations Act, R.S.O. 1990, c. B.16
s. 182 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 192 — referred to

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

Companies Act, 1985, c. 6
s. 425 — referred to

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

s. 4 — considered

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

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s. 6 — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
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

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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

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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

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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.

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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 25 th . 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

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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

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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.

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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:

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> 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

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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

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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).

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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.

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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.

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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

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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.

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. . . . .

> [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.

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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

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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.

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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

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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.

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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

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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

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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).

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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 6

2011 ONSC 2750
Ontario Superior Court of Justice

Nelson Financial Group Ltd., Re

2011 CarswellOnt 3100, 2011 ONSC 2750, 202 A.C.W.S. (3d) 444, 79 C.B.R. (5th) 307

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

And In the Matter of a Proposed Plan of Compromise or Arrangement of Nelson Financial Group Ltd. (Applicant)

Morawetz J.

Heard: April 20, 2011
Judgment: April 21, 2011
Written reasons: May 6, 2011
Docket: 10-8630-00CL

Counsel: Richard B. Jones, Douglas Turner, Q.C. for Interim Operating Officer and Noteholders
James H. Grout, Seema Aggarwal for Monitor, A. John Page & Associates Inc.
Jane Waechter, Swapna Chandra for Ontario Securities Commission

Subject: Insolvency

Headnote

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

Debtor company filed application under Companies' Creditors Arrangement Act — Debtor's management committed wrongful acts — Debtor's management was replaced by interim operating officer (IOO) — IOO developed business plan and plan of arrangement that would allow debtor to stay in business — Plan gave creditors buy-out option and option to receive new shares and debentures — Creditors received information circular regarding business plan, financial projections and management — Ninety-three percent of creditor claims were voted — Plan was approved by over 96 percent of creditors voting representing 94.9 percent of claim value — Debtor brought motion to approve plan of arrangement — Motion granted — Test of whether debtor complied with statutory requirements and previous court orders was applied for period subsequent to appointment of IOO — Since IOO was appointed, debtor met compliance test — Debtor did not do anything that was not authorized by Act — Plan was fair and reasonable — Monitor reported plan was fair and reasonable — Creditors had benefit of information and voted overwhelmingly in favour of plan — Appropriate considerations were taken into account.

Table of Authorities

Cases considered by *Morawetz J.*:

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

Statutes considered:

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

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2011 ONSC 2750, 2011 CarswellOnt 3100, 202 A.C.W.S. (3d) 444, 79 C.B.R. (5th) 307

Generally — referred to

MOTION by debtor company to sanction plan of arrangement .

***Morawetz J.*:**

1 The motion to sanction the Plan of Arrangement of Nelson Financial Group Ltd. ("Nelson") was heard on April 20, 2011.

2 On April 21, 2011, following consideration of the supplementary affidavit of Richard B. Jones, sworn April 20, 2011, the record was endorsed as follows:

> Motion granted. The Plan is sanctioned. An order has been signed in the form presented, as amended, which includes sealing provision relating to Exhibit B to the Thirteenth Report of the Monitor. Reasons will follow.

3 These are the reasons.

4 At the outset, I note that this *Companies' Creditors Arrangement Act* ("CCAA") application proceeded in a somewhat unconventional manner. These reasons reflect the very specific facts of the application.

5 Nelson filed its application under the CCAA on March 22, 2010. Nelson had sold to members of the public some $80 million of term promissory notes and preferred shares. As of the date of filing, over $37 million of the promissory notes were outstanding. The sole director, voting shareholder and president of Nelson was Mr. Marc Boutet.

6 Under the Initial Order of March 23, 2010, A. John Page & Associates Inc. was appointed as Monitor of the Applicant (the "Monitor").

7 By order of Pepall J., made on consent of the Applicant and the Monitor on June 15, 2010, Douglas Turner, Q.C. was appointed as Representative Counsel for the holders of the notes issued by Nelson and Richard B. Jones was appointed as his Special Counsel.

8 The restructuring was commenced as an application made by Nelson under the direction and control of incumbent management and ownership.

9 Commencing in September 2010, Representative Counsel sought the replacement of management, as issues had been raised questioning the competency and *bona fides* of management.

10 In October 2010, the Representative Counsel's Noteholder Advisory Committee canvassed noteholders and obtained confirmation from more than two-thirds in claim amount that they would not support any plan of arrangement that continued the incumbency of Mr. Boutet.

11 On November 11, 2010, Mr. Boutet resigned all of his positions with Nelson, surrendered his shares for cancellation and released all claims against Nelson held by him or any of his associated corporations. In exchange, he was provided with a limited release. The arrangements in respect of his departure were approved by order of Pepall J. made November 22, 2010. In that same decision, Pepall J. appointed a substantial shareholder, Ms. Sherri Townsend, as the Interim Operating Officer ("IOO"). Under the terms of her appointment, the IOO was granted full powers as the Chief Executive Officer and was given particular authority to review the circumstances of the debtor company and its assets and, if practicable, to develop a plan for its restructuring.

12 Under the direction of the IOO, a business plan was developed and a Plan of Compromise and Arrangement was devised.

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13 Counsel for the IOO takes the position that since the business of Nelson came under the authority and direction of the IOO, Nelson has conducted itself in full compliance with the requirements of the CCAA and of the court orders made in these proceedings. Specifically, counsel submits that the IOO has performed all of the duties and responsibilities placed upon her by the order of November 22, 2010 and by subsequent orders of the court.

14 Under the Plan, creditors have the following options:

(a) creditors with claims for $1,000 or less will receive a cash payment for the full amount of their claims (the "Convenience Class");

(b) creditors may elect to receive a cash payment of 25% of their claims in full satisfaction of their claims and all of their rights against the Applicant or any other person in respect of their claims (the "Cash Exit Option"); and

(c) creditors who are not in the Convenience Class and who do not elect the Cash Exit Option will receive:

(i) capital recovery debentures for 25% of their claim;

(ii) new special shares with a redemption price of 25% of their claim; and

(iii) one common share of the Applicant for each $100 of their claims (the "General Plan Option").

15 The Plan was substantially finalized on February 11, 2011.

16 The Plan Filing and Meeting Order was granted on March 4, 2011.

17 From and after the appointment of the IOO, the relationship as between the Monitor, the IOO and their respective counsel became strained, if not dysfunctional. Further details in respect of this relationship are set out in the materials served by the parties in the period leading up to the granting of the Plan Filing and Meeting Order on March 4, 2011.

18 Subsequent to the granting of the Plan Filing and Meeting Order, issues were raised by Ms. Brenda Bissell, in her capacity as power of attorney for Gloria Bissell, who holds promissory notes of Nelson in her own name and also in her capacity as the owner of Globis Administrators Inc. The concerns of Ms. Bissell are set out in her affidavit of April 12, 2011.

19 Ms. Bissell, through counsel, attended before Mesbur J. on April 13, 2011 in respect of a request for scheduling of a motion seeking to adjourn the meeting of creditors scheduled by the Plan Filing and Meeting Order for April 16, 2011.

20 The endorsement of Mesbur J. reads as follows:

> Brenda Bissell P.A. [Power of Attorney] for a noteholder wishes to move urgently to postpone the vote on the proposed Plan of Arrangement, etc. scheduled for Saturday, April 16, 2011. Essentially, she wishes the opportunity to communicate her position and information to the other Noteholders. A solution has emerged at this 9:30 that will avoid both an urgent motion and any necessity to delay the vote.
>
> On consent:
>
> 1. Special Counsel, Mr. Jones, will forthwith (i.e. today, as soon as possible) email all the Noteholders directing them to Ms. Bissell's motion materials posted on the Monitor's website, and suggesting they review the material before the meeting.
>
> 2. Mr. Page will provide Mr. Yellin today with a copy of the unredacted claims procedure memorandum: (done)

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3. Mr. Yellin will provide Mr. Jones with an electronic copy of the communication his client wishes to send to the Noteholders and Mr. Jones will immediately email it to all the Noteholders, subject to the communication not containing defamatory, libellous or illegal statements.

4. If the plan is approved, Ms. Bissell's motion materials may be filed for the purposes of the sanction hearing and considered as a dissenting creditor's responding materials on the sanction hearing.

"Mesbur J."

21 Counsel to the IOO stated that all required steps, directed by the court in the Plan Filing and Meeting Order, have been taken by the IOO and the Monitor.

22 About 93% of the creditor claims were voted and the Plan of Compromise and Arrangement including its technical amendments to April 12, 2011, was approved by over 96% of the creditors voting representing 94.9% of the claim value voted.

23 For a plan to be sanctioned, the application must meet the following three tests:

(i) there has been strict compliance with all statutory requirements and adherence to 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.

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

24 Counsel to the IOO submits that the circumstances of this case are atypical. Until late 2010, the Applicant was under the direction of Mr. Boutet who, counsel submits, appears to have committed a number of wrongful and fraudulent acts. The IOO, in her First Report dated February 18, 2011, set out some of those acts that had come to her attention. Counsel advised that there can be no assurance provided by the IOO or the Monitor that there was strict compliance with the court orders or the CCAA by the Applicant prior to the appointment of the IOO. Counsel submitted that in a case where the control of the debtor company is changed in the course of the CCAA proceedings, the tests of compliance must be applied with reference to the conduct of the persons who are directing the debtor company and the persons who will benefit from the exercise of the court's discretion at the time of the application for sanctioning.

25 In the circumstances of this case, I accept this submission and consider it appropriate to apply the test as set out in *Sammi Atlas*, in respect of compliance with statutory requirements and orders of the court, for the period subsequent to the appointment of the IOO.

26 Based on what was disclosed in the Motion Record filed April 19, 2011, the test as set out in *Sammi Atlas* would appear to have been satisfied.

27 However, it is also necessary to consider the Motion Record submitted by counsel on behalf of Ms. Bissell. In the hearing, I inquired as to whether counsel had any comment in respect of the materials filed by Ms. Bissell, as it was apparent that neither Ms. Bissell nor her counsel were in attendance.

28 In response to my inquiries, counsel advised that there had been the aforementioned attendance before Mesbur J. on April 13, 2011.

29 I find it surprising that the directions ordered by Mesbur J. were not placed in the materials put before the court. In submissions, Mr. Jones advised that there had been full compliance with respect to the directions issued by Mesbur J.

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He subsequently filed, in response to my request, his affidavit setting forth complete details of the steps taken to comply with the directions of Mesbur J.

30 Having had the opportunity to review the affidavit of Mr. Jones, I am satisfied that, in the period following the application of the IOO, there has been compliance with all statutory requirements and adherence to all previous orders of the court. Further, I am satisfied that it appears that there has been nothing done or purported to be done that has not been authorized by the CCAA.

31 With respect to the third part of the test, namely, whether the plan is fair and reasonable, the Plan does extinguish the equity interests of shareholders. Counsel to the IOO submits that this is just and equitable as the liquidation analysis of the Monitor, as set out in the Thirteenth Report as of April 6, 2011, confirms that there is no reasonable basis on which there is any economic value or interest in any shareholding of the Applicant at this time.

32 Further, the Monitor, in its Thirteenth Report, finds that the Plan is "fair and reasonable".

33 In addition, counsel to the IOO points out that the IOO and Representative Counsel provided an information circular to the creditors including specific information as to the business plan, financial projections and management of Nelson if the plan should be approved. Further, the circular was reviewed by the Ontario Securities Commission and was found to be unobjectionable.

34 Counsel also submits that the Plan proposed and approved by the creditors is fair and reasonable on its face and the only persons who receive any benefit under the Plan are the creditors and those benefits are strictly proportionate to the proven claim interests of each creditor.

35 In its Report, the Monitor makes a recommendation to the creditors and the court. The Monitor clearly states that the creditors of Nelson are faced with a choice. They could choose to approve the Plan which has both upsides and downsides. The upside is that if the new board of directors and new management can successfully carry on the business, then, in time, the creditors may recover the full amount of their claim and perhaps make a profit. However, the downside is that, if not successful, then the corporation may end up being wound up and creditors may recover less than the approximately 42% recovery over five years that is estimated by the Monitor in a bankruptcy or other form of liquidation at this time.

36 In this case, creditors had the benefit of the information circular and the supplementary materials posted on the website and voted overwhelmingly in favour of the Plan.

37 In determining whether a plan is fair and reasonable, the following are relevant considerations:

1. The claims must have been properly classified; there must be no secret arrangements to give an advantage to a creditor or creditors; 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 of rights of certain creditors.

5. Unfairness to shareholders.

6. The court will consider the public interest.

(See N§45, The 2011 Annotated Bankruptcy and Insolvency Act (Houlden, Morawetz and Sarra)

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38 I am satisfied that the foregoing considerations have been taken into account and, I am satisfied that, in these circumstances, the Plan can be considered fair and reasonable.

39 Accordingly, the motion is granted. An order has been signed approving and sanctioning the Plan and the Articles of Reorganization and providing for its implementation.

Motion granted.

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TAB 7

2012 ONSC 7050
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 15913, 2012 ONSC 7050, 224 A.C.W.S. (3d) 21

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 Sino-Forest Corporation, Applicant

Morawetz J.

Heard: December 7, 2012
Judgment: December 12, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Sino-Forest Corporation
Derrick Tay, Jennifer Stam, Cliff Prophet, for Monitor, FTI Consulting Canada Inc.
Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholders
Kenneth Rosenberg, Kirk Baert, Max Starnino, A. Dimitri Lascaris, for Class Action Plaintiffs
Won J. Kim, James C. Orr, Michael C. Spencer, Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP, Comité Syndicale Nationale de Retraite Bâtirente Inc.
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young Inc.
Peter Green, Ken Dekkar, for BDO Limited
Edward A. Sellers, Larry Lowenstein, for Board of Directors of Sino-Forest Corporation
John Pirie, David Gadsden, for Poyry (Beijing)
James Doris, for Plaintiff in New York Class Action
David Bish, for Underwriters
Simon Bieber, Erin Pleet, for David Horsley
James Grout, for Ontario Securities Commission
Emily Cole, Joseph Marin, for Allen Chan
Susan E. Freedman, Brandon Barnes, for Kai Kit Poon
Paul Emerson, for ACE/Chubb
Sam Sasso, for Travelers

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Applicant debtor corporation was integrated forest plantation operator and forest products company with majority of assets in People's Republic of China and complicated corporate structure — In 2011, reports of financial impropriety of corporation had significant negative effect, resulting in corporation defaulting under note indentures and subsequent agreement of noteholders supporting restructuring of corporation in March 2012 — At same time corporation obtained initial order under Companies' Creditors Arrangement Act, and subsequent orders included grant of extensions of stay of proceedings, claims procedure order, and class action proceedings in Ontario as well as other jurisdictions — On August 31, 2012, court approved filing of plan to discharge all affected claims, distribute consideration in respect of proven claims and transfer ownership of corporate business to two new corporations

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whose shares would be distributed to all affected creditors — Plan was approved by 99 per cent of affected creditors — Corporation brought motion for order sanctioning plan of compromise and reorganization — Motion granted — Considering relevant factors on sanction hearing, sanction of order was warranted, as corporation established strict compliance with all statutory requirements and prior court orders, did nothing not authorized by Act and had fair and reasonable plan — Monitor concluded plan was preferable alternative to liquidation or bankruptcy — Plan provided fair and reasonable balance among corporation's stakeholders and provided corporation simultaneous ability to continue as going concern for all stakeholders — Plan adequately considered public interest providing certainty to corporate employees, suppliers, customers and other stakeholders — Selection of $150 million cap on indemnified noteholders class action reflected business judgment of parties' assessment risk related to Ontario class action and was commercially reasonable — Reasonable connection existed between claims being compromised and overall purpose of plan.

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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.) — considered

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

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Ravelston Corp., Re (2005), 2005 CarswellOnt 4267, 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]) — considered

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Sino-Forest Corp., Re (2012), 2012 ONSC 5011, 2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 2012 ONCA 816, 2012 CarswellOnt 14701 (Ont. C.A.) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 7041, 2012 CarswellOnt 15919 (Ont. S.C.J. [Commercial List]) — referred to

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Statutes considered:

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

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

s. 2(1) "company" — referred to

s. 2(1) "equity claim" — considered

s. 6 — pursuant to

s. 6(1) — considered

MOTION by debtor corporation for order sanctioning plan of compromise and reorganization.

***Morawetz J.*:**

1 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.

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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 (*Sino-Forest Corp., Re*, 2012 ONSC 7041 (Ont. S.C.J. [Commercial List])). 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 (Ont. S.C.J. [Commercial List])), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816 (Ont. C.A.)).

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.

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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 [2012 CarswellOnt 14701 (Ont. C.A.)], 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

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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 *Sino-Forest Corp., Re* (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 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], 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.

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34 On August 31, 2012 [2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List])], 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.

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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%

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Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

47 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.

48 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.

49 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

50 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.

51 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 *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), leave to appeal denied, 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 (S.C.C.) and *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750, 79 C.B.R. (5th) 307 (Ont. S.C.J.)).

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

53 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.

54 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.

55 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.

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

57 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., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Canadian Airlines Corp., Re*, and *Nortel Networks Corp., Re*, [2009] O.J. No. 2166 (Ont. S.C.J. [Commercial List]). Further, courts should resist classification approaches that potentially jeopardize viable plans.

58 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.

59 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.

60 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.

61 In *Nelson Financial Group Ltd., Re*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

> 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.

62 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.

63 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.

64 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.

65 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

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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.

66 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 Communications Corp., Re* and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.). 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.

67 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.

68 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.

69 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 *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]). 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.

70 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.

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

72 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.

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73 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.

74 In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), and *Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]). 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.

75 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.

76 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.

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

78 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

79 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.

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

Motion granted.

End of Document

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TAB 8

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

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.

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

Sealing confidential materials.

Table of Authorities

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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

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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:

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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").

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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).

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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

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(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

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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.

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TAB 9

2016 ONSC 316
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 589, 2016 ONSC 316, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

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.

G.B. Morawetz R.S.J.

Heard: December 21-22, 2015
Judgment: January 15, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Shawn Irving, Tracy Sandler, 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
Linda Galessiere, Gus Camelino, for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)
Laura M. Wagner, Mathew P. Gottlieb, for KingSett Capital Inc.
Yannick Katirai, Daniel Hamson, for Eleven Points Logistics Inc.
Daniel Walker, for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited
Jay A. Schwartz, Robin Schwill, for Target Corporation
Miranda Spence, for CREIT
Jay Carfagnini, Jesse Mighton, Alan Mark, Melaney Wagner, for Alvarez & Marsal Canada Inc. in its capacity as Monitor
James Harnum, for Employee
Harvey Chaiton, for Directors and Officers of the Applicants
Stephen M. Raicek, Mathew Maloley, for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada
Vern W. DaRe, for Doral Holdings Limited and 430635 Ontario Inc.
Stuart Brotman, for Sobeys Capital Incorporated
Catherine Francis, for Primaris Reit
Kyla Mahar, for Centerbridge Partners and Davidson Kempner
William V. Sasso, for Pharmacist
Varoujan C. Arman, for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.
Brian Parker, for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.
Roger Jaipargas, for Glentel Inc., Bell Canada and BCE Nexxia
Nancy Tourgis for Issi Inc.

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Subject: Insolvency

Headnote

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

T Canada sought protection under Companies' Creditors Arrangement Act (CCAA) — Certain landlords reached understanding with T Canada and its parent company T Corp. formalized through addition of paragraph 19A to Initial and Restated Order — Paragraph provided that CCAA proceedings would not be used to compromise guarantee claims landlords had against T Corp. — T Canada developed plan to present to affected creditors — T Canada negotiated structure with T Corp. whereby it would subordinate intercompany claims for benefit of remaining creditors and make other contributions — T Corp. required all claims including guarantees to landlords to be settled — T Canada brought motion to accept joint plan and compromise, establish class of affected creditors, authority to hold meeting of creditors, and to set date for hearing of sanction of plan if it was accepted — Motion dismissed — Plan failed to meet low threshold to authorize holding creditors meeting — There was no reasonable chance of success — Plan would not meet criteria at sanction hearing — Court was required to ensure that CCAA process unfolds in fair and transparent manner — Landlords should not be required through CCAA proceeding to release T Corp. from guarantees in exchange for consideration in plan in form of formula within plan — Landlords were concerned about effect CCAA proceedings would have on guarantees from very beginning — That T Corp. would only consider subordinating its intercompany claims as part of global settlement including landlord guarantees was not reason to approve plan — Without amendment landlords would have considered issuing bankruptcy proceedings as against T Canada — Paragraph 19A was incorporated into Initial and Restated Order with support of both T Corp. and monitor — Varying paragraph 19A so that plan could address guarantee claims landlords had as against T Corp. meant plan required court to completely ignore background that led to paragraph 19A and reliance that parties placed on it — Any change in economic landscape did not justify departure from agreed upon course of action as set out in paragraph 19A — T Canada and T Corp. were trying to use CCAA proceeding as means to secure release of T. Corp. from its liabilities — Proposal clearly contravened agreement memorialized and enforced in paragraph 19A — Paragraph 19A arose in post-CCAA filing environment, with each interested party carefully negotiating its position — All parties knew they were entering into binding agreements supported by binding orders — Agreements were heavily negotiated by sophisticated parties — Plan also established landlord formula amount which was not in original order.

Table of Authorities

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

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to

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

Alternative Fuel Systems Inc., Re (2003), 2003 ABQB 745, 2003 CarswellAlta 1262, 46 C.B.R. (4th) 8, 20 Alta. L.R. (4th) 265, [2004] 5 W.W.R. 467, 46 C.B.R. (4th) 17, 20 Alta. L.R. (4th) 264 (Alta. Q.B.) — considered

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Alternative Fuel Systems Inc., Re (2004), 2004 ABCA 31, 2004 CarswellAlta 64, 47 C.B.R. (4th) 1, 236 D.L.R. (4th) 155, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.*) 346 A.R. 28, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.*) 320 W.A.C. 28 (Alta. C.A.) — referred to

BlueStar Battery Systems International Corp., Re (2000), 2000 CarswellOnt 4837, [2001] G.S.T.C. 2, 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]) — referred to

Crystallex International Corp., Re (2013), 2013 ONSC 823, 2013 CarswellOnt 3043, 3 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered

Dairy Corp. of Canada Ltd., Re (1934), [1934] O.R. 436, [1934] 3 D.L.R. 347, [1934] O.W.N. 347, 1934 CarswellOnt 33 (Ont. C.A.) — referred to

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp. (2015), 2015 ONSC 4004, 2015 CarswellOnt 9738, 27 C.B.R. (6th) 134 (Ont. S.C.J.) — referred to

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

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

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. 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, 1993 CarswellOnt 182 (Ont. Gen. Div.) — 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.) — referred to

ScoZinc Ltd., Re (2009), 2009 NSSC 163, 2009 CarswellNS 283, 55 C.B.R. (5th) 205 (N.S. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 65.2(3) [en. 1992, c. 27, s. 30] — considered

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

s. 4 — considered

s. 11 — considered

s. 20(1)(a)(iii) — considered

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MOTION to accept joint plan and compromise, to establish class of affected creditors to vote on plan, and authority to hold meeting of those creditors and vote on plan and related procedures, and to set date for hearing of sanction of plan of it was accepted.

***G.B. Morawetz R.S.J.*:**

1 The 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 ("Target Canada") bring this motion for an order, *inter alia*:

> (a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");
>
> (b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");
>
> (c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;
>
> (d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

2 On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

3 These are the reasons.

4 The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

5 The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

6 The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

7 The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner, CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

8 The Monitor also supports the motion.

9 The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

10 In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

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11 By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

12 The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

13 The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

14 Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

15 The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

16 The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

17 In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

18 The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 — Breach of paragraph 19A of the Amended and Restated Order

19 First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

20 Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings;

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(c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

21 The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order...[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation.

22 The Monitor, in its second report dated February 9, 2015, stated:

(3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.

(3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;

(a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and

(b) a fair and reasonable balancing of interests.

23 Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP — it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

24 The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 — Breach of paragraph 55 of the Claim Procedure Order

25 Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

26 The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

27 The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for

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distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

28 In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

29 In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

30 Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

31 Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

32 Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

33 Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

34 The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

35 Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

36 The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

37 With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

38 Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the

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proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

39 The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

40 The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

41 If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

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42 Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

43 The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

> 4. Where a compromise or 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, or 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 shareholders of the company, to be summoned in such manner as the court directs.

44 Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.).

45 Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205 (N.S. S.C.)).

46 Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

47 Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

48 Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

49 Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

50 The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), affirmed 2008 ONCA 587 (Ont. C.A.), (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

51 Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

52 With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

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53 The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

54 As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

55 At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

56 Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

57 The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

58 Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

59 The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

60 With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

61 Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

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62 In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp., Re*, 2013 ONSC 823, 2013 CarswellOnt 3043 (Ont. S.C.J. [Commercial List]) . Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

63 In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,
>
> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.
>
> Likewise, the Claims Procedure Order, as amended, clearly provides that:
>
> (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
>
> (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
>
> (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.
>
> There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order...

64 With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc., Re*, 2003 ABQB 745, 20 Alta. L.R. (4th) 264 (Alta. Q.B.), aff'd 2004 ABCA 31, 346 A.R. 28 (Alta. C.A.), where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

65 Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

66 Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

67 In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

68 Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

69 As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

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70 Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.); *Dairy Corp. of Canada Ltd., Re*, [1934] O.R. 436 (Ont. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at p. 182, aff'd (1989), (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *BlueStar Battery Systems International Corp., Re* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

71 As explained below, the Plan cannot meet the required criteria.

72 It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

73 The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

74 The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

75 The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

76 Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

77 However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

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78 Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

79 This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

80 Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 (Ont. S.C.J.) at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

81 The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

82 The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

83 A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

84 In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

85 It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

86 Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

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Disposition

87 Accordingly, the Plan is not accepted for filing and this motion is dismissed.

88 The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

89 At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Motion dismissed.

Footnotes

1 Capitalized terms not defined herein have the same meaning as set out in the Plan.

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TAB 10

2016 CarswellOnt 5922
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2016 CarswellOnt 5922

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 (collectively the "Applicants")

Morawetz R.S.J.

Judgment: April 13, 2016
Docket: CV-15-10832-00CL

Counsel: Counsel — not provided

Subject: Insolvency

Headnote
Bankruptcy and insolvency

***Morawetz R.S.J.*:**

Meeting Order

1 THIS MOTION, made by the Applicants and the partnerships listed on Schedule "A" hereto (together with the Applicants, the "*Target Canada Entities*") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "*CCAA*") for an order, *inter alia*, (a) accepting the filing of an Amended and Restated Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Target Canada Entities dated April 6, 2016 (the "*Plan*"), (b) authorizing the Target Canada Entities to establish one class of Affected Creditors for the purpose of considering and voting on the Plan, (c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "*Creditors' Meeting*") to consider and vote on a resolution to approve the Plan; (d) approving the procedures to be followed with respect to the calling and conduct of the Creditors' Meeting; and (e) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan, was heard this day at 330 University Avenue, Toronto, Ontario.

2 ON READING the Affidavit of Mark J. Wong sworn April 6, 2016 (the "*Wong Affidavit*"), and the exhibits thereto and the Twenty-Sixth Report of the Monitor, and on hearing the submissions of respective counsel for the Target Canada Entities, the Monitor, and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

SERVICE

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1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and that service thereof upon any interested party other than the persons served with the Motion Record is hereby dispensed with.

2. THIS COURT ORDERS that any capitalized terms not otherwise defined in this Meeting Order shall have the meanings ascribed to them in the Plan.

AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

3. THIS COURT ORDERS that the Plan is hereby accepted for filing, and the Target Canada Entities are hereby authorized to seek approval of the Plan from the Affected Creditors in the manner set forth herein.

4. THIS COURT ORDERS that the Target Canada Entities, with the consent of the Plan Sponsor and the Monitor, be and they are hereby authorized to make and to file a modification or restatement of, or amendment or supplement to, the Plan (each a "*Plan Modification*") prior to or at the Creditors' Meeting, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Target Canada Entities shall give notice of any such Plan Modification at the Creditors' Meeting prior to the vote being taken to approve the Plan. The Target Canada Entities may give notice of any such Plan Modification at or before the Creditors' Meeting by notice which shall be sufficient if, in the case of notice at the Creditors' Meeting, given to those Affected Creditors present at such meeting in person or by Proxy and, in the case of notice before the Creditors' Meeting, provided to those Persons listed on the service list posted on the Website (as amended from time to time, the "*Service List*"). The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

5. THIS COURT ORDERS that after the Creditors' Meeting (and both prior to and subsequent to the obtaining of any Sanction and Vesting Order), the Target Canada Entities may at any time and from time to time, with the consent of the Plan Sponsor and the Monitor effect a Plan Modification (a) pursuant to an Order of the Court or (b) where such Plan Modification concerns a matter which, in the opinion of the Target Canada Entities and the Monitor, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction and Vesting Order or to cure any errors, omissions or ambiguities, and in either circumstance is not materially adverse to the financial or economic interests of the Affected Creditors. The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

FORMS OF DOCUMENTS

6. THIS COURT ORDERS that the Notice of Creditors' Meeting substantially in the form attached hereto as Schedule "B" (the "*Notice of Creditors' Meeting*"), the Proxy substantially in the form attached hereto as Schedule "C" (the "Proxy"), the Convenience Class Claim Election substantially in the form attached hereto as Schedule "D" (the "*Convenience Class Claim Election*") and the form of Resolution substantially in the form attached as Schedule "E" (the "*Resolution*") are each hereby approved and the Target Canada Entities with the consent of the Monitor are authorized and directed to make such changes to such forms of documents as they consider necessary or desirable to conform the content thereof to the terms of the Plan or this Meeting Order.

CLASSIFICATION OF CREDITORS

7. THIS COURT ORDERS that for the purposes of considering and voting on the Plan, the Affected Creditors shall constitute a single class, the "Unsecured Creditors' Class".

NOTICE OF CREDITORS' MEETING

8. THIS COURT ORDERS that the Monitor shall cause to be sent by regular pre-paid mail, courier, fax or e-mail copies of the Notice of Creditors' Meeting, the Proxy, the Convenience Class Claim Election, the Resolution,

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the Plan, the Letter to Creditors attached as Exhibit "B" to the Wong Affidavit and a copy of this Meeting Order (collectively, the "*Meeting Materials*") as soon as practicable after the granting of this Meeting Order and, in any event, no later than April 21, 2016 to each Affected Creditor at the address for such Affected Creditor set out in such Affected Creditor's Proof of Claim or to such other address subsequently provided to the Monitor by such Affected Creditor.

9. THIS COURT ORDERS that the Monitor shall forthwith post an electronic copy of the Meeting Materials on the Website, send a copy of the Meeting Materials to the Service List and shall provide a written copy to any Affected Creditor upon request by such Affected Creditor.

10. THIS COURT ORDERS that on or before April 27, 2016 the Monitor shall cause the Notice of Creditors' Meeting to be published for a period of two (2) Business Days in *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal.*

11. THIS COURT ORDERS that the delivery of the Meeting Materials in the manner set out in paragraph 8 hereof, posting of the Meeting Materials on the Website in accordance with paragraph 9 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 10 hereof shall constitute good and sufficient service of this Meeting Order and of the Plan, and good and sufficient notice of the Creditors' Meeting on all Persons who may be entitled to receive notice thereof of these proceedings or who may wish to be present in person or by Proxy at the Creditors' Meeting or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons.

12. THIS COURT ORDERS that on or before May 11, 2016, the Monitor shall serve a report regarding the Plan on the Service List and promptly thereafter post such report on the Website.

CONDUCT AT THE CREDITORS' MEETING

13. THIS COURT ORDERS that the Target Canada Entities are hereby authorized to call, hold and conduct the Creditors' Meeting on May 25, 2016 at 10:00 a.m. at the Toronto Region Board of Trade, 77 Adelaide Street West in Toronto, Ontario for the purpose of considering, and if deemed advisable by the Unsecured Creditors' Class, voting in favour of, with or without variation, the Resolution to approve the Plan.

14. THIS COURT ORDERS that a representative of the Monitor, designated by the Monitor, shall preside as the chair of the Creditors' Meeting (the "*Chair*") and, subject to any further Order of this Court, shall decide all matters relating to the conduct of the Creditors' Meeting.

15. THIS COURT ORDERS that the Chair is authorized to accept and rely upon Proxies or such other forms as may be acceptable to the Chair.

16. THIS COURT ORDERS that the quorum required at the Creditors' Meeting shall be one (1) Affected Creditor with a Voting Claim present at such meeting in person or by Proxy.

17. THIS COURT ORDERS that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at the Creditors' Meeting. A Person designated by the Monitor shall act as secretary at the Creditors' Meeting. 18. THIS COURT ORDERS that if (a) the requisite quorum is not present at the Creditors' Meeting, or (b) the Creditors' Meeting is postponed by the vote of the majority in value of Affected Creditors holding Voting Claims in person or by Proxy at the Creditors' Meeting, then the Creditors' Meeting shall be adjourned by the Chair to such time and place as the Chair deems necessary or desirable.

19. THIS COURT ORDERS that the Chair be, and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule the Creditors' Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair deems necessary or desirable (without the need to first convene such Creditors' Meeting for the purpose of

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any adjournment, postponement or other rescheduling thereof). None of the Target Canada Entities, the Chair or the Monitor shall be required to deliver any notice of the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, provided that the Monitor shall: (a) announce the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (b) post notice of the adjournment at the originally designated time and location of the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (c) forthwith post notice of the adjournment on the Website; and (d) provide notice of the adjournment to the Service List forthwith. Any Proxies validly delivered in connection with the Creditors' Meeting shall be accepted as Proxies in respect of any adjourned Creditors' Meeting.

20. THIS COURT ORDERS that the only Persons entitled to attend and speak at the Creditors' Meeting are representatives of the Target Canada Entities and the Plan Sponsor and their respective legal counsel and advisors, the Monitor and its legal counsel and advisors, Pharmacists' Representative Counsel, Employee Representative Counsel, the Employee Trust Trustee and his legal counsel and all other Persons, including the holders of Proxies, entitled to vote at the Creditors' Meeting and their respective legal counsel and advisors. Any other Person may be admitted to the Creditors' Meeting on invitation of the Chair.

VOTING PROCEDURE AT THE CREDITORS' MEETING

21. THIS COURT ORDERS that the Chair shall direct a vote on the Resolution to approve the Plan and any amendments or variations thereto made in accordance with the Plan and this Meeting Order.

22. THIS COURT ORDERS that any Proxy in respect of the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) must be (a) received by the Monitor by 10:00 a.m. on May 24, 2016, or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting, or (b) deposited with the Chair at the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the "*Election/Proxy Deadline*").

23. THIS COURT ORDERS that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise exercise its right to vote at the Creditors' Meeting.

24. THIS COURT ORDERS that each Affected Creditor with a Voting Claim shall be entitled to one vote equal to the dollar value of its Affected Claim determined as a Voting Claim in accordance with the Claims Procedure Order and paragraph(s) 30 and 31 of this Meeting Order.

25. THIS COURT ORDERS that each Convenience Class Creditor shall be deemed to have voted in favour of the Plan.

26. THIS COURT ORDERS that (a) holders of Intercompany Claims shall not be entitled to vote on the Plan and (b) the Plan Sponsor shall not be entitled to vote on the Plan in respect of (i) its Plan Sponsor Subrogated Claims, (ii) any amounts to be contributed to the Landlord Guarantee Enhancement Cash Pool and to the Landlord Non-Guarantee Creditor Equalization Cash Pool under the Plan, or (iii) any Cash Management Lender Claims.

27. THIS COURT ORDERS that an Affected Creditor's Voting Claim shall not include fractional numbers and Voting Claims shall be rounded down to the nearest whole Canadian Dollar amount.

28. THIS COURT ORDERS that an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim prior to the Creditors' Meeting, provided that neither the Target Canada Entities nor the Monitor shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof, including allowing such transferee or assignee of an Affected Claim to vote at the Creditors'

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Meeting, unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing no later than 5:00 p.m. on the date that is seven (7) days prior to the Creditors' Meeting. Thereafter such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order and this Meeting Order, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim. Such transferee or assignee shall not be entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such transferee or assignee to any of the Target Canada Entities. Where a Claim has been transferred or assigned in part, the transferor or assignor shall retain the right to vote at the Creditors' Meeting in respect of the full amount of the Claim as determined for voting purposes in accordance with this Meeting Order, and the transferee or assignee shall have no voting rights at the Creditors' Meeting in respect of such Claim.

29. THIS COURT ORDERS that an Affected Creditor (other than a Convenience Class Creditor), a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim after the Creditors' Meeting provided that the Target Canada Entities shall not be obligated to make any distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, this Meeting Order and the Plan, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim.

DISPUTED CLAIMS

30. THIS COURT ORDERS that the Canada Revenue Agency shall have one vote in respect of its Disputed Claims, the dollar value of which shall be equal to $1, without prejudice to the determination of the dollar value of such Disputed Claims for distribution purposes in accordance with the Claims Procedure Order.

31. THIS COURT ORDERS that the dollar value of a Disputed Claim of an Affected Creditor (other than the Disputed Claims of the Canada Revenue Agency) for voting purposes at the Creditors' Meeting shall be the dollar value of such Disputed Claim as set out in such Affected Creditor's Notice of Revision or Disallowance previously delivered by the Monitor pursuant to the Claims Procedure Order, without prejudice to the determination of the dollar value of such Affected Creditor's Disputed Claim for distribution purposes in accordance with the Claims Procedure Order.

32. THIS COURT ORDERS that the Monitor shall keep a separate record of votes cast by Affected Creditors holding Disputed Claims and shall report to the Court with respect thereto at the Sanction Motion.

CONVENIENCE CLASS CLAIM ELECTION

33. THIS COURT ORDERS that any Affected Creditor with one or more Proven Claims in an amount in excess of Cdn$25,000 shall be entitled to elect to receive only the Cash Elected Amount and be deemed to vote in favour of the Plan in accordance with paragraph 25 hereof by returning an executed Convenience Class Claim Election to the Monitor prior to the Election/Proxy Deadline.

APPROVAL OF THE PLAN

34. THIS COURT ORDERS that in order to be approved, the Plan must receive an affirmative vote by the Required Majority.

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35. THIS COURT ORDERS that following the vote at the Creditors' Meeting, the Monitor shall tally the votes and determine whether the Plan has been approved by the Required Majority.

36. THIS COURT ORDERS that the results of and all votes provided at the Creditors' Meeting shall be binding on all Affected Creditors, whether or not any such Affected Creditor is present or voting at the Creditors' Meeting.

SANCTION HEARING

37. THIS COURT ORDERS that the Monitor shall provide a report to the Court as soon as practicable after the Creditors' Meeting (the "*Monitor's Report Regarding the Creditors' Meeting*") with respect to:

(a) the results of voting at the Creditors' Meeting on the Resolution;

(b) whether the Required Majority has approved the Plan;

(c) the separate tabulation for Disputed Claims required by paragraph 32 herein; and

(d) in its discretion, any other matter relating to the Target Canada Entities' motion seeking sanction of the Plan.

38. THIS COURT ORDERS that an electronic copy of the Monitor's Report Regarding the Creditors' Meeting, the Plan, including any Plan Modifications, and a copy of the motion seeking the Sanction and Vesting Order in respect of the Plan (the "*Sanction Motion*") shall be posted on the Website prior to the Sanction Motion.

39. THIS COURT ORDERS that in the event the Plan has been approved by the Required Majority, the Target Canada Entities may bring the Sanction Motion before this Court on June 2, 2016, or such later date as shall be acceptable to the Target Canada Entities, the Plan Sponsor and the Monitor as set by this Court upon motion by the Target Canada Entities, seeking the Sanction and Vesting Order.

40. THIS COURT ORDERS that service of this Meeting Order by the Target Canada Entities to the parties on the Service List, the delivery of the Meeting Materials in accordance with paragraph 8 hereof, posting of the Meeting Materials on the Website in accordance with paragraph 9 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 10 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

41. THIS COURT ORDERS that any Person intending to oppose the Sanction Motion shall (i) file or have filed with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least seven (7) days before the date set for the Sanction Motion; and (ii) serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the Sanction Motion that are available by at least seven (7) days before the date set for the Sanction Motion, or such shorter time as the Court, by Order, may allow.

42. THIS COURT ORDERS that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

43. THIS COURT ORDERS that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Meeting Order, the terms, conditions and provisions of the Plan shall govern and be paramount, and any such provision of this Meeting Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

EXTENSION OF STAY PERIOD

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44. THIS COURT ORDERS that the Stay Period (as defined in paragraph 17 of the Initial Order) is hereby extended until and including June 6, 2016.

EXTENSION OF NOTICE OF OBJECTION BAR DATE

45. THIS COURT ORDERS that the definition of "Notice of Objection Bar Date" set out at paragraph 3(aa) of the Claims Procedure Order (issued by Regional Senior Justice Morawetz on June 11, 2015, as amended) is hereby amended to extend the Notice of Objection Bar Date to 28 days following June 6, 2016 or such later date as this Court may Order.

GENERAL PROVISIONS

46. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the Initial Order, shall assist the Target Canada Entities in connection with the matters described herein, and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by this Meeting Order.

47. THIS COURT ORDERS that the Target Canada Entities and the Monitor shall use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms hereunder are completed and executed and the time in which they are submitted and may waive strict compliance with the requirements of this Meeting Order including with respect to the completion, execution and time of delivery of required forms.

48. THIS COURT ORDERS that the Monitor may, if necessary, apply to this Court for directions regarding its obligations under this Meeting Order.

49. THIS COURT ORDERS that any notice or other communication to be given under this Meeting Order by a Creditor to the Monitor or the Target Canada Entities shall be in writing in the substantially the form, if any, provided for in this Meeting Order and will be sufficiently given only if given by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or e-mail addressed to:

Target Canada Entities' Counsel:	Osier, Hoskin & Harcourt LLP P.O. Box 50, 1 First Canadian Place 100 King Street West Toronto, ON M5X 1B8 Attention: Tracy C. Sandler / Jeremy E. Dacks E-mail: tsandler@osler.com / jdacks@osler.com Fax: (416) 862-6666
The Monitor:	Alvarez & Marsal Canada Inc., Target Canada Monitor 200 Bay Street, Suite 2900 P.O. Box 22 Toronto, ON M5J 2J1 Attention: Alan J. Hutchens E-mail: ahutchens@alvarezandmarsal.com Fax: (416) 847-5201
With a copy to Monitor's Counsel:	Goodmans LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Attention: Jay A. Carfagnini / Melaney J. Wagner E-mail: jcarfagnini@goodmans.ca / mwagner@goodmans.ca Fax: (416) 979-1234

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50. THIS COURT ORDERS that any such notice or other communication shall be deemed to have been received: (a) if sent by prepaid ordinary mail or registered mail, on the third Business Day after mailing in Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (b) if sent by courier or personal delivery, on the next Business Day following dispatch; and (c) if delivered by facsimile transmission or e-mail by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

51. THIS COURT ORDERS that, in the event that the day on which any notice or communication required to be delivered pursuant to this Meeting Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

52. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Meeting Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or e-mail in accordance with this Order.

53. THIS COURT ORDERS that all references to time in this Meeting Order shall mean prevailing local time in Toronto, Ontario and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

54. THIS COURT ORDERS that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

55. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Meeting Order and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of this Meeting Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

Schedule "A"

Partnerships

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

Schedule "B"

Notice of Creditors' Meeting

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

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE TARGET CANADA ENTITIES

AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

NOTICE OF CREDITORS' MEETING

TO: The Affected Creditors 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., Target Canada Property LLC, Target Canada Pharmacy Franchising LP, Target Canada Mobile LP and Target Canada Property LP (collectively, the "*Target Canada Entities*")

NOTICE IS HEREBY GIVEN that a meeting of the Affected Creditors of the Target Canada Entities will be held on May 25, 2016 at 10:00 a.m. at the Toronto Region Board of Trade, 77 Adelaide Street West, Toronto, ON M5X 1C1 (the "*Creditors' Meeting*") for the following purposes:

1. to consider and, if deemed advisable, to pass, with or without variation, a resolution (the "*Resolution*") approving the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "*CCAA*") dated April 6, 2016 (as amended, restated, modified and/or supplemented from time to time in accordance with the terms thereof, the "*Plan*"); and

2. to transact such other business as may properly come before the Creditors' Meeting or any adjournment or postponement thereof.

The Creditors' Meeting is being held pursuant to an order (the "*Meeting Order*") of the Ontario Superior Court of Justice (Commercial List) (the "*Court*") made on April 13, 2016.

Capitalized terms used and not otherwise defined in this Notice have the respective meanings given to them in the Plan.

The Plan contemplates the compromise of Claims of the Affected Creditors. Quorum for the Creditors' Meeting has been set by the Meeting Order as the presence, in person or by Proxy, at the Creditors' Meeting of one Affected Creditor with a Voting Claim.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by that number of Affected Creditors representing at least a majority in number of Voting Claims, whose Affected Claims represent at least two-thirds in value of the Voting Claims of Affected Creditors who validly vote (in person or by Proxy) on the Resolution at the Creditors' Meeting or were deemed to vote on the Resolution as provided for in the Meeting Order (the "*Required Majority*"). Each Affected Creditor will be entitled to one vote at the Creditors' Meeting, which vote will have the value of such person's Voting Claim as determined in accordance with the Claims Procedure Order and the Meeting Order. If approved by the Required Majority, the Plan must also be sanctioned by the Court under the CCAA. Subject to the satisfaction of the other conditions precedent to implementation of the Plan, all Affected Creditors will then receive the treatment set forth in the Plan.

Deemed Voting in Favour of the Plan

Convenience Class Creditors will be deemed to vote in favour of the Plan.

Forms and Proxies

Convenience Class Claim Election

Affected Creditors with one or more Proven Claims in an amount in excess of Cdn$25,000 may file with the Monitor a Convenience Class Claim Election, pursuant to which such Affected Creditor may elect to be treated as a Convenience

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Class Creditor and receive only the Cash Elected Amount of Cdn$25,000 and shall be deemed thereby to vote in favour of the Plan, prior to 10:00 a.m. (Toronto Time) on May 24, 2016, or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting, or deposit such Convenience Class Claim Election with the Chair at the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the "*Election/Proxy Deadline*").

Proxy Form

An Affected Creditor may attend at the Creditors' Meeting in person or may appoint another person as its proxyholder by inserting the name of such person in the space provided in the form of Proxy provided to Affected Creditors by the Monitor, or by completing another valid form of Proxy. Persons appointed as proxyholders need not be Affected Creditors.

In order to be effective, proxies must be received by the Monitor at Alvarez & Marsal Canada Inc., 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com, prior to the Election/Proxy Deadline.

If an Affected Creditor (other than those who are deemed to vote in favour of the Plan as set out above) specifies a choice with respect to voting on the Resolution on a Proxy, the Proxy will be voted in accordance with the specification so made. *In absence of such specification, a Proxy will be voted FOR the Resolution provided that the proxyholder does not otherwise exercise its right to vote at the Creditors' Meeting.*

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority at the Creditors' Meeting, the Target Canada Entities intend to bring a motion before the Court on June 2, 2016 at 9:30 a.m. (Toronto time) at the Court located at 330 University Avenue, Toronto, Ontario M5G 1R8. The motion will be seeking the granting of the Sanction and Vesting Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any Affected Creditor that wishes to appear or be represented, and to present evidence or arguments, at such Court hearing must file with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least seven (7) days before such Court hearing. Any Affected Creditor that wishes to oppose the relief sought at such Court hearing shall serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used at such hearing at least seven (7) days before the date set for such hearing, or such shorter time as the Court, by Order, may allow. A copy of the Service List may be obtained by contacting the Monitor at the particulars set out above or from the Monitor's website set out below.

This Notice is given by the Target Canada Entities pursuant to the Meeting Order.

You may view copies of the documents relating to this process on the Monitor's website at www.alvarezandmarsal.com/targetcanada.

DATED this • day of •, •.

Schedule "C"

Form of Proxy

PROXY AND INSTRUCTIONS FOR AFFECTED CREDITORS IN THE MATTER OF THE PROPOSED AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT OF THE TARGET CANADA ENTITIES

Meeting of Affected Creditors

to be held pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "*Court*") made on April 13, 2016 (the "*Meeting Order*") in connection with the Amended and Restated Joint Plan of Compromise and

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Arrangement of the Target Canada Entities dated April 6, 2016 (as amended, restated, modified and/or supplemented from time to time, the "*Plan*")

on May 25, 2016 at 10:00 a.m. (Toronto time) at

Toronto Region Board of Trade

77 Adelaide Street West

Toronto, ON M5X 1C1

and at any adjournment, postponement or other rescheduling thereof (the "*Creditors' Meeting*")

PLEASE COMPLETE, SIGN AND DATE THIS PROXY AND (I) RETURN IT TO ALVAREZ & MARSAL CANADA INC. BY 10:00 A.M. (TORONTO TIME) ON MAY 24, 2016, OR 24 HOURS (EXCLUDING SATURDAYS, SUNDAYS AND STATUTORY HOLIDAYS) PRIOR TO ANY ADJOURNED, POSTPONED OR RESCHEDULED CREDITORS' MEETING, OR (II) DEPOSIT THIS PROXY WITH THE CHAIR AT THE CREDITORS' MEETING (OR ANY ADJOURNMENT, POSTPONEMENT OR OTHER RESCHEDULING THEREOF) IMMEDIATELY PRIOR TO THE VOTE AT THE TIME SPECIFIED BY THE CHAIR (THE "*ELECTION/PROXY DEADLINE*"). PLEASE RETURN OR DEPOSIT YOUR ORIGINAL PROXY SO THAT IT IS ACTUALLY RECEIVED BY THE MONITOR OR THE CHAIR ON OR BEFORE THE ELECTION/PROXY DEADLINE.

Please use this Proxy form if you do not wish to attend the Creditors' Meeting to vote in person but wish to appoint a proxyholder to attend the Creditors' Meeting, vote your Voting Claim to accept or reject the Plan and otherwise act for and on your behalf at the Creditors' Meeting and any adjournment(s), postponement(s) or rescheduling(s) thereof.

The Plan is included in the Meeting Materials delivered by the Monitor to all Affected Creditors, copies of which you have received. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Plan.

You should review the Plan before you vote. In addition, on April 13, 2016, the Court issued the Meeting Order establishing certain procedures for the conduct of the Creditors' Meeting, a copy of which is included in the Meeting Materials. The Meeting Order contains important information regarding the voting process. Please read the Meeting Order and the instructions sent with this Proxy prior to submitting this Proxy.

If the Plan is approved by the Required Majority and is sanctioned by the Court, it will be binding on you whether or not you vote.

Convenience Class Creditors do not need to complete or return a Proxy as they are deemed to vote in favour of the Plan pursuant to the Meeting Order and the Plan.

Appointment of Proxyholder and Vote

By checking one of the two boxes below, the undersigned Affected Creditor hereby revokes all proxies previously given and nominates, constitutes and appoints either *{if no box is checked, the Monitor will act as your proxyholder):*

- _____, or
- a representative of *Alvarez & Marsal Canada Inc.* in its capacity as Monitor of the Target Canada Entities

as proxyholder, with full power of substitution, to attend, vote and otherwise act for and on behalf of the undersigned at the Creditors' Meeting and at adjournment(s), postponement(s) and rescheduling(s) thereof, and to vote the amount of the Affected Creditors' Voting Claim. Without limiting the generality of the power hereby conferred, the person named

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as proxyholder is specifically directed to vote as shown below. The person named as proxyholder is also directed to vote at the proxyholder's discretion and otherwise act for and on behalf of the undersigned with respect to any amendments or variations to the Plan and to any matters that may come before the Creditors' Meeting or at any adjournment, postponement or rescheduling thereof and to vote the amount of the Affected Creditor's Voting Claim as follows *(mark only one):*

- Vote *FOR* the approval of the Plan, or
- Vote *AGAINST* the approval of the Plan

Please note that if no specification is made above, the Affected Creditor will be deemed to have voted FOR approval of the Plan at the Creditors' Meeting provided the Affected Creditor does not otherwise exercise its right to vote at the Creditors' Meeting.

DATED at _____ this _____ day of _____, 20_____.

AFFECTED CREDITOR'S SIGNATURE:

_____

(Print Legal Name of Affected Creditor)

_____

(Print Legal Name of Assignee, if applicable)

_____

(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____

(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____

(Mailing Address of the Affected Creditor/Assignee)

_____

(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

YOUR PROXY MUST BE RECEIVED (I) BY THE MONITOR AT THE ADDRESS LISTED BELOW OR (II) BY THE CHAIR AT THE CREDITORS' MEETING BEFORE THE ELECTION/PROXY DEADLINE.

ALVAREZ & MARSAL CANADA INC.

MONITOR OF THE TARGET CANADA ENTITIES

200 Bay Street

Suite 2900

P.O. Box 22

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Toronto, ON

M5J 2J1

Attention: Steven Glustein

Facsimile: (416) 847-5201

E-mail: targetcanadamonitor@alvarezandmarsal.com

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT targetcanadamonitor@alvarezandmarsal.com OR VISIT THE MONITOR'S WEBSITE AT www.alvarezandmarsal.com/targetcanada

Instructions for Completion of Proxy

1. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities dated April 6, 2016 (the "*Plan*"), a copy of which you have received.

2. Please read and follow these instructions carefully. Your Proxy must actually be received (i) by the Monitor at Alvarez & Marsal Canada Inc., Monitor of the Target Canada Entities, 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com prior to 10:00 a.m. (Toronto time) on May 24, 2016 or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to the time of any adjournment, postponement or rescheduling of the Creditors' Meeting or (ii) by the Chair at the Creditors' Meeting (or any adjournment, postponement or rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the "*Election/Proxy Deadline*"). If your Proxy is not received by the Election/Proxy Deadline, unless such time is extended, your Proxy will not be counted.

3. The aggregate amount of your Claim in respect of which you are entitled to vote (your "*Voting Claim*") shall be your Proven Claim, or with respect to a Disputed Claim, the amount as determined by the Monitor to be your Voting Claim in accordance the Claims Procedure Order and the Meeting Order.

4. Each Affected Creditor who has a right to vote at the Creditors' Meeting has the right to appoint a person (who need not be an Affected Creditor) to attend, act and vote for and on behalf of the Affected Creditor and such right may be exercised by inserting in the space provided the name of the person to be appointed, or to select a representative of the Monitor as its proxyholder. If no proxyholder is selected, the Affected Creditor will be deemed to have appointed any officer of Alvarez & Marsal Canada Inc., in its capacity as Monitor, or such other person as Alvarez & Marsal Canada Inc. may designate, as proxyholder of the Affected Creditor, with power of substitution, to attend on behalf of and act for the Affected Creditor at the Creditors' Meeting to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling thereof.

5. Check the appropriate box to vote for or against the Plan. *If you do not check either box, you will be deemed to have voted FOR approval of the Plan provided you do not otherwise exercise your right to vote at the Creditors' Meeting.*

6. Sign the Proxy - your original signature is required on the Proxy to appoint a proxyholder and vote at the Creditors' Meeting. If you are completing the proxy as a duly authorized representative of a corporation or other entity, indicate your relationship with such corporation or other entity and the capacity in which you are signing, and if subsequently requested, provide proof of your authorization to so sign. In addition, please provide your name, mailing address, telephone number and e-mail address.

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7. Return the completed Proxy to the Monitor at Alvarez & Marsal Canada Inc., Monitor of the Target Canada Entities, 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: *targetcanadamonitor@alvarezandmarsal.com*, so that it is actually received by no later than the Election/Proxy Deadline.

8. If you need additional Proxies, please immediately contact the Monitor.

9. If multiple Proxies are received from the same person with respect to the same Claims prior to the Election/Proxy Deadline, the latest dated, validly executed Proxy timely received will supersede and revoke any earlier received Proxy. However, if a holder of Claims casts Proxies received by the Monitor dated with the same date, but which are voted inconsistently, such Proxies will not be counted. If a Proxy is not dated in the space provided, it shall be deemed dated as of the date it is received by the Monitor.

10. If an Affected Creditor (other than a Convenience Class Creditor) validly submits a Proxy to the Monitor and subsequently attends the Creditors' Meeting and votes in person inconsistently, such Affected Creditor's vote at the Creditors' Meeting will supersede and revoke the earlier received Proxy.

11. Proxies may be accepted for purposes of an adjourned, postponed or other rescheduled Creditors' Meeting if received by the Monitor by the Election/Proxy Deadline.

12. Any Proxy that is illegible or contains insufficient information to permit the identification of the claimant will not be counted.

13. After the Election/Proxy Deadline, no Proxy may be withdrawn or modified, except by an Affected Creditor voting in person at the Creditors' Meeting, without the prior consent of the Monitor and the Target Canada Entities.

14. If you are an Affected Creditor with one or more Proven Claims in an amount in excess of Cdn$25,000, you may elect to receive the Cash Elected Amount in full and final satisfaction of your Affected Claims by completing the Convenience Class Claim Election contained in the Meeting Materials you received from the Monitor. If you elect to receive the Cash Elected Amount, you will be deemed to have voted in favour of the Plan and do not need to complete this Proxy.

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT targetcanadamonitor@alvarezandmarsal.com OR VISIT THE MONITOR'S WEBSITE AT www.alvarezandmarsal.com/targetcanada

Schedule "D"

Form of Convenience Class Claim Election

TO: ALVAREZ & MARSAL CANADA INC., in its capacity as Monitor of the Target Canada Entities

In connection with the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated April 6, 2016 (as amended, restated, modified and/or supplemented from time to time, the "*Plan*"), the undersigned hereby elects to be treated as a Convenience Class Creditor and thereby to receive the Cash Elected Amount of Cdn$25,000 in full and final satisfaction of the Proven Claim(s) of the undersigned, and hereby acknowledges that the undersigned shall be deemed to vote its Voting Claim(s) in favour of the Plan at the Creditors' Meeting.

For the purposes of this election, terms not defined herein shall have the meanings ascribed thereto in the Plan.

DATED at _____ this _____ day of _____, 20_____.

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AFFECTED CREDITOR'S SIGNATURE:

_____

(Print Legal Name of Affected Creditor)

_____

(Print Legal Name of Assignee, if applicable)

_____

(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____

(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____

(Mailing Address of the Affected Creditor/Assignee)

_____

(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

Schedule "E"

Form of Resolution

BE IT RESOLVED THAT:

1. The Amended and Restated Joint Plan of Compromise and 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., Target Canada Property LLC, Target Canada Pharmacy Franchising LP, Target Canada Mobile LP, and Target Canada Property LP (collectively, the "*Target Canada Entities*") pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated April 6, 2016 (the "*Plan*"), which Plan has been presented to this meeting and which is substantially in the form attached as Exhibit "A" to the Affidavit of Mark J. Wong sworn April 6, 2016 (as such Plan may be amended, restated, supplemented and/or modified as provided for in the Plan) be and it is hereby accepted, approved, agreed to and authorized; and

2. any director or officer of each of the Target Canada Entities be and is hereby authorized and directed, for and on behalf of each of the Target Canada Entities, respectively (whether under its respective corporate seal or otherwise), to execute and deliver, or cause to be executed and delivered, any and all documents and instruments and to take or cause to be taken such other actions as he or she may deem necessary or desirable to implement this resolution and the matters authorized hereby, including the transactions required by the Plan, such determination to be conclusively evidenced by the execution and delivery of such documents or other instruments or the taking of any such actions.

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IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended Court File No: CV-17-11785-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF EXPRESS FASHION APPAREL CANADA INC. AND EXPRESS CANADA GC GP, INC.

Applicant

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANT

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