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Court File No. CV-12-9762-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 28TH DAY
JUSTICE WILTON-SIEGEL	)	OF SEPTEMBER, 2012

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

AND IN THE MATTER OF DURABLA MANUFACTURING COMPANY AND DURABLA CANADA LTD. (the "Debtors")

APPLICATION OF DURABLA CANADA LTD. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ORDER

THIS MOTION, made by the Debtors for an Order recognizing and approving the Order made by the Honourable Judge Mary F. Walrath on June 27, 2012 (the "**U.S. Confirmation Order**") of the United States Bankruptcy Court for the District of Delaware (the "**U.S. Bankruptcy Court**") confirming the Second Amended Joint Chapter 11 Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd., as Modified, dated May 25, 2012 (the "**Plan**"), and for certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Dianne F. Lowden sworn September 13, 2012 (the **"Lowden Affidavit**"), the Affidavit of Stephen

Ferguson, sworn September 17, 2012 (the **"Ferguson Affidavit"**), the Affidavit of Sara-Ann Van Allen, sworn September 17, 2012 (the **"Van Allen Affidavit"**) and the Second Report of Alvarez & Marsal Canada Inc., in its capacity as information officer (the "**Information Officer**") dated September 17, 2012, each filed.

AND UPON HEARING the submissions of counsel for the Debtors, counsel for St. Paul Fire and Marine Insurance Company, Allstate Insurance Company, Allstate Insurance Company of Canada, Royal & Sun Alliance Insurance Company of Canada, Chartis Insurance Company of Canada and American Home Assurance Company, counsel for the Information Officer, and counsel for the Durabla Manufacturing Company and Durabla Canada Ltd., Asbestos Trust, no one appearing for any other party although properly served as appears from the Affidavit of Service of Mary Carreiro, sworn September 14, 2012, filed.

SERVICE

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

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan attached as Exhibit "F" to the Lowden Affidavit.

RECOGNITION OF U.S. CONFIRMATION ORDER

3. **THIS COURT ORDERS** that the U.S. Confirmation Order, attached as **Schedule "A"** to this Order, be and is hereby recognized and declared to be effective

and shall be implemented in Canada in accordance with its terms, and all persons subject to the jurisdiction of this Court shall be so bound.

IMPLEMENTATION OF PLAN

4. **THIS COURT ORDERS** that the Debtors are authorized, directed and permitted to take all such steps and actions, and do all things necessary or appropriate to implement the Plan and the transactions contemplated thereby in accordance with and subject to the terms of the Plan, and to enter into, execute, deliver, implement and consummate all the steps, transactions and agreements contemplated pursuant to the Plan.

5. **THIS COURT ORDERS AND DECLARES** that upon the Effective Date, the terms of the Plan shall be immediately effective and enforceable and deemed binding upon the Debtors and all claimants and shall be binding on all parties with a Claim and any Entity that is a party to or are subject to the settlements, compromises, releases, discharges and injunctions described in the Plan.

RELEASES AND INJUNCTIONS

6. **THIS COURT ORDERS** that without limiting the foregoing, the releases, exculpations and injunctions set forth in the U.S. Confirmation Order and set out in Article 12 of the Plan be, and the same are, hereby approved and shall be immediately effective in Canada in accordance with the U.S. Confirmation Order and the Plan on the Effective Date without further act or order.

RECOGNITION OF U.S. DISTRICT COURT ORDER

7. **THIS COURT ORDERS** that the Order of the United States District Court for the District of Delaware dated August 2, 2012, attached as **Schedule "B"** to this Order, affirming the U.S. Confirmation Order, be and is hereby recognized and given full force and effect in all provinces and territories of Canada.

ACTIVITIES OF THE INFORMATION OFFICER

8. **THIS COURT ORDERS** that the First Report of the Information Officer dated July 26, 2012 (the "**First Report**") and the Second Report of the Information Officer dated September 17, 2012 (the "**Second Report**") and the activities of the Information Officer, as described in the First Report and the Second Report, be and are hereby approved.

DISCHARGE OF INFORMATION OFFICER

9. **THIS COURT ORDERS** that the Information Officer shall be discharged from any further obligations under the Orders made in these proceedings, provided however that notwithstanding its discharge herein, (a) the Information Officer shall remain Information Officer for the performance of such incidental duties as may be required to complete the administration of these proceedings, and (b) the Information Officer shall continue to have the benefit of the provisions of all Orders made in these proceedings, including all approvals, protections and stays of proceedings in favour of the Information Officer.

10. **THIS COURT ORDERS AND DECLARES** that Alvarez & Marsal Canada Inc. ("**A&M**") is hereby released and discharged from any and all liabilities that A&M

now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of A&M while acting in its capacity as Information Officer in these proceedings. Without limiting the generality of the foregoing, A&M is hereby forever released and discharged from any and all liabilities relating to matters that were raised, or which could have been raised, in the within proceedings, save and except for any gross negligence or wilful misconduct on the part of the Information Officer.

11. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Information Officer in any way arising from or related to its capacity or conduct as Information Officer except with prior leave of this Honourable Court and on prior written notice to the Information Officer and such further order securing, as security for costs, the solicitor and his own client costs of the Information Officer in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

APPROVAL OF FEES

12. **THIS COURT ORDERS** that the fees and disbursements of the Information Officer, as described in the Second Report and as set out in the Ferguson Affidavit, including the estimates to completion, be and are hereby approved.

13. **THIS COURT ORDERS** that the fees and disbursements of the Information Officer's legal counsel, Heenan Blaikie LLP, as described in the Second Report and as set out in the Van Allen Affidavit, including the estimates to completion, be and are hereby approved.

STAY OF PROCEEDINGS

14. **THIS COURT ORDERS** that the Stay Period (as defined in the Initial Recognition Order and the Supplemental Recognition Order of Mr. Justice Morawetz dated June 28, 2012) be and is hereby terminated.

INITIAL RECOGNITION ORDER AND SUPPLEMENTAL RECOGNITION ORDER

15. **THIS COURT ORDERS** that except to the extent that the Initial Recognition Order or the Supplemental Recognition Order has been varied by or is inconsistent with this Order or any further Order of this Court, the provisions of the Initial Recognition Order and the Supplemental Recognition Order shall remain in full force and effect until the Effective Date, provided that the protections granted in favour of the Information Officer pursuant to the Initial Recognition Order and the Supplemental Recognition Order shall continue in full force and effect.

16. **THIS COURT ORDERS** that despite anything to the contrary herein, nothing in this Order, the Plan, or any order confirmed or made herein prevents (a) a person from seeking or obtaining benefits under a government-mandated workers' compensation system; or (b) a government agency or insurance company from seeking or obtaining reimbursement, contribution, subrogation, or indemnity as a result of payments made to or for the benefit of such person under such a system and fees and expenses incurred under any insurance policies, laws, or regulations covering workers' compensation claims.

AID AND ASSISTANCE

17. **THIS COURT ORDERS** and requests the aid and recognition of any Court or any judicial, regulatory or administrative body in any province or territory in Canada (including the assistance of any Court in Canada) pursuant to section 17 of the CCAA, and the Federal Court of Canada and any judicial, regulatory or administrative body or other Court constituted pursuant to the Parliament of Canada or the legislature of any province in carrying out the terms of this Order.

G. Hainey J.

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LE / DANS LE REGISTRE NO.:

SEP 28 2012

PER / PAR:

Schedule "A"

U.S. Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
DURABLA MANUFACTURING COMPANY and DURABLA CANADA LTD.,	:	Case No. 09-14415 (MFW) (Jointly Administered)
Debtors.	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION FOR DURABLA MANUFACTURING COMPANY AND DURABLA CANADA LTD., AS MODIFIED[1]

WHEREAS, Durabla Manufacturing Company ("**DMC**") filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on December 15, 2009 (the "**DMC Petition Date**");

WHEREAS, on January 21, 2010 the United States Trustee appointed the Official Committee of Unsecured Creditors (the "**Creditors' Committee**") in DMC's reorganization case [Doc. No. 44];

WHEREAS, on May 3, 2010, the Court appointed Lawrence Fitzpatrick as the Legal Representative for Future Asbestos Claimants (the "**Legal Representative**") [Doc. No. 123];

WHEREAS, on May 18, 2010, Certain Asbestos Personal Injury Claimants represented by the Shein Law Center, Ltd. (the "**Shein Plaintiffs**") filed a motion to dismiss DMC's reorganization case [Doc. No. 136], to which DMC filed an opposition on June 9, 2010 [Doc.

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Glossary of Defined Terms for the Disclosure Statement and Joint Chapter 11 Plan of Reorganization of Durabla Manufacturing Company and Durabla Canada Ltd. (Exhibit 1 to Plan) [Doc. No. 856].

No. 155] and on which the Shein Plaintiffs, DMC, the Creditors' Committee and the Legal Representative all filed additional responses following a hearing before the Court on July 7, 2010;

WHEREAS, on October 6, 2010, the Court entered an order denying the Shein Plaintiffs' motion to dismiss DMC's reorganization case [Doc. No. 250] and on October 20, 2010, the Shein Plaintiffs filed a motion for reconsideration of that denial [Doc. No. 262], to which DMC, the Creditors' Committee and the Legal Representative filed an opposition [Doc. No. 274] on November 3, 2010;

WHEREAS, on November 8, 2010, Durabla Canada Ltd. ("**DCL**," and collectively with DMC, the "**Debtors**") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "**DCL Petition Date**");

WHEREAS, also on November 8, 2010, the Debtors, the Creditors' Committee, and the Legal Representative (collectively, the "**Plan Proponents**") filed the Joint Chapter 11 Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd. (the "**Nov. 8, 2010 Plan**") [Doc. No. 277];

WHEREAS, on November 12, 2010, the Court entered an order directing the joint administration of DMC's and DCL's reorganization cases [Doc. No. 284] and on January 7, 2011, the Court entered an order making certain orders in DMC's Reorganization Case applicable in DCL's Reorganization Case, including the orders appointing the Creditors' Committee and the Legal Representative [Doc. No. 351];

WHEREAS, on January 7, 2011, the Court entered an order approving a settlement agreement (the "**PPCIGA Settlement Agreement**") between DMC and the Pennsylvania Property and Casualty Insurance Guaranty Association ("**PPCIGA**") [Doc. No. 352], pursuant to

which the PPCIGA agreed to pay, on behalf of two of DMC's insolvent insurers, The Home Insurance Company and Paxton National Insurance Company, $1,574,660 in exchange for a release and protection as one of the Settling Asbestos Insurance Companies under DMC's plan of reorganization pursuant to 11 U.S.C. § 524(g);

WHEREAS, on June 29, 2011, the Plan Proponents withdrew the Nov. 8, 2010 Plan and filed the Joint Chapter 11 Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd. (the "**June 29, 2011 Plan**") [Doc. No. 513] and the Disclosure Statement Regarding the Joint Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd. (the "**Disclosure Statement**") [Docket No. 514];

WHEREAS, also on June 29, 2011, the Debtors filed the Motion of Debtors and Debtors in Possession for an Order (I) Approving Disclosure Statement Regarding Joint Plan of Reorganization for Durabla Manufacturing and Durabla Canada Ltd.; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Joint Plan of Reorganization; (III) Approving Forms of Ballots; (IV) Approving Form and Scope of Notice of the Plan and Confirmation Hearing; (V) Establishing a Record Date for Voting Purposes Only; and (VI) Setting Certain Deadlines [Docket No. 515];

WHEREAS, the Court set (1) August 8, 2011 as the date for a hearing on the adequacy of the Disclosure Statement and approval of the procedures for the solicitation and tabulation of votes to accept or reject the June 29, 2011 Plan and (2) August 1, 2011 as the deadline for filing objections to the Disclosure Statement [Docket No. 516];

WHEREAS, on August 1, 2011, St. Paul Fire and Marine Insurance Company and Allstate Insurance Company, and Allstate Insurance Company of Canada (collectively, the "**Certain Insurers**"), each of which had issued insurance policies to DCL, filed an objection to

the Disclosure Statement [Doc. No. 539] and included in that filing various objections to the June 29, 2011 Plan;

WHEREAS, the Court held a hearing on August 8, 2011, on the Disclosure Statement, the Certain Insurers' objections to the Disclosure Statement, and the Plan Proponents' response to those objections [Doc. No. 544], during which the Court ordered the Plan Proponents and Certain Insurers to meet and confer to see if the objections raised by the Certain Insurers could be addressed consensually [Doc. No. 579];

WHEREAS, as a result of discussions with the Certain Insurers, the Plan Proponents made certain additional changes to the June 29, 2011 Plan and Disclosure Statement and on September 13, 2011, filed an amended plan (the "**Amended Plan**") and disclosure statement (the "**Amended Disclosure Statement**") [Doc. No. 592];

WHEREAS, on September 20, 2011, the Court held a hearing on the Amended Disclosure Statement and final changes to the Amended Disclosure Statement were discussed and approved by the Court;

WHEREAS, on September 21, 2011, the Plan Proponents filed a Second Amended Chapter 11 Joint Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd. (the "**Second Amended Plan**") [Doc. No. 609] and related amended Disclosure Statement (the "**Second Amended Disclosure Statement**") [Doc. No. 610], reflecting the discussions and decisions at the September 20, 2011 hearing;

WHEREAS, on September 22, 2011, this Court issued an Order approving the Second Amended Disclosure Statement and related materials as containing adequate information, approving the forms of Ballots for solicitation of votes on the Second Amended Plan, establishing a schedule for certain discovery requests of the Certain Insurers', setting November

21, 2011 as the deadline for voting on the Second Amended Plan, and setting November 28, 2011, as the date for a hearing on Confirmation of the Second Amended Plan (the "**Solicitation Procedures Order**") [Doc. No. 617];

WHEREAS, Dianne Lowden, on behalf of the designated Voting Agent, distributed the Second Amended Disclosure Statement, the Second Amended Plan, the form of Ballots and instructions, notice of the Confirmation Hearing and certain other documents related to the Second Amended Plan (collectively, the "**Solicitation Package**") on September 30, 2011, and filed a Notice of Solicitation describing the distribution of the Solicitation Package on October 4, 2011 (the "**Solicitation Notice**") [Doc. No. 630];

WHEREAS, notice of the Second Amended Plan and Confirmation Hearing was provided by publication on October 11, 2011, in 11 newspapers (the *Philadelphia Inquirer, Baltimore Sun, San Francisco Chronicle, Chicago Sun Times, Cleveland Plain Dealer, Houston Chronicle, New Orleans Times-Picayune, Los Angeles Daily News, Newark Star Ledger, Charleston Gazette and Daily Mail,* and *Pittsburgh Post-Gazette)* as described in the Notice of Filing of Affidavit of Publication Regarding Notice of Plan and Confirmation Hearing filed by the Debtors on April 24, 2012 (the "**Publication Notice**") [Doc. No. 829];

WHEREAS, the November 28, 2011 confirmation hearing date established in the Solicitation Procedures Order was continued on multiple occasions to enable the Plan Proponents and the Certain Insurers, together with DCL's three other insurers, American Home Assurance Company, Chartis Insurance Company of Canada, and Royal & Sun Alliance Insurance Company of Canada, (collectively with Certain Insurers, the "**Canadian Insurers**") to negotiate and finalize a settlement (the "**Canadian Insurance Settlement Agreement**");

WHEREAS, on November 14, 2011, the Plan Proponents filed certain modifications to the Second Amended Plan which consisted of certain changes required by the terms of the Canadian Insurance Settlement Agreement (the "**Canadian Insurance Settlement Plan Modifications**") [Doc. 671];

WHEREAS, the Plan Proponents determined that, as a consequence of the nature of the Canadian Insurance Settlement Plan Modifications, a re-solicitation was required of holders of Asbestos Claims who had timely cast votes on the Plan, and accordingly filed a Supplement to the Second Amended Disclosure Statement describing the proposed changes to the Second Amended Plan (the "**Supplemental Disclosure Statement**") [Doc. No. 670];

WHEREAS, on November 14, 2011, the Plan Proponents filed a Motion for an Order (I) Conditionally Approving Supplement to Amended Disclosure Statement; (II) Approving the Form Permitting Creditors to Change their Votes on the Proposed Modified Plan, (III) Fixing the Time for Creditors to Change Their Votes on the Proposed Modified Plan, (IV) Fixing the Time for Creditors to File Objections to Final Approval of the Supplement and to Confirmation of the Proposed Modified Plan, and (V) Continuing the Confirmation Hearing to a New Date (the "**Supplemental Disclosure Statement and Resolicitation Motion**") [Doc. No. 672];

WHEREAS, after the filing of the Supplemental Disclosure Statement and Resolicitation Motion the Plan Proponents determined that due to the passage of time since the filing of the Second Amended Plan certain other amendments to the Second Amended Plan were required and accordingly revised the Supplement to the Disclosure Statement to include a description of those amendments along with the Canadian Insurance Settlement Agreement Plan Modifications which were also slightly modified (the "**Revised Supplemental Disclosure Statement**");

WHEREAS, on March 3, 2012, the Plan Proponents filed a Revised Motion for an Order: (I) Approving Supplement to the Second Amended Disclosure Statement, (II) Approving the Form Permitting Creditors to Change Their Votes on the Second Amended Plan as Modified, (III) Fixing the Time for Creditors to Change Their Votes, (IV) Fixing the Time for Creditors to File Responses to the Modified Plan, and (V) Continuing the Confirmation to a New Date [Doc No. 775] (the **"Revised Supplemental Disclosure Statement and Resolicitation Motion"**);

WHEREAS, on March 21, 2012, the Court entered an order approving the Canadian Insurance Settlement Agreement [Doc. No. 794] and an order (1) approving the Revised Supplemental Disclosure Statement and Resolicitation Motion; (2) setting May 16, 2012 as the date by which (a) creditors were to file any changed votes on the Second Amended Plan as modified and (b) objections to Confirmation of the Second Amended Plan as modified were to be filed; and (3) establishing May 31, 2012 as the date for the Confirmation Hearing on the Second Amended Plan as modified (the **"Supplemental Disclosure Statement and Resolicitation Order"**) [Doc. No. 795];

WHEREAS, also on March 21, 2012, the Court entered an order authorizing DCL to act as the foreign representative of the Debtors' estates in a Companies' Creditors Arrangement Act proceeding in Canada in connection with implementing the Canadian Insurance Settlement Agreement [Doc. No. 796];

WHEREAS, on March 29, 2012, Digital Legal, LLC served the Revised Supplemental Disclosure Statement and related materials, including the form approved by the Court to allow persons who previously voted on the Second Amended Plan to change their votes if they wished to do so (collectively, the **"Resolicitation Package"**), upon claimants in Class 4A and Class 4B

who had voted on the Second Amended Plan (the "**Supplemental Solicitation and Confirmation Hearing Notice**") [Doc. Nos. 807, 828];

WHEREAS, no objections to the Second Amended Plan as modified were filed by the objection deadline of May 16, 2012 established by the Court's Supplemental Disclosure Statement and Resolicitation Order;

WHEREAS, on May 25, 2012, the Plan Proponents filed a composite of the Second Amended Joint Chapter 11 Plan of Reorganization, for Durabla Manufacturing Company and Durabla Canada Ltd., as Modified which incorporated the modifications and technical changes to the Second Amended Plan to that date (the "**Modified Second Amended Plan**" or the "**Plan**") [Doc. No. 856];

WHEREAS, the Modified Second Amended Plan provides for the establishment of the Asbestos Trust, which will be governed by documents substantially in the form of Durabla Manufacturing Company and Durabla Canada Ltd. Asbestos Trust Agreement (the "**Trust Agreement**") [Doc. No. 856, Plan Exhibit 2] and the form of Durabla Manufacturing Company and Durabla Canada Ltd. Asbestos Trust Distribution Procedures (the "**TDP**") [Doc. No. 856, Plan Exhibit 3];

WHEREAS, also on May 25, 2012, the Plan Proponents filed the (1) Proffer of David Moser in Support of the Second Amended Joint Chapter 11 Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd., as Modified (the "**Moser Proffer**") [Doc. No. 858], (2) Proffer of Dianne F. Lowden in Support of the Second Amended Joint Chapter 11 Plan of Reorganization for Durabla Manufacturing Company and Durabla Canada Ltd., as Modified (the "**Lowden Proffer**") [Doc. No. 859], and (3) Proffer of Lawrence Fitzpatrick in Support of the Second Amended Joint Chapter 11 Plan of Reorganization for Durabla

Manufacturing Company and Durabla Canada Ltd., as Modified (the "**Fitzpatrick Proffer**") [Doc. No. 860];

WHEREAS, the testimony in the Lowden Proffer establishes that the final voting results reflected that: (1) 107,356 holders of Asbestos Claims in Class 4A voted to accept the Plan while seven holders in that class voted to reject the Plan, resulting in 99.9% of holders of Asbestos Claims voting in Class 4A approving the Plan; (2) 36,550 holders of Asbestos Claims in Class 4B voted to accept the Plan, while five holders in that class voted to reject the Plan, resulting in 99.99% of holders of Asbestos Claims voting in Class 4B approving the Plan; (3) holders of Asbestos Claims in Class 4A holding $120,379,101 in dollar value of Asbestos Claims voted in favor of the Plan, while holders of Asbestos Claims in that class holding $23,600 in dollar value voted to reject the Plan, resulting in 99.98% of the aggregate dollar amount of claims voting in Class 4A approving the Plan; and (4) holders of Asbestos Claims in Class 4B holding $40,277,900 in dollar value of Asbestos Claims voted in favor of the Plan, while holders of Asbestos Claims in that class holding $11,600 in dollar value voted to reject the Plan, resulting in 99.97% of the aggregate dollar amount of claims voting in Class 4B approving the Plan (Lowden Proffer at 9-10);

WHEREAS, the Court held a confirmation hearing on May 31, 2012 (the "**Confirmation Hearing**"), during which the Court accepted the proffers of Mr. Moser, Ms. Lowden and Mr. Fitzpatrick, and no persons raised any objections to the Modified Second Amended Plan; and

WHEREAS, the United States Trustee raised a concern about Section 12.1 of the Plan and the Court required an amendment to Section 12.1 of the Plan, and the Plan Proponents agreed to amend Section 12.1 of the Plan as directed by the Court.

NOW, THEREFORE, based upon the Court's review of the Modified Second Amended Plan, the Second Amended Disclosure Statement, the Revised Supplemental Disclosure Statement, the Canadian Insurance Settlement Agreement, the Solicitation Package, the Solicitation Notice, the Publication Notice, the Resolicitation Package, the Supplemental Solicitation and Confirmation Hearing Notice, and upon (i) all of the evidence proffered (including the proffers of Mr. Moser, Ms. Lowden and Mr. Fitzpatrick), or adduced, and arguments of counsel made at, the Confirmation Hearing and (ii) the record of these Chapter 11 Cases; and after due deliberation thereon; and good and sufficient cause appearing therefore, it is hereby found and determined that:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings and conclusions set forth herein constitute the Bankruptcy Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, made applicable to this proceeding pursuant to Fed. R. Bankr. P. 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

A. Jurisdiction; Venue; Core Proceeding (28 U.S.C. §§ 157(b)(2) and 1334(a))

This Court has jurisdiction over the Debtors' Chapter 11 Cases pursuant to sections 157 and 1334 of title 28 of the United States Code. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), and this Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed. Venue is proper under sections 1408 and 1409 of title 28 of the United States Code. DMC and DCL are proper debtors under section 109 of the Bankruptcy Code and proper proponents of the Plan under section 1121(a) of the Bankruptcy Code.

B. Commencement, Appointment of Creditors' Committee and Legal Representative

On their respective Petition Dates, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "**Chapter 11 Cases**"). The Debtors continue to manage their assets and properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

On January 21, 2010, the Office of the United States Trustee appointed, pursuant to section 1102 of the Bankruptcy Code, the Creditors' Committee, which consists of creditors represented by the following nine law firms: Brayton Purcell, LLP; Goldberg, Persky & White, P.C.; The Jacques Admiralty Law Firm, P.C.; Kelly & Ferraro LLP; the Law Offices of Peter G. Angelos, P.C.; Motley Rice LLC; Waters & Kraus, LLP; Weitz & Luxenberg, P.C.; and Wilentz Goldman & Spitzer. [Doc. No. 44]. On May 3, 2010, the Court appointed the Legal Representative [Doc. No. 123] and on January 7, 2011, the Court entered an order making certain orders in DMC's reorganization case applicable in DCL's reorganization case, including the orders appointing the Creditors' Committee and the Legal Representative [Doc. No. 351]. No trustee or examiner has been appointed in the Chapter 11 Cases.

C. Judicial Notice

This Court takes judicial notice of the dockets of these Chapter 11 Cases maintained by the Clerk of the Bankruptcy Court and/or its duly-appointed agent, including, without limitation, all pleadings and other documents filed, all orders entered, and evidence and argument made, proffered, or adduced at the hearings held before the Bankruptcy Court during the pendency of these Chapter 11 Cases, including the Confirmation Hearing.

D. Burden of Proof

The Debtors have the burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of evidence. The Plan Proponents submitted the proffers of

David Moser, Dianne F. Lowden and Lawrence Fitzpatrick in support of Confirmation of the Plan. The Court finds that the testimony in the Moser Proffer, the Lowden Proffer, and the Fitzpatrick Proffer is credible and supports Confirmation.

E. Notice of Confirmation Hearing

The Solicitation Notice and the Supplemental Solicitation and Confirmation Hearing Notice were served and the Publication Notice was published in compliance with the Solicitation Procedures Order and the Supplemental Disclosure Statement and Resolicitation Order, and such service and publication were adequate and sufficient. Adequate and sufficient notice of the Confirmation Hearing and the other deadlines established in the Solicitation Procedures Order and the Supplemental Disclosure Statement and Resolicitation Order was given in compliance with the Bankruptcy Rules and those orders, and no other or further notice is or shall be required.

F. Impaired Class That Has Voted To Accept The Plan

As set forth in the Plan, holders of Class 4A and Class 4B Asbestos Claims are impaired by the Plan and therefore were entitled to vote. As set forth in the Lowden Proffer, holders of Class 4A and Class 4B Asbestos Claims voted in excess of the statutory thresholds in sections 1126(c) and 524(g)(2)(B)(ii)(IV)(bb) of the Bankruptcy Code. Thus, at least one impaired Class of Claims has voted to accept the Plan. Votes to accept and reject the Plan have been solicited and tabulated fairly, in good faith, and in a manner consistent with the Bankruptcy Code and the Bankruptcy Rules.

G. Classes Conclusively Presumed to Have Accepted the Plan

Class 1 (Priority Claims (other than Priority Tax Claims)), Class 2 (Secured Claims), Class 3 (Unsecured Claims (other than Asbestos Claims)), Class 5 (Equity Interests) are unimpaired under the Plan, and pursuant to section 1126(f) of the Bankruptcy Code and Section 7.2 of the Plan, are conclusively presumed to have accepted the Plan.

H. Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1))

The Plan complies with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

I. Plan Compliance with Bankruptcy Code (11 U.S.C. §§ 1122 and 1123)

1. Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)).

In addition to the Administrative Expense Claims and Priority Tax Claims listed in Article 2 of the Plan, which need not be designated, Article 3 of the Plan designates five (5) Classes of Claims and Equity Interests. The Claims and Equity Interests placed in each Class are substantially similar to other Claims and Equity Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between holders of Claims and Equity Interests. Thus, the requirements of sections 1122 and 1123(a)(1) of the Bankruptcy Code are satisfied.

2. Specify Unimpaired Classes (11 U.S.C. § 1123(a)(2)).

Article 4 of the Plan specifies that Class 1 (Priority Claims (Other Than Priority Tax Claims)), Class 2 (Secured Claims), Class 3 (Unsecured Claims (Other than Asbestos Claims)), and Class 5 (Equity Interests) are unimpaired under the Plan. Thus, the requirements of section 1123(a)(2) of the Bankruptcy Code are satisfied.

3. Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)).

Article 4 of the Plan designates Class 4A and Class 4B (Asbestos Claims) as impaired and specifies the treatment of Claims in those Classes. Thus, the requirements of section 1123(a)(3) of the Bankruptcy Code are satisfied.

4. No Discrimination (11 U.S.C. § 1123(a)(4)).

Article 4 of the Plan provides for the same treatment of each Allowed Claim or Interest in each respective Class unless the holder of a particular Claim or Equity Interest has agreed to a less favorable treatment of such Claim or Equity Interest. Thus, the requirements of section 1123(a)(4) of the Bankruptcy Code are satisfied.

5. Implementation of Plan (11 U.S.C. § 1123(a)(5)).

The Plan provides adequate and proper means for the Plan's implementation, including, among other things, (i) the creation of the Asbestos Trust; (ii) the transfer to and vesting in the Asbestos Trust of the Asbestos Trust Assets, as more fully described in Article 11.1 of the Plan; (iii) the merger of DMC into Gasket Resources Inc. ("GRI") as set forth in Articles 10.2(f) and 11.3 of the Plan; (iv) amendment of the Debtors' charters prohibiting the issuance of non-voting equity securities as described in Article 11.4 of the Plan; and (v) emergence of DCL with its assets being revested. The Debtors and the Reorganized Debtors are authorized to implement the Plan in accordance with its terms and as detailed herein. Plan §§ 11.7, 11.10. Thus, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

6. Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)).

As provided in Section 11.4 of the Plan, the amended certificate of incorporation and amended by-laws of each of the Debtors shall prohibit the issuance of nonvoting equity securities. Thus, the requirements of section 1123(a)(6) of the Bankruptcy Code are satisfied.

7. Selection of Trustee, Members of the Asbestos Trust Advisory Committee and Directors of Reorganized Debtors (11 U.S.C. § 1123(a)(7)).

Sections 5.6 and 5.7 of the Plan contain provisions with respect to the manner of selection of the initial Trustee, subsequent Trustees, and the Legal Representative. The name of the initial Trustee, Edward D. Robertson, Jr., was disclosed in the form of Trust Agreement.

Section 5.9 of the Plan provides for the establishment of the Trust Advisory Committee, the initial members of which shall be Deirdre Pacheco of Wilentz, Goldman & Spitzer, Woodbridge, NJ; Thomas M. Wilson of Kelley & Ferraro, L.L.P., Cleveland, OH; John A. Baden, IV, of Motley Rice LLC, Mt. Pleasant, SC; and Benjamin Shein of the Shein Law Center, Ltd., Philadelphia, PA.

Section 11.5 of the Plan identifies the members of the boards of directors of GRI (which will be successor by merger to Reorganized DMC on the Effective Date) and Reorganized DCL. The Plan is consistent with public policy with respect to the manner of selection of officers and directors of the Debtors. *See* Moser Proffer at 16. Thus, the requirements of section 1123(a)(7) of the Bankruptcy Code are satisfied.

8. Additional Plan Provisions (11 U.S.C. § 1123(b)).

The Plan's provisions are appropriate and not inconsistent with the applicable provisions of the Bankruptcy Code.

J. Compliance with Bankruptcy Rule 3016(a)

The Plan is dated and identifies the Plan Proponents as submitting it, thereby satisfying Bankruptcy Rule 3016(a).

K. Compliance With Bankruptcy Rule 3017

The Debtors have given notice of the Confirmation Hearing as required by Bankruptcy Rule 3017(d).

L. Compliance With Bankruptcy Rule 3018

The solicitation of votes to accept or reject the Plan satisfies Bankruptcy Rule 3018. The Plan was transmitted to all known Class 4A and Class 4B creditors, sufficient time was prescribed for such creditors to accept or reject the Plan, and the Solicitation Package, Resolicitation Package, solicitation procedures, and resolicitation procedures complied with

section 1126 of the Bankruptcy Code, thereby satisfying the requirements of Bankruptcy Rule 3018.

M. Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129)

1. Debtors' Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)).

The Debtors have complied with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(2) of the Bankruptcy Code. Specifically:

(i) The Debtors are proper debtors under section 109 of the Bankruptcy Code.

(ii) The Debtors have complied with applicable provisions of the Bankruptcy Code, except as otherwise provided or permitted by orders of the Bankruptcy Court.

(iii) The Debtors have complied with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules in transmitting the Plan, the Second Amended Disclosure Statement, the Revised Supplemental Disclosure Statement, the Ballots, and the Form Permitting Creditors to Change Their Votes on the Plan, as the case may be, and related documents, and in soliciting and tabulating votes on the Plan. *See* Moser Proffer at 16-17.

2. Plan Proposed in Good Faith (11 U.S.C. § 1129(a)(3)).

The Plan Proponents have proposed the Plan in good faith and not by any means forbidden by law, and this Confirmation Order was not procured by fraud, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. The Plan Proponents' good faith is evident from the facts and record of these Chapter 11 Cases, and the record of the Confirmation Hearing and other proceedings held in these Chapter 11 Cases. The Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates, resolving the Debtors' asbestos-related liabilities, and effectuating a successful reorganization of the Debtors. *See* Moser Proffer at 17-18.

3. Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).

Any payment made or to be made by the Debtors for services, costs or expenses in or in connection with these Chapter 11 Cases, or in connection with the Plan and incident to these Chapter 11 Cases, has been approved by, or is subject to the approval of, the Bankruptcy Court as reasonable as provided in Article 2 of the Plan, thereby satisfying section 1129(a)(4) of the Bankruptcy Code. *See* Moser Proffer at 18.

4. Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).

The Plan complies with section 1129(a)(5) of the Bankruptcy Code. Section 11.5 of the Plan identifies the members of the board of directors of the Reorganized Debtors, and the appointment to, or continuance in, such offices of such persons is consistent with the interests of holders of Claims against and Equity Interests in the Debtors and with public policy. The name of the Initial Trustee of the Asbestos Trust, Edward D. Robertson, Jr., was disclosed in the Trust Agreement. The Legal Representative was identified in Section 5.7 of the Plan and the members of the Trust Advisory Committee are identified in paragraph I.7 above.

5. No Rate Changes (11 U.S.C. § 1129(a)(6)).

Section 1129(a)(6) of the Bankruptcy Code is satisfied because the Plan does not provide for any change in rates over which a governmental regulatory commission has jurisdiction. *See* Moser Proffer at 19.

6. Best Interests of Creditors (11 U.S.C. § 1129(a)(7)).

The Plan satisfies section 1129(a)(7) of the Bankruptcy Code. The liquidation analysis attached as Exhibit D to the Disclosure Statement and other evidence proffered or adduced at or prior to the Confirmation Hearing, including the discussion of the liquidation analysis in the Moser Proffer, (a) are persuasive and credible, (b) have not been controverted by other evidence, and (c) establish that each holder of an impaired Claim or Equity Interest either has accepted the

Plan or will receive or retain under the Plan, on account of such Claim or Equity Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date. *See* Moser Proffer at 19.

7. Acceptance of Certain Classes (11 U.S.C. § 1129(a)(8)).

Class 1 (Priority Claims (Other Than Priority Tax Claims)), Class 2 (Secured Claims), Class 3 (Unsecured Claims (Other than Asbestos Claims)), and Class 5 (Equity Interests) are Classes of Unimpaired Claims that are conclusively presumed to have accepted the Plan under section 1126(f) of the Bankruptcy Code. Class 4A and Class 4B (Asbestos Claims) have voted to accept the Plan in accordance with sections 1126(c) and 524(g)(2)(B)(ii)(IV)(bb) of the Bankruptcy Code. *See* Lowden Proffer at 9-10.

8. Treatment of Administrative, Priority Tax and Priority Claims (11 U.S.C. § 1129(a)(9)).

The treatment of Administrative Expense Claims and Priority Claims pursuant to Sections 2.1, 2.2 and 4.1 of the Plan satisfies the requirements of sections 1129(a)(9)(A) and (B) of the Bankruptcy Code. The treatment of Priority Tax Claims pursuant to Section 2.3 of the Plan satisfies the requirements of section 1129(a)(9)(C) of the Bankruptcy Code.

9. Acceptance by Impaired Classes (11 U.S.C. § 1129(a)(10)).

Class 4A and Class 4B (Asbestos Claims) are Impaired Classes of Claims that have voted to accept the Plan in accordance with sections 1126(c) and 524(g) of the Bankruptcy Code and, to the Debtors' knowledge, do not contain insiders whose votes have been counted. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code, that at least one Class of Claims against or Interests in the Debtors that is impaired under the Plan has accepted the Plan, is satisfied.

10. Feasibility (11 U.S.C. § 1129(a)(11)).

The Plan and all evidence proffered or adduced at the Confirmation Hearing (a) are persuasive and credible, (b) have not been controverted by other evidence, (c) do not provide for the liquidation of all or substantially all of the property of the Debtors, (d) establish that the Reorganized Debtors will continue in business as ongoing reorganized debtors, and (e) establish that Confirmation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Reorganized Debtors, thus satisfying the requirements of section 1129(a)(11) of the Bankruptcy Code.

11. Payment of Fees (11 U.S.C. § 1129(a)(12)).

All fees payable under section 1930 of title 28, United States Code, as determined by the Bankruptcy Court on the Confirmation Date, have been paid or will be paid, on and after the Effective Date, and thereafter as may be required until entry of a final decree with respect to the Debtors pursuant to Section 2.2(b) of the Plan. *See* Moser Proffer at 20. Accordingly, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

12. Retiree Benefits (11 U.S.C. § 1129(a)(13)).

Section 11.13 of Plan provides for the continuation of payment by the Debtors of all "retiree benefits," as defined in section 1114(a) of the Bankruptcy Code, if any, at previously established levels, thus satisfying the requirements of section 1129(a)(13) of the Bankruptcy Code.

13. Domestic Support Obligations (11 U.S.C. § 1129(a)(14)).

The Debtors are not required to pay any domestic support obligations. Accordingly, section 1129(a)(14) of the Bankruptcy Code is not applicable to the Plan.

14. Individual Cases Subject to Objection by Unsecured Creditor (11 U.S.C. § 1129(a)(15)).

The Debtors are not individuals. Accordingly, section 1129(a)(15) of the Bankruptcy Code is not applicable to the Plan.

15. Transfers of Property Pursuant to Non-Bankruptcy Law (11 U.S.C. § 1129(a)(16))

All transfers of property under the Plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. The Plan therefore complies with section 1129(a)(16) of the Bankruptcy Code.

16. Fair and Equitable; No Unfair Discrimination (11 U.S.C. § 1129(b)).

As set forth in paragraph 7 above, all Classes of Claims and Interests have either voted to accept the Plan or are presumed to accept the Plan. Accordingly, section 1129(b) is inapplicable.

17. Principal Purpose of the Plan (11 U.S.C. § 1129(d)).

The principal purpose of the Plan is to treat the asbestos personal injury claims against the Debtors. Accordingly, the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of section 5 of the Securities Act, and no Governmental Unit has objected to the Confirmation of the Plan on any such grounds. The Plan therefore satisfies the requirements of section 1129(d) of the Bankruptcy Code.

N. Modifications to the Plan

Following the resolicitation in connection with the Second Amended Plan, the Plan Proponents filed the Additional Plan Modifications on March 30, 2012 and certain further modifications set forth in the Modified Second Amended Plan. Those modifications and those set forth in this Confirmation Order constitute technical changes and do not materially adversely affect or change the treatment of any Claims or Equity Interests. Accordingly, pursuant to

Bankruptcy Rule 3019, these modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that holders of Asbestos Claims be afforded an opportunity to change previous acceptances or rejections of the Plan.

In accordance with the Court's direction at the Confirmation Hearing, Section 12.1(a) of the Plan is amended as set forth below:

12.1 EXONERATION AND RELIANCE.

(a) The Debtors, Reorganized Debtors, the Creditors' Committee, and the Legal Representative, as well as their respective ~~stockholders,~~ directors, officers, ~~agents, employees, members,~~ attorneys, accountants, financial advisors, and representatives, shall not be liable other than for willful misconduct or gross negligence to any holder of a Claim or Interest or any other Entity with respect to any action, omission, forbearance from action, decision or exercise of discretion taken at any time prior to the Effective Date in connection with, or arising out of, the Reorganization Cases, including, without limitation: (a) the discharge of their duties under the Bankruptcy Code; (b) the implementation of any of the transactions provided for, or contemplated in, the Plan or the Plan Documents; (c) any action taken in connection with either the enforcement of either Debtor's rights against any Entity or the defense of Claims asserted against the Debtors with regard to the Reorganization Cases; (d) any action taken in the negotiation, formulation, development, proposal, disclosure, Confirmation or implementation of the Plan Documents filed in this Reorganization Case; or (e) the administration of the Plan or the Asbestos Trust or the Asbestos Trust Assets and property to be distributed pursuant to the Plan.

(b) The Debtors, Reorganized Debtors, the Creditors' Committee, and the Legal Representative, as well as their respective ~~stockholders,~~ directors, officers, ~~agents, employees, members,~~ attorneys, accountants, financial advisors, and representatives may reasonably rely upon the opinions of their respective counsel, accountants, and other experts or professionals and such reliance, if reasonable, shall conclusively establish good faith and the absence of willful misconduct; *provided, however*, that a determination that such reliance is unreasonable shall not, by itself, constitute a determination or finding of bad faith or willful misconduct.

(c) Nothing contained in the Plan, including this section 12.1, shall relieve the Debtors and the Reorganized Debtors from making

payments to the United States Trustee when due as required by 28 U.S.C. 1930(a)(6).

O. Good Faith Solicitation (11 U.S.C. § 1125(e))

Based on the record before the Bankruptcy Court in these Chapter 11 Cases, the Plan Proponents and the Released Parties, and in each case their current or former officers, directors, attorneys, accountants, financial advisors, have acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code in compliance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all their respective activities relating to the solicitation of acceptances to the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the exculpation provisions set forth in Section 12.1 of the Plan as modified in this Confirmation Order.

P. Assumption and Rejection

The Plan's treatment of the assumption and rejection of Executory Contracts and Unexpired Leases in Article 6 of the Plan comports with the requirements of section 365(b) of the Bankruptcy Code.

Q. Cure of Defaults (11 U.S.C. § 1123(d))

Article 6.2 of the Plan governs the cure associated with each executory contract and unexpired lease to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. The cure will be determined in accordance with the underlying agreements and applicable bankruptcy and non-bankruptcy law. Thus, the Plan satisfies the requirements of section 1123(d) of the Bankruptcy Code.

R. Satisfaction of Confirmation Requirements

The Plan satisfies all applicable requirements for Confirmation set forth in section 1129 of the Bankruptcy Code.

S. Retention of Jurisdiction

The Bankruptcy Court may properly retain jurisdiction over the matters set forth in Article 14 of the Plan and section 1142 of the Bankruptcy Code.

T. Plan Compliance with Requirements of Section 524(g)

As of the DMC Petition Date, DMC had outstanding approximately 104,000 asbestos-related personal injury claims against it. Moser Proffer at 22-23. As of the DCL Petition Date, DCL also had been named as a defendant in asbestos-related personal injury suits. The channeling injunction set forth in the Plan that is to be implemented with the Asbestos Trust complies with the requirements of Section 524(g) of the Bankruptcy Code as follows:

1. District Court Approval (11 U.S.C. § 524(g)(3)(A)).

The Court finds and determines that the Injunctions to be issued and the Asbestos Trust to be established by virtue of this Confirmation Order are consistent with the provisions of section 524(g)(1)(A). The Supplemental Injunction also must be affirmed by the United States District Court for the District of Delaware (the "District Court") as mandated by Section 524(g)(3)(A) as a condition precedent (under Section 10.2(b) of the Plan) to the Effective Date of the Plan.

2. Assumption of Liabilities (11 U.S.C. § 524(g)(2)(B)(i)(I)).

The Debtors have been named as defendants in asbestos-related personal injury suits seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products. In compliance with section 524(g)(2)(B)(i)(I) of the Bankruptcy Code and pursuant to Article 5 of the Plan, as of the Effective Date, liability for all Channeled

Asbestos Claims shall automatically and without further act, deed or court order be channeled to and assumed by the Asbestos Trust in accordance with, and to the extent set forth in, Articles 11 and 12 of the Plan and the applicable Plan Documents. Each Channeled Asbestos Claim shall be determined and paid in accordance with the terms, provisions and procedures of the Trust Agreement and the TDP. *See* Plan § 8.2

3. Funding of the Asbestos Trust (11 U.S.C. § 524(g)(2)(B)(i)(II)).

The Asbestos Trust shall be funded by the Asbestos Trust Assets in accordance with the provisions of Sections 5.2 and 11.1 of the Plan, including the Trust Notes and guaranties of each Debtor, which constitute an obligation of the Debtors to make future payments to the Asbestos Trust. One note will be issued by GRI, a Related Entity into which DMC will be merged on the Effective Date, in the principal amount of $1,700,000. Triangle Fluid Controls Ltd., another Related Entity, will also issue a Trust Note to the Asbestos Trust in the principal amount of $1,700,000, and DFT Inc., another Related Entity, will issue a Trust Note to the Asbestos Trust in the principal amount of $4,600,000. The Trust Notes will be fully secured by the assets of each of the Note Issuers, and the performance and payment of the Trust Notes will be guaranteed by the Debtors and the Related Entities (other than the Trust Notes for which they are a Note Issuer). Those guaranties are also secured by all assets of the Note Guarantors. To secure the performance of the Note Issuers and Note Guarantors under the Trust Notes, the Asbestos Trust will have the right, upon the occurrence of an Event of Default (as defined in the Share Issuance Agreement), to own a majority of the shares of voting stock of each Note Issuer and Note Guarantor. *See* Exhibits 6 and 7 to the Modified Second Amended Plan; Moser Proffer at 21-22; Fitzpatrick Proffer at 8. Accordingly, the Asbestos Trust will be funded in part by an obligation of the Debtors to make future payments to the Asbestos Trust, and the Plan satisfies section 524(g)(2)(B)(i)(II) of the Bankruptcy Code.

4. Transfer of Voting Shares (11 U.S.C. § 524(g)(2)(B)(i)(III)).

Pursuant to Sections 5.2 and 11.1 of the Plan, as discussed in the previous paragraph, the Asbestos Trust will be funded by the Asbestos Trust Assets, which provide that the Asbestos Trust will be entitled to own, upon the occurrence of an Event of Default (as defined in the Share Issuance Agreement), a majority of the voting shares of each Note Issuer and Note Guarantor of the Trust Notes. *See* Exhibits 6 and 7 to the Modified Second Amended Plan; Moser Proffer at 21-22; Fitzpatrick Proffer at 8. Thus, the Plan satisfies section 524(g)(2)(B)(i)(III) of the Bankruptcy Code.

5. Use of Trust Assets (11 U.S.C. § 524(g)(2)(B)(i)(IV)).

The Asbestos Trust will use its assets and income to satisfy Asbestos Claims and Demands. *See* Plan §§5.1, 8.2; Trust Agreement; TDP; Fitzpatrick Proffer at 6; Moser Proffer at 20. Thus, the Plan satisfies section 524(g)(2)(B)(i)(IV) of the Bankruptcy Code.

6. Likelihood of Future Demands (11 U.S.C. § 524(g)(2)(B)(ii)(I)).

In the absence of the Plan, the Debtors likely would be subject to substantial future Demands for payment arising out of the same or similar conduct or events that gave rise to the existing Asbestos Claims which are addressed by the Supplemental Injunction. *See* Fitzpatrick Proffer at 8-10; Moser Proffer at 22-23. Thus, the Plan satisfies section 524(g)(2)(B)(ii)(I) of the Bankruptcy Code.

7. Indeterminate Nature of Future Demands (11 U.S.C. § 524(g)(2)(B)(ii)(II)).

The actual amounts, numbers and timing of Demands cannot be determined. *See* Fitzpatrick Proffer at 8-10. Therefore, the Plan satisfies section 524(g)(2)(B)(ii)(II) of the Bankruptcy Code.

8. Threat of Future Demands Pursued Outside the Plan (11 U.S.C. § 524(g)(2)(B)(ii)(III)).

Pursuit of Demands outside the procedures prescribed by the Plan is likely to threaten the Plan's purpose to deal equitably with Asbestos Claims and Demands. *See* Fitzpatrick Proffer at 11. Thus, the Plan satisfies section 524(g)(2)(B)(ii)(III) of the Bankruptcy Code.

9. Description of Injunctions in Plan and Disclosure Statement (11 U.S.C. § 524(g)(2)(B)(ii)(IV)(aa)).

The terms of the Injunctions, including provisions barring actions against third parties, are set forth in the Plan and described in the Second Amended Disclosure Statement and Supplemental Disclosure Statement. *See* Plan Article 12; Second Amended Disclosure Statement at 11, 29-31; Revised Supplemental Disclosure Statement; Fitzpatrick Proffer at 11. Thus, the Plan satisfies section 524(g)(2)(B)(ii)(IV)(aa) of the Bankruptcy Code.

10. Acceptance of Plan by Class Addressed by Asbestos Trust (11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb)).

The Plan separately classifies asbestos-related personal injury claims into Class 4A (Asbestos Claims against Durabla Manufacturing Co.) and Class 4B (Asbestos Claims against Durabla Canada Ltd.). *See* Articles 3 and 4 of the Plan. Section 7.3 of the Plan requires that at least seventy-five percent (75%) in number of the members of such Classes actually voting on the Plan have voted to accept the Plan. The Plan received acceptances from 99.9% in number and 99.98% in amount of creditors holding Asbestos Claims in Class 4A who voted, and 99.99% in number and 99.97% in amount of creditors holding Asbestos Claims in Class 4B who voted. *See* Lowden Proffer at 9-10. Thus, the Plan satisfies Section 524(g)(2)(B)(ii)(IV)(bb) of the Bankruptcy Code, as well as Section 1126(c) of the Bankruptcy Code.

11. Operation of the Asbestos Trust (11 U.S.C. § 524(g)(2)(B)(ii)(V)).

Pursuant to (a) the TDP; (b) court order; or (c) otherwise, the Asbestos Trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of Asbestos Claims and Demands or other comparable mechanisms that provide reasonable assurance that the Asbestos Trust will value, and be in a financial position to pay, similar Asbestos Claims and Demands in substantially the same manner. *See* Fitzpatrick Proffer at 11-13; *see generally* Trust Agreement; TDP. Therefore, the Plan complies with section 524(g)(2)(B)(ii)(V) of the Bankruptcy Code.

12. Identity of Protected Third-Party (11 U.S.C. § 524(g)(4)(A)(ii)).

The Supplemental Injunction bars any action against the Protected Parties (or any of them) for the purpose of directly or indirectly collecting, recovering, or receiving payments, satisfaction, or recovery with respect to any Channeled Asbestos Claim. *See* Plan § 12.4. The Protected Parties are clearly defined and identified in the Plan and in the Supplemental Injunction. *See* Plan § 12.4; Plan Exhibit 1 (Glossary) ¶ 75. Thus, the Plan complies with section 524(g)(4)(A)(ii) of the Bankruptcy Code.

13. Appointment of the Legal Representative (11 U.S.C. § 524(g)(4)(B)(i)).

Lawrence Fitzpatrick was appointed by the Bankruptcy Court as the Legal Representative for the purpose of, among other things, protecting the rights of persons that might subsequently assert Demands of the kind that are addressed in the Supplemental Injunction and channeled to the Asbestos Trust. In his capacity as the Legal Representative, Mr. Fitzpatrick conducted due diligence of the Debtors and the Related Entities and participated in the negotiation of the Plan Documents and Trust Documents. *See generally* Fitzpatrick Proffer. Mr. Fitzpatrick is a Plan

Proponent and supports Confirmation of the Plan. *See id.* Therefore, the Plan satisfies section 524(g)(4)(B)(i).

14. Supplemental Injunction is Fair and Equitable (11 U.S.C. § 524(g)(4)(B)(ii)).

In light of the benefits provided, or to be provided, to the Asbestos Trust by or on behalf of each Protected Party, the Supplemental Injunction is fair and equitable with respect to the persons that might subsequently assert Demands against any Protected Party. *See* Fitzpatrick Proffer at 13,17; Moser Proffer at 23-25. Thus, the Plan complies with section 524(g)(4)(B)(ii) of the Bankruptcy Code.

15. The Plan Complies with 11 U.S.C. §§ 524 and 1126.

The Plan and its acceptance otherwise comply with sections 524(g) and 1126 of the Bankruptcy Code, and Confirmation of the Plan is in the best interest of all creditors.

U. Asbestos Trust Contributions

The Asbestos Trust will be funded by contributions consisting of $2,200,000 in Cash from the Debtors and certain of the Related Entities; $8,000,000 representing the aggregate principal amount of the Trust Notes; DMC's rights to approximately $230,000 held by the Remco Trust; approximately $140,000 in funds held in attorney trust accounts for paying Asbestos Claims; C$4.9 million in proceeds from the Canadian Insurance Settlement Agreement; approximately $1,574,660 in proceeds from the PPCIGA settlement; and the assignment of various Asbestos Insurance Rights and certain causes of action. *See* Glossary at 3; Fitzpatrick Proffer at 5-6. These contributions constitute substantial assets of the Plan and the reorganization, are essential and necessary to the feasibility of the Plan and the successful reorganization of the Debtors, and constitute a sufficient basis upon which to provide the

Protected Parties with the protections afforded to them under the Plan, Plan Documents and this Confirmation Order. *See* Fitzpatrick Proffer at 13-16; Moser Proffer at 26.

V. Objections

No objections to the Plan were filed with the Court by the Objection deadline of May 16, 2012 established in this Court's March 21, 2012 Supplemental Disclosure Statement and Resolicitation Order.

DECREES

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Objections. All Objections to the Plan that have not been withdrawn or waived, and all reservations of rights pertaining to Confirmation of the Plan included therein, are overruled on the merits.

PLAN

2. Confirmation. The Modified Second Amended Plan, as amended in paragraph N above, is approved and confirmed under section 1129 of the Bankruptcy Code.

3. Amendments. The modifications of the Plan through May 25, 2012, and the amendments of the Plan contained herein or as reflected on the record at the Confirmation Hearing meet the requirements of sections 1127(a) and (c). Such amendments do not adversely change the treatment of the Claim of any creditor or Equity Interest of any equity security holder within the meaning of Bankruptcy Rule 3019, and no further solicitation or voting is required.

4. Plan Classification Controlling. The classifications and allowance of Non-Asbestos Claims and Equity Interests for purposes of the distributions to be made under the Plan shall be governed solely by the terms of the Plan. The classifications and temporary allowance for voting purposes set forth on the Ballots tendered to or returned by the Debtors' creditors in

connection with voting on the Plan (a) were set forth on the Ballots solely for purposes of voting to accept or reject the Plan, (b) do not necessarily represent, and in no event shall be deemed to modify, or otherwise affect, the actual classification of such Claims and Equity Interests under the Plan for distribution purposes, and (c) shall not be binding on the Debtors or Reorganized Debtors.

5. Binding Effect. The Plan and its provisions shall be binding upon the Debtors, Reorganized Debtors, the Creditors' Committee, the Legal Representative, any Entity acquiring or receiving property or a distribution under the Plan, and any holder of a Claim against or Equity Interest in the Debtors, including all governmental entities (including without limitation all taxing authorities), whether or not the Claim or Equity Interest of such holder is impaired under the Plan, whether or not the Claim or Equity Interest is Allowed, and whether or not such holder or Entity has accepted the Plan.

The rights, benefits and obligations of any Entity named or referred to in the Plan, or whose actions may be required to effectuate the terms of the Plan, shall be binding on, and shall inure to the benefit of, any heir, executor, administrator, successor or assign of such Entity (including, but not limited to, any trustee appointed for the Debtors under Chapters 7 or 11 of the Bankruptcy Code). The terms and provisions of the Plan and this Confirmation Order shall survive and remain effective after entry of any order which may be entered converting these Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code, and the terms and provisions of the Plan shall continue to be effective in this or any superseding case under the Bankruptcy Code. This Confirmation Order shall supersede any Bankruptcy Court orders issued prior to the Confirmation Date that may be inconsistent with the Confirmation Order.

6. Vesting of Assets (11 U.S.C. § 1141(b) and (c)). Except as otherwise provided in the Plan, the Reorganized Debtors, after consideration of DMC's merger with and into GRI on the Effective Date, will exist after the Effective Date as separate Entities, with all the powers of corporations under applicable law and without prejudice, except as otherwise provided in the amended certificate of incorporation of Reorganized DCL or GRI, and the amended by-laws of Reorganized DCL or GRI, to any right to alter or terminate such existence (whether by merger, dissolution, or otherwise) under applicable law. Pursuant to Section 13.7 of the Plan, except as otherwise provided in the Plan, the Plan Documents or the Confirmation Order, the property of the Estate of each Debtor (except for the assets contributed by each Debtor to the Asbestos Trust) shall vest in each respective Reorganized Debtor on the Effective Date free and clear of any and all Liens, Claims, Encumbrances and other interests of any Entity. From and after the Effective Date, the Reorganized Debtors may operate their businesses and may use, acquire, and dispose of property free of any restrictions imposed under the Bankruptcy Code, the Bankruptcy Rules, and the Bankruptcy Court. Without limiting the generality of the foregoing, the Reorganized Debtors may, without application to, or approval by, the Bankruptcy Court, pay Professional fees and expenses that the Reorganized Debtors incur after the Effective Date.

7. Objection to Claims. Pursuant to Section 8.7 of the Plan, the Debtors or Reorganized Debtors shall be entitled to object to Claims that have been or should have been brought in the Bankruptcy Court (other than Asbestos Claims) on or before one hundred twenty (120) days after the later of the Effective Date or the date on which such Claim was filed with the Bankruptcy Court unless no Proof of Claim is required to be filed pursuant to Bankruptcy Rule 3002, the Plan, or any order of the Court, as the same may be extended from time to time

by the Bankruptcy Court, and shall be authorized to settle, compromise, withdraw or litigate to judgment such objections without further approval of the Bankruptcy Court.

8. Distributions. Other than with respect to distributions to be made to Asbestos Claims from the Asbestos Trust, the Reorganized Debtors shall make all Distributions required to be made under the Plan as provided under Article 8 of the Plan. All Distributions to be made on account of Asbestos Claims shall be made in accordance with the terms of the Trust Agreement and the TDP, as set forth in Sections 5.1 and 8.2 of the Plan.

9. Disputed Claims. All Disputed Claims against the Debtors shall be subject to the provisions of Article 9 of the Plan. Notwithstanding any other provision of the Plan, if any portion of a Non-Asbestos Claim is a Disputed Claim, no payment or distribution provided for under the Plan shall be made on account of such Non-Asbestos Claim, unless and until such Non-Asbestos Claim becomes an Allowed Claim. All Asbestos Claims must be submitted solely to the Asbestos Trust. Asbestos Claims shall be determined and paid by the Asbestos Trust in accordance with Sections 5.1 and 8.2 of the Plan, the Trust Agreement and the TDP. Only the Asbestos Trust shall have the right to object to and/or resolve Asbestos Claims. Plan § 8.7.

10. Assumption or Rejection of Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)). Pursuant to Section 6.1 of the Plan, the Debtors shall assume, as of the Effective Date, all pre-petition executory contracts to which either Debtor is a party, except for: any executory contract or unexpired lease that (a) has been assumed or rejected pursuant to a Final Order or (b) is the subject of a pending motion for authority to assume or reject contracts or leases filed by either Debtor prior to the entry of this Confirmation Order. All executory contracts assumed or assumed and assigned by the Debtors during these Chapter 11 Cases or

under the Plan shall remain in full force and effect for the benefit of the Reorganized Debtors or the assignee thereof notwithstanding any provision in such contract or lease (including those provisions described in sections 365(b)(2) and (1) of the Bankruptcy Code) that prohibits such assignment or transfer or that enables or requires termination of such contract or lease. This Confirmation Order shall constitute an order of the Bankruptcy Court approving such: (a) rejections; (b) assumptions; or (c) assumptions and assignments, as the case may be, pursuant to sections 365 and 1123 of the Bankruptcy Code as of the Effective Date.

11. Cure of Defaults. Pursuant to Section 6.2 of the Plan, although the Debtors believe no defaults exist of any executory contract or unexpired lease to be assumed under the Plan, the Reorganized Debtors shall, pursuant to section 365(b)(a) of the Bankruptcy Code, satisfy any such monetary default amounts by cure. If there is a dispute regarding (a) the existence or amount of any cure payment, (b) the ability of the Reorganized Debtors to provide adequate assurance of future performance under the executory contract to be assumed, or (c) any other matter pertaining to assumption, the cure payment shall occur either within thirty (30) days of entry of a Final Order determining the amount of the Debtors' or Reorganized Debtors' liability or as may be otherwise agreed by the parties to the executory contract.

12. Bar to Rejection Damages. Pursuant to Section 6.3 of the Plan, any claim for damages arising from the rejection of an executory contract by the Debtors shall be forever barred and shall not be enforceable against the Debtors, the Reorganized Debtors, their Affiliates or their properties, unless a Proof of Claim with respect to such damages is filed within thirty (30) days after the Confirmation Date.

13. Preservation of Insurance. As set forth in Article 11.2 of the Plan, nothing in the Plan, the Plan Documents, or this Confirmation Order shall operate to, or have the effect of,

impairing any Asbestos Insurance Company's legal, equitable, or contractual rights under the Asbestos Insurance Policies in any respect other than the enforcement of any "anti-assignment provision(s) in such policies. The rights of insurers shall be determined according to the terms of the Asbestos Insurance Policies, as applicable. All rights and proceeds under the Asbestos Insurance Policies and insurance settlement agreements shall be transferred to the Asbestos Trust pursuant to Sections 5.2 and 11.1 of the Plan and the Asbestos Insurance Transfer Agreement.

14. Access to Insurance Proceeds and Rights. Upon Confirmation and consummation of the Plan, the Asbestos Trust shall receive and have access to insurance proceeds and rights to insurance coverage and/or insurance payments related to Asbestos Insurance Policies (subject to any applicable policy limits and to the extent provided in the applicable settlement agreement with any Settling Asbestos Insurance Company approved by the Bankruptcy Court) to defend, resolve, and satisfy the Channeled Asbestos Claims in the same manner as such insurance coverage and/or insurance payments were available to either Debtor to respond to asbestos-related claims prior to the Confirmation of the Plan.

15. General Authorizations. The Debtors and Reorganized Debtors are authorized to execute, deliver, file, or record such contracts, instruments, releases, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate, implement, and further evidence the terms and conditions of the Plan, including without limitation any notes or securities issued pursuant to the Plan. The Debtors and Reorganized Debtors and their respective directors, officers, members, agents, and attorneys, are authorized and empowered to issue, execute, deliver, file, or record any agreement, document, or security, including, without limitation, as modified, amended, and supplemented, in substantially the form included therein,

and to take any action necessary or appropriate to implement, effectuate, and consummate the Plan in accordance with its terms, or take any or all corporate actions authorized to be taken pursuant to the Plan, and any release, amendment, or restatement of any bylaws, certificates of incorporation, or other organization documents of the Debtors, whether or not specifically referred to in the Plan or the Plan Documents, without further order of the Bankruptcy Court, and any or all such documents shall be accepted by each of the respective state filing offices and recorded in accordance with applicable state law and shall become effective in accordance with their terms and the provisions of state law.

16. Transfers of Property from the Debtors to Reorganized Debtors. The transfers of property by the Debtors to the Reorganized Debtors (a) are or will be legal, valid, and effective transfers of property; (b) vest or will vest the Reorganized Debtors with good title to such property, except as expressly provided in the Plan or this Confirmation Order; (c) do not and will not constitute avoidable transfers under the Bankruptcy Code or under other applicable bankruptcy or non-bankruptcy law; and (d) do not and will not subject the Reorganized Debtors to any liability by reason of such transfer under the Bankruptcy Code or applicable non-bankruptcy law, including, without limitation, any laws affecting or effecting successor or transferee liability.

17. Approval of Settlements, Transactions and Agreements. By virtue of this Confirmation Order, the other settlements, transactions and agreements to be effected pursuant to the Plan are hereby approved in all respects, including, without limitation, the Trust Agreement, the TDP, the Asbestos Records Cooperation Agreement, the Asbestos Insurance Transfer Agreement, the Share Issuance Agreement, the Canadian Insurance Settlement Agreement, and the PPCIGA Settlement Agreement. The Entities listed in the Canadian

Insurance Settlement Agreement, the PPCIGA Settlement Agreement, and any other Person that qualifies as a Settling Asbestos Insurance Company shall have the rights and benefits entitled to Settling Asbestos Insurance Companies under the Plan, including the benefits of the Supplemental Injunction with respect to Channeled Asbestos Claims. The Canadian Insurers shall have the benefit of the Anti-Suit Injunction under the Plan.

The terms and conditions of the Note Issuance, Guaranty, and Security Agreement, the Trust Notes, the Share Issuance Agreement, and any related documents are essential to the success and feasibility of the Plan. All such documents shall constitute legal, valid, binding and authorized obligations of the Debtors obligated thereunder, enforceable in accordance with their terms. On the Effective Date, all of the Liens and security interests granted by the Debtors in accordance with such documents shall be deemed approved and shall be legal, valid, binding and enforceable Liens on the collateral in accordance with the terms of each agreement.

18. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state or any other governmental authority with respect to the implementation or consummation of the Plan and any documents, instruments, or agreements, and any amendments or modifications thereto, and any other acts referred to in or contemplated by the Plan, the Second Amended Disclosure Statement, the Revised Supplemental Disclosure Statement, and any documents, instruments, or agreements, and any amendments or modifications thereto.

19. Exemption from Transfer Taxes. Pursuant to section 1146(a) of the Bankruptcy Code, the issuance, transfer, or exchange of notes or equity securities under the Plan, the creation of any mortgage, deed of trust, or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any deed or other instrument of transfer

under, in furtherance of, or in connection with the Plan shall be exempt from all taxes as provided in such section 1146(a).

20. Administrative Expense Claims. Pursuant to Section 2.2 of the Plan, all Administrative Expense Claims must be made by application filed with the Bankruptcy Court and served on counsel for the Debtors no later than the Administrative Expense Claims Bar Date which shall be the first Business Day that is at least forty-five (45) days after the Effective Date. The Debtors, the Reorganized Debtors, the Asbestos Trust, or any other party in interest may object to an Administrative Expense Claim within thirty (30) days of the Administrative Expense Claims Bar Date and the Bankruptcy Court shall determine the Allowed amount of such Administrative Expense Claim. Notwithstanding the foregoing, (a) no application seeking payment of an Administrative Expense Claim need be filed with respect to an undisputed post-petition obligation that was paid or is payable by the Debtors in the ordinary course of business; provided, however, that in no event shall a post-petition obligation that is contingent or disputed and subject to liquidation through pending or prospective litigation, including, but not limited to, obligations arising from personal injury, property damage, products liability, consumer complaints, employment law (excluding claims arising under workers' compensation law), secondary payor liability, or any other disputed legal or equitable claim based on tort, statute, contract, equity, or common law, be considered to be an obligation which is payable in the ordinary course of business; and (b) no application seeking payment of an Administrative Expense Claim need be filed with respect to a cure payment owing under an executory contract or unexpired lease if the amount of cure is fixed by order of the Bankruptcy Court.

21. Professional Fee Claims. Notwithstanding anything to the contrary in the Confirmation Order, all entities seeking awards by the Bankruptcy Court of compensation for

services rendered or reimbursement of expenses incurred through and including the Effective Date under sections 327, 328, 330, 331, 503(b) and 1103 of the Bankruptcy Code (the "Professional Fee Claims"), including any compensation requested by any Entity for making a substantial contribution in the Reorganization Case except for as provided in Section 8.8 of the Plan) shall file an application for final allowance of compensation and reimbursement of expenses by no later than the first Business Day that is at least forty-five (45) days after the Effective Date. Objections to any requests for Professional Fee Claims can be filed by not later than seventy-five (75) days after the Effective Date. The Reorganized Debtors are authorized to pay compensation for Professional services rendered and reimbursement of expenses incurred after the Effective Date in the ordinary course of business and without the need for Bankruptcy Court approval.

22. Dissolution of Creditors' Committee. Effective on the Effective Date, any committee appointed in these Chapter 11 Cases shall be dissolved automatically, whereupon its members, Professionals, and agents shall be released from any further duties and responsibilities in these Chapter 11 Cases and under the Bankruptcy Code, except with respect to applications for compensation by Professionals or reimbursement of expenses incurred as a member of an official committee and any motions or other actions seeking enforcement or implementation of the provisions of the Plan or the Confirmation Order or pending appeals of any other order entered in these Chapter 11 Cases. The Creditors' Committee may, at its option, participate in any (a) appeal of the Confirmation Order; (b) hearing on a claim for compensation or reimbursement of a Professional; or (c) adversary proceeding pending on the Effective Date in which the Creditors Committee is a party.

23. Continuation of Legal Representative. From and after the Effective Date, the Legal Representative shall continue to serve as provided in the Plan and the Trust Agreement, to perform the functions specified and required therein. The Legal Representative also may, at his option, participate in any: (a) appeal of the Confirmation Order; (b) hearing on a claim for compensation or reimbursement of a Professional; or (c) adversary proceeding pending on the Effective Date in which the Legal Representative is a party.

24. Canadian Proceedings. This Court's March 21, 2012 Order approving DCL as a Foreign Representative shall remain in full force and effect notwithstanding confirmation of the Plan, and the Court shall retain jurisdiction to issue further orders in connection therewith.

DISCHARGE AND INJUNCTIONS

25. Exculpation. Pursuant to Section 12.1 of the Plan, as modified herein, the Debtors, the Reorganized Debtors, the Creditors' Committee, the Legal Representative or any respective directors, officers, employees, members, attorneys, accountants, financial advisors, and representatives shall not be liable, other than for willful misconduct or gross negligence, to any holder of a Claim or Equity Interest or any other Entity with respect to any action, omission, forbearance from action, decision or exercise of discretion taken at any time prior to the Effective Date in connection with or arising out of the Reorganization Cases, including: (a) the discharge of their duties under the Bankruptcy Code; (b) the implementation of any of the transactions provided for or contemplated in the Plan or Plan Documents; (c) any action taken in connection with either the enforcement of either Debtor's rights against any Entity or the defense of Claims asserted against the Debtors with regard to the Reorganization Cases; (d) any action taken in the negotiation, formulation, development, proposal, disclosure, Confirmation or implementation of the Plan Documents filed in this Reorganization Case; or (e) the

administration of the Plan or the Asbestos Trust or the Asbestos Trust Assets and property to be distributed pursuant to the Plan. Such parties shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under the Plan and the Plan Documents.

26. Discharge. Pursuant to Section 12.2 of the Plan, except as specifically provided for in the Plan or this Confirmation Order, and pursuant to section 1141(d)(1)(A) of the Bankruptcy Code, Confirmation of the Plan shall (a) discharge the Debtors and the Reorganized Debtors from any and all Claims (including Asbestos Claims), including any Claim of the kind specified in sections 502(g), 502(h) and 502(i) of the Bankruptcy Code, whether or not: (i) a Proof of Claim based on such Claim was filed or deemed filed under section 501 of the Bankruptcy Code, or such Claim was listed on any Schedules of the Debtors; (ii) such Claim is or was allowed under section 502 of the Bankruptcy Code; or (iii) the holder of such Claim has voted on or accepted the Plan; and (b) preserve all rights and interests of the holders of Equity Interests in respect of the Debtors or Reorganized Debtors, for the purposes of and subject to the terms of the Plan. Except as specifically provided for in the Plan to the contrary, the rights provided in the Plan shall be in complete discharge of all Claims (including Asbestos Claims) against, Liens on, and Interests in the Debtors or the Reorganized Debtors (other than the Equity Interests in Class 5).

27. Release. Pursuant to Section 12.2 of the Plan, each Entity that accepts a distribution or right pursuant to the Plan shall be presumed conclusively to have discharged the Reorganized Debtors and to have released the Released Parties from any other cause of action based on or arising from the Claim or Interest on which the distribution or right is received. Nothing contained in the Plan is intended to operate as a release of (a) any potential claims

based upon gross negligence or willful misconduct or (b) any claim by any federal, state or local authority under the Internal Revenue Code or other tax regulation or any applicable environmental or criminal laws.

28. Discharge Injunction. As set forth in Section 12.3 of the Plan and except as specifically provided to the contrary in the Plan or the Plan Documents, pursuant to §§ 105(a), 524(a), and 1141 of the Bankruptcy Code, all Entities are prohibited and enjoined from commencing or continuing any action, the employment of process, or any act to collect, recover from, or offset (a) any Claim (including Asbestos Claims) against or Interest (other than the Equity Interests in Class 5) in the Debtors or the Reorganized Debtors and (b) any cause of action, whether known or unknown, against the Debtors or the Reorganized Debtors based on or arising from any Claim or Interest described in part (a) of this paragraph.

29. Supplemental Injunction. To preserve and promote the settlements contemplated by and provided for in the Plan and to supplement, where necessary, the injunctive effect of the discharge both provided by §§ 1141 and 524(a) of the Bankruptcy Code and as described in Section 12.3 of the Plan and pursuant to the exercise of the equitable jurisdiction and power of the Bankruptcy Court and the District Court under §§ 524(g) or 105(a) of the Bankruptcy Code (or both), all Entities which have held or asserted, which hold or assert, or which may in the future hold or assert any Channeled Asbestos Claim against the Protected Parties (or any of them) shall be permanently stayed, restrained, and enjoined from taking any action for the purpose of directly or indirectly collecting, recovering, or receiving payments, satisfaction, or recovery with respect to any Channeled Asbestos Claim, including, but not limited to:

a. commencing or continuing in any manner any action or other proceeding of any kind with respect to any Channeled Asbestos Claim against any of the Protected Parties,

or against the property of any Protected Party with respect to any such Channeled Asbestos Claim;

b. enforcing, attaching, collecting, or recovering, by any manner or means, any judgment, award, decree, or order against any of the Protected Parties or against the property of any Protected Party with respect to any Channeled Asbestos Claim;

c. creating, perfecting, or enforcing any Lien of any kind against any Protected Party or the property of any Protected Party with respect to any Channeled Asbestos Claim;

d. except as otherwise specifically provided in the Plan, asserting or accomplishing any setoff, right of subrogation, indemnity, contribution, or recoupment of any kind against any obligation due any Protected Party or against the property of any Protected Party with respect to any Channeled Asbestos Claim; and

e. taking any act, in any manner, in any place whatsoever, against any of the Protected Parties or their property, that does not conform to, or comply with, the provisions of the Plan Documents pertaining to a Channeled Asbestos Claim.

Without limiting the foregoing, the following Claims are deemed to be within the scope of this injunction: (a) any and all Claims that are based in whole or in part on the insurance relationship between any of the Insurer Releasees and any of the DCL Releasees based on, arising from, attributable to, in any way, or under the DCL Policies, whether arising from statute, common law, or otherwise, including, but not limited to, any such Claim that is (i) based on the defense, handling, settlement, trial, or appeal of a Claim against any of the DCL Releasees, (ii) based directly or indirectly on allegedly suppressed or inappropriate settlement values or the alleged failure to assert Claims due to the conduct of any of the Insurer Releasees or any of the

DCL Releasees or their respective counsel, with respect to Claims against any of the DCL Releasees, (iii) alleging conspiracy or concert of action between any of the DCL Releasees and any of the Insurer Releasees to suppress the knowledge of the hazards of asbestos, (iv) alleging failure to disclose facts or information concerning asbestos learned or acquired as a result of the insurance relationship between any of the Insurer Releasees and any of the DCL Releasees, (v) based on, arising from, or attributable to, in any way, any surveys or loss prevention and control activities undertaken or not undertaken, or allegedly undertaken or allegedly not undertaken, by any of the Insurer Releasees, or (vi) alleging insurer misconduct or wrongdoing of any kind whatsoever based on, arising from, or attributable to, in any way, Asbestos Claims or the DCL Policies; and (b) any and all Claims that are based in whole or in part on any alleged breach of the duty of good faith and fair dealing, unfair claims practices, unfair trade practices, bad faith, violations of any statute, regulation or code (except violations of any criminal law that has resulted in a criminal charge), or any other type of extra-contractual liability based on, arising from, or attributable to, in any way, Asbestos Claims or the DCL Policies.

In addition, with respect to the Insurer Releasees and as between the DCL Releasees and the Insurer Releasees, for the purposes of interpreting, construing and applying Section 12.4 hereof, the proviso in the Glossary definition of "Asbestos Claims" stating that "'Asbestos Claims' shall not include or pertain to any Claim held by a Released Party or by an Affiliate of either Debtor (even if such Claim would constitute an Indirect Asbestos Claim if it arose in favor of an Entity that was not a Released Party or an Affiliate of either Debtor)" does not apply.

30. Reservations in Connection with the Supplemental Injunction. Notwithstanding anything to the contrary in paragraph 29 above, the Supplemental Injunction shall not enjoin:

a. the rights of Entities to the treatment accorded them under Articles 2, 3 and 4 of the Plan, as applicable, including the rights of Entities with Channeled Asbestos Claims to assert such Channeled Asbestos Claims and to have such Channeled Asbestos Claims resolved in accordance with the TDP;

b. the rights of Entities to assert any Channeled Asbestos Claim against the Asbestos Trust in accordance with the TDP, or any debt, obligation, or liability for payment of Asbestos Trust Expenses against the Asbestos Trust;

c. the rights of the Asbestos Trust, Reorganized Durabla Manufacturing Company, or Reorganized Durabla Canada Ltd. to prosecute any Asbestos Insurance Action; or

d. the rights of Entities to assert any Claim, debt, obligation, or liability for payment against an Asbestos Insurance Company that is not a Protected Party unless otherwise enjoined by order of the Bankruptcy Court or estopped by provisions of the Plan.

31. Anti-Suit Injunction. With respect to any Insurer Releasee, Section 12.8 of the Plan shall operate as an injunction, pursuant to section 105(a) of the Bankruptcy Code, permanently and forever prohibiting and enjoining the commencement, conduct, or continuation of any action or cause of action, whether known or unknown, the employment of process or any act to collect, recover from, or offset any non-asbestos Claim or Demand against, any Insurer Releasee based on, arising from, or attributable to, in any way, an Asbestos Insurance Policy or any other insurance policy or rights under such other insurance policy issued to, or insuring the relationship of the relevant Insurer Releasees with, the relevant Debtor entities that are insureds under such policies, but such injunction pursuant to section 105(a) of the Bankruptcy Code shall not affect or modify the rights of Persons insured under policies of insurance except to the extent released in an applicable settlement agreement with a Settling Asbestos Insurance

Company approved by the Bankruptcy Court. The foregoing injunction includes but is not limited to (a) any and all Claims that are based in whole or in part on the insurance relationship between any of the Insurer Releasees and any of the DCL Releasees arising from, attributable to, in any way, or under the DCL Policies, whether arising from statute, common law, or otherwise, including, but not limited to, any such Claim that is (i) based on the defense, handling, settlement, trial, or appeal of a Claim against any of the DCL Releasees, (ii) based directly or indirectly on allegedly suppressed or inappropriate settlement values or the alleged failure to assert Claims due to the conduct of any of the Insurer Releasees or any of the DCL Releasees or their respective counsel, with respect to Claims against any of the DCL Releasees, (iii) alleging conspiracy or concert of action between any of the DCL Releasees and any of the Insurer Releasees to suppress the knowledge of the hazards of asbestos, (iv) alleging failure to disclose facts or information concerning asbestos learned or acquired as a result of the insurance relationship between any of the Insurer Releasees and any of the DCL Releasees, (v) based on, arising from, or attributable to, in any way, any surveys or loss prevention and control activities undertaken or not undertaken, or allegedly undertaken or allegedly not undertaken, by any of the Insurer Releasees, or (vi) alleging insurer misconduct or wrongdoing of any kind whatsoever based on, arising from, or attributable to, in any way, Asbestos Claims or the DCL Policies; and (b) any and all Claims that are based in whole or in part on any alleged breach of the duty of good faith and fair dealing, unfair claims practices, unfair trade practices, bad faith, violations of any statute, regulation or code (except violations of any criminal law that has resulted in a criminal charge), or any other type of extra-contractual liability based on, arising from, or attributable to, in any way, Asbestos Claims or the DCL Policies.

32. Reservation of Rights. The satisfaction, release, and discharge, and the Injunctions set forth in paragraphs 25-31 above and Sections 12.2, 12.3, 12.4 and 12.8 of the Plan shall not serve to satisfy, discharge, release, or enjoin claims by the Reorganized Debtors, or any other Entity, against (a) the Asbestos Trust for payment of Asbestos Claims in accordance with the TDP or (b) the Asbestos Trust for the payment of Asbestos Trust Expenses. The Discharge Injunction shall not enjoin any action taken or to be taken by the holder of an Allowed Secured Claim (including any action that would otherwise be prohibited by subparagraphs (a) through (e) of paragraph 29 above or subparts (a)(1) through (5) of Section 12.4 of the Plan) to enforce its Allowed Secured Claim, or to perfect its Liens and security interests in its collateral. The Plan shall not discharge or release any claim or demand of the Debtors, Reorganized Debtors, the Asbestos Trust, or any Asbestos Claimant against any Asbestos Insurance Company other than a Settling Asbestos Insurance Company (to the extent provided in the applicable settlement agreement with such Settling Asbestos Insurance Company approved by the Bankruptcy Court).

33. Moratorium, Injunction, and Limitation of Recourse for Payment. Except as otherwise provided in the Plan or by subsequent order of the Bankruptcy Court, all Persons or entities who have held, hold, or may hold Claims and Interests (other than the Equity Interests in Class 5) against the Debtors are permanently enjoined from taking any of the following actions against the Estate, the Reorganized Debtors, the Creditors' Committee, the individual members of the Creditors' Committee, or the Legal Representative, or their professionals, representatives and/or agents or any of their property on account of any such Claims and Interests:
(i) commencing or continuing, in any manner or in any place, any administrative, civil or criminal action or other proceeding; (ii) enforcing, attaching, collecting or recovering in any

manner any judgment, award, decree, injunction or order; (iii) creating, perfecting, or enforcing any Lien or encumbrance; (iv) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability, or obligation due to either Debtor other than through a proof of claim or adversary proceeding; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Plan; *provided, however*, that nothing contained herein shall preclude such persons from exercising their rights pursuant to and consistent with the terms of the Plan.

34. Releases, Exculpations, and Injunctions. The release, exculpation, and injunction provisions contained in the Plan are fair and equitable, are given for valuable consideration, and are in the best interests of the Debtors and their chapter 11 Estates, and such provisions shall be effective and binding upon all persons and entities. In addition, the releases of and by non-Debtors under the Plan are fair to holders of Claims and Interests and are necessary to the proposed reorganization, and set forth the proper standard of liability, thereby satisfying the requirements of In re PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000), In re Continental Airlines, Inc., 203 F.3d 203, 214 (3d Cir. 2000), and In re Zenith Electronics Corp., 241 B.R. 92, 110-11 (Bankr. D. Del. 1999).

35. Termination of Injunctions and Automatic Stay. Pursuant to Section 13.2 of the Plan, all of the injunctions and/or stays in existence immediately prior to the Confirmation Date provided for in or in connection with these Chapter 11 Cases, whether pursuant to sections 105, 362, 524(g) or any other provision of the Bankruptcy Code, or other applicable law, shall remain in full force and effect until the Injunctions set forth in the Plan become effective pursuant to a Final Order. In addition, on and after the Confirmation Date, the Reorganized Debtors may seek

such further orders as they may deem necessary or appropriate to preserve the status quo during the time between the Confirmation Date and the Effective Date.

36. Each of the Injunctions contained in the Plan or the Confirmation Order shall become effective on the Effective Date and shall continue in effect at all times thereafter unless otherwise provided by the Plan or the Confirmation Order. All actions of the type or nature of those to be enjoined by such Injunctions shall be enjoined during the period between the Confirmation Date and the Effective Date.

37. Neither the Debtors, Reorganized Debtors, the Related Entities, the Legal Representative, the Creditors' Committee, nor the Trustee shall seek to terminate, reduce or limit the scope of the Supplemental Injunction, the Anti-Suit Injunction, or any other injunction contained in the Plan that inures to the benefit of any Settling Asbestos Insurance Company.

38. Limitations of Injunctions. Pursuant to Section 12.4(b) of the Plan, the releases set forth in the Plan and the injunction set forth in Section 12.4 shall not enjoin: (a) the rights of Entities to the treatment accorded to them under Articles 3 and 4 of the Plan, as applicable, including the rights of Entities with Channeled Asbestos Claims to assert such Claims or Demands against the Asbestos Trust in accordance with the TDP; and (b) the rights of Entities to assert any Claim, debt, obligation, or liability for payment of Asbestos Trust Expenses against the Asbestos Trust.

THE ASBESTOS TRUST

39. Creation of Asbestos Trust. Pursuant to Section 5.1 of the Plan, on the Effective Date, the Asbestos Trust shall be created and funded with the Asbestos Trust Assets in accordance with the Plan Documents, the Trust Documents and section 524(g) of the Bankruptcy Code. The Asbestos Trust is intended to constitute a "qualified settlement fund" within the meaning of section 468B of the Internal Revenue Code and the regulations issued

thereunder. The purpose of the Asbestos Trust is to (a) assume all liability for all Channeled Asbestos Claims, (b) preserve, hold, manage and maximize the Asbestos Trust Assets for use in paying and otherwise satisfying Channeled Asbestos Claims and paying the Asbestos Trust Expenses, (c) provide for the resolution or liquidation and, if appropriate, satisfaction of all Channeled Asbestos Claims in accordance with the TDP, and (d) otherwise comply in all respects with the requirements of a trust set forth in section 524(g)(2)(B) of the Bankruptcy Code, all in accordance with the Plan and the Trust Agreement in such a way that all holders of Asbestos Claims and Demands are treated in a substantially similar manner. Plan § 5.1; Fitzpatrick Proffer at 7, 11-13; Trust Agreement at § 1.2.

40. Appointment of Trustee. As set forth in the Trust Agreement, the initial Trustee shall be The Honorable Edward D. Robertson, Jr. From the time of his designation to the Effective Date, the Trustee is authorized to initiate or otherwise engage in such organizational activity with regard to the Asbestos Trust as he, in his reasonable judgment, deemed or deems appropriate. Compensation and reimbursement of the Trustee and any professionals retained by him for services rendered or expenses incurred pending the Effective Date shall be the sole responsibility of the Asbestos Trust, and shall be payable from the Asbestos Trust Assets as costs of organizing the Asbestos Trust. The Trustee is authorized to retain professionals, including professionals currently retained by the Creditors' Committee in these Chapter 11 Cases pending the Effective Date.

41. Creation of the Trust Advisory Committee. On the Effective Date, there shall be formed a Trust Advisory Committee which will serve in accordance with the terms of Trust Agreement. The initial members of the Trust Advisory Committee shall be: Deirdre Pacheco of Wilentz, Goldman & Spitzer, Woodbridge, NJ; Thomas M. Wilson of Kelley & Ferraro, L.L.P.,

Cleveland, OH; John A. Baden, IV, of Motley Rice LLC, Mt. Pleasant, SC; and Benjamin Shein of the Shein Law Center, Ltd., Philadelphia, PA.

42. Execution and Delivery of Plan Documents. On the Effective Date, the Note Issuers and Note Guarantors shall execute and deliver the Note Issuance, Guaranty and Security Agreement, the Trust Notes, and the Share Issuance Agreement to the Asbestos Trust; the Shareholders (as defined in the Share Issuance Agreement) shall execute and deliver the Share Issuance Agreement to the Asbestos Trust; and the Debtors shall execute and deliver the Asbestos Insurance Transfer Agreement and the Asbestos Records Cooperation Agreement to the Asbestos Trust.

43. Books and Records. The Asbestos Records Cooperation Agreement shall become effective on the Effective Date, and the Asbestos Records shall be treated in accordance therewith.

44. Obligations Pertaining to Insurance Settlement Agreements. Pursuant to Section 5.10 of the Plan, this Confirmation Order, any settlement agreement of a Settling Asbestos Insurance Company, and each Final Order of the Bankruptcy Court approving such settlement agreement(s) shall be binding upon and inure to the benefit of the Asbestos Trust, and each of the foregoing shall be fully bound by all the terms and conditions of each such settlement agreement without need for further act or documentation of any kind.

45. Obligations Pertaining to Canadian Insurance Settlement Agreement. Effective from the creation of the Asbestos Trust, the Asbestos Trust shall be subject to and bound by the Canadian Insurance Settlement Agreement and the Order Authorizing and Approving Settlement and Policy Buy Back Among Durabla Canada Ltd., St. Paul Fire and Marine Insurance Company, Allstate Insurance Company, Allstate Insurance Company of Canada,

Royal & Sun Alliance Insurance Company of Canada, and Chartis Insurance Company of Canada, and American Home Assurance Company, pursuant to Sections 105, 363, 1107 and 1108 of the Bankruptcy Code and Rules 2002, 6004, 9014 and 9019 of the Federal Rules of Bankruptcy Procedure [Doc. No. 794]. The Asbestos Trust, upon its creation and without further order of any court or action by any Person, shall be deemed a party to the Canadian Insurance Settlement Agreement.

MISCELLANEOUS

46. Modification of Confirmation Order Without Consent. Pursuant to section 524(g)(i)(A) of the Bankruptcy Code, the District Court must affirm the Supplemental Injunction as a condition precedent to the Effective Date of the Plan. In the event that the District Court modifies the Plan or this Confirmation Order without the consent of the Plan Proponents, the Plan Proponents shall have the opportunity to withdraw their support for the Plan, and upon notification submitted by the Plan Proponents to the Bankruptcy Court: (A) this Confirmation Order shall be vacated; (B) no Distributions under the Plan shall be made; and (C) the Debtors and all holders of Claims against and Equity Interests in the Debtors shall be restored to the *status quo ante* as of the day immediately preceding the Confirmation Date as though the Confirmation Date never occurred; provided, that, nothing contained in the Plan shall: (A) constitute or be deemed a waiver or release of any Claims or Equity Interests by, against, or in the Debtors or any other Entity; or (B) prejudice in any manner the rights of the Debtors or any other Entity in these Chapter 11 Cases or any other or further proceedings involving the Debtors.

47. Notice of Entry of Confirmation Order and Effective Date. The Debtors and their authorized agent shall serve notice of entry of this Confirmation Order on all creditors of

the Debtors as of the date hereof, and other parties in interest, within five (5) business days of the Effective Date.

48. Authorization to File Conformed Plan. The Debtors are authorized to file a conformed Plan, dated on the date hereof, that incorporates the amendments to the Plan authorized herein within thirty (30) days of the entry of this Confirmation Order.

49. Applicable Non-Bankruptcy Law. Pursuant to sections 1123(a) and 1142(a) of the Bankruptcy Code and the provisions of this Confirmation Order, the Plan and the Plan Documents shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

50. Final Order. This Confirmation Order shall become a Final Order in the manner provided in paragraph 52 of the Glossary.

51. Severability. Each term and provision of the Plan, as it may have been altered or interpreted by the Bankruptcy Court in accordance with Section 15.7 of the Plan, is valid and enforceable pursuant to its terms.

52. Conflicts Between Order and Plan. To the extent of any inconsistency between the provisions of the Plan and this Confirmation Order, the terms and conditions contained in this Confirmation Order shall govern. The provisions of this Confirmation Order are integrated with each other and are nonseverable and mutually dependent unless expressly stated by further order of this Court.

53. Superseder of Confirmation Order. This Confirmation Order shall supersede any Bankruptcy Court orders issued prior to the Confirmation Date that may be inconsistent with this Confirmation Order.

REPORT AND RECOMMENDATION TO THE DISTRICT COURT

54. To the extent required under 28 U.S.C. § 157(d), this Court hereby reports to the District Court and recommends that the District Court enter an order issuing and affirming the Injunctions set forth in the Plan and paragraphs 29 and 31 of this Confirmation Order and adopting the findings of fact and conclusions of law found in Section T (Plan Compliance with Requirements of Section 524(g)) of this Confirmation Order pursuant to section 524(g)(3) of this Bankruptcy Code.

Dated: June 21, 2012
Wilmington, Delaware

The Honorable Mary F. Walrath
United States Bankruptcy Judge

Schedule "B"

U.S. District Court Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
DURABLA MANUFACTURING COMPANY and DURABLA CANADA LTD.,	:	Case No. 09-14415 (MFW) (Jointly Administered)
Debtors.	:	District Court Case No. 12-mc-144-SLR

ORDER AFFIRMING THE BANKRUPTCY COURT'S ORDER CONFIRMING THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF DURABLA MANUFACTURING COMPANY AND DURABLA CANADA LTD. AS MODIFIED

Upon the Motion of the Debtors for an Order Affirming the Bankruptcy Court's Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization of Durabla Manufacturing Company and Durabla Canada Ltd. as Modified (the "Motion")[1] and upon consideration of the entire Confirmation Record as supplemented by the Motion, and upon this Court having determined that it has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a), and for good and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. Pursuant to 11 U.S.C. § 524(g), the Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization of Durabla Manufacturing Company and Durabla Canada Ltd. as Modified (the "Confirmation Order") are hereby adopted, approved, and affirmed in all respects, including but not limited to the Supplemental Injunction and the Anti-Suit Injunction.

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

3. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: August 2, 2012

United States District Judge

Court File No. CV-12-9762-00CL

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

AND IN THE MATTER OF DURABLA MANUFACTURING COMPANY AND DURABLA CANADA LTD.

APPLICATION OF DURABLA CANADA LTD. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT
TORONTO

ORDER

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Lawyers for Durabla Canada Ltd. and
Durabla Manufacturing Company

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2010 ONSC 3974
Ontario Superior Court of Justice [Commercial List]

Xerium Technologies Inc., Re

2010 CarswellOnt 7712, 2010 ONSC 3974, 193 A.C.W.S. (3d) 1066, 71 C.B.R. (5th) 300

IN THE MATTER OF the Companies' Creditors Arrangement ACT, R.S.C. 1985, c. C-36, AS AMENDED

XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC., STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC, XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED, XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A. (collectively, the "Chapter 11 Debtors") (Applicants)

C. Campbell J.

Heard: May 14, 2010
Judgment: September 28, 2010
Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

Headnote

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

Foreign Proceedings — Debtors commenced proceedings in U.S. under Chapter 11 of U.S. Bankruptcy Code ("U.S. Code") — Recognition order was granted in Canada recognizing Chapter 11 Proceedings as foreign main proceeding in respect of Debtors, pursuant to Pt. IV of Companies' Creditors Arrangements Act ("CCAA") — U.S. Bankruptcy Court made various orders in respect of Debtors' ongoing business operations ("Orders") and confirmed Debtors' Joint Plan of Reorganization ("Plan") under U.S. Code ("Confirmation Order") — Applicant company, Foreign Representative of Debtors, brought motion to have Orders, Confirmation Order and Plan recognized and given effect in Canada — Motion granted — Provisions of Plan were consistent with purposes set out in s. 61(1) of CCAA — Plan was critical to restructuring of Debtors as global corporate unit — Recognition of Confirmation Order was necessary to ensure fair and efficient administration of cross-border insolvency — U.S. Bankruptcy Court concluded Plan complied with U.S. Bankruptcy principles, and that Plan was made in good faith; did not breach any applicable law; was in interests of Debtors' creditors and equity holders; and would not likely be followed by need for liquidation or further financial reorganization of Debtors — Such principles also underlay CCAA, and thus dictated in favour of Plan's recognition and implementation in Canada.

Table of Authorities

Cases considered by *C. Campbell J.*:

Babcock & Wilcox Canada Ltd., Re (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Chapter 11 — referred to

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

Pt. IV — referred to

s. 44 — considered

s. 53(b) — referred to

s. 61(1) — considered

MOTION by applicant for orders recognizing and giving effect to certain orders of U.S. Bankruptcy Court in Canada.

***C. Campbell J.*:**

1 The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

2 Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

3 On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

4 On various dates in April 2010, Judge Kevin J. Carey of the U.S. Bankruptcy Court made certain orders in respect of the Chapter 11 Debtors' ongoing business operations.

5 On May 12, 2010, Judge Carey confirmed the Chapter 11 Debtors' amended Joint Prepackaged Plan of Reorganization dated March 30, 2010 as supplemented (the "Plan") [1] pursuant to the U.S. Bankruptcy Code (the "U.S. Confirmation Order.")

6 Xerium sought in this motion to have certain orders made by the U.S. Bankruptcy Court in April 2010, the U.S Confirmation Order and the Plan recognized and given effect to in Canada.

7 The Applicant together with its direct and indirect subsidiaries (collectively, the "Company") are a leading global manufacturer and supplier of products used in the production of paper products.

8 Both Xerium, a Delaware limited liability company, Xerium Canada Inc. ("Xerium Canada"), a Canadian company, together with other entities forming part of the Chapter 11 Debtors are parties to an Amended and Restated Credit and Guarantee Agreement dated as of May 30, 2008 as borrowers, with various financial institutions and other persons as lenders. The Credit Facility is governed by the laws of the State of New York.

9 Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and is difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

10 The Plan was developed between the Applicant, its direct and indirect subsidiaries together with the Administrative Agent and the Secured Lender Ad Hoc Working Group.

11 Pursuant to the Plan, on March 2, 2010, the Chapter 11 Debtors commenced the solicitation of votes on the Plan and delivered copies of the Plan, the Disclosure Statement and the appropriate ballots to all holders of claims as of February 23, 2010 in the classes entitled to vote on the Plan.

12 The Disclosure Statement established 4:00 p.m. (prevailing Eastern time) on March 22, 2010 as the deadline for the receipt of ballots to accept or reject the Plan, subject to the Chapter 11 Debtors' right to extend the solicitation period. The Chapter 11 Debtors exercised their right to extend the solicitation period to 6:00 p.m. (prevailing Eastern time) on March 26, 2010. The Plan was overwhelmingly accepted by the two classes of creditors entitled to vote on the Plan.

13 On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

14 Various orders were made by the U.S. Bankruptcy Court in April 2010, which orders were recognized by this Court.

15 On May 12, 2010, at the Combined Hearing, the U.S. Bankruptcy Court confirmed the Plan, and made a number of findings, *inter alia*, regarding the content of the Plan and the procedures underlying its consideration and approval by interested parties. These included the appropriateness of notice, the content of the Disclosure Statement, the voting process, all of which were found to meet the requirements of the U.S. Bankruptcy Code and fairly considered the interests of those affected.

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

17 Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.$640 million to a notional value of approximately U.S.$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. $80 million Exit Facility.

18 The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than $41.5 million in value.

19 Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

20 The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

21 I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

22 On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

> (a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;
>
> (b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;
>
> (c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;
>
> (d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;
>
> (e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;
>
> (g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and
>
> (h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

23 I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

24 Section 44 identifies the purpose of Part IV of the CCAA. It states

> The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (b) greater legal certainty for trade and investment;
>
> (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (d) the protection and the maximization of the value of debtor company's property; and
>
> (e) the rescue of financially troubled businesses to protect investment and preserve employment.

25 I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

> Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

27 The applicable factors from *Babcock & Wilcox Canada Ltd., Re* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum:

> (a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;
>
> (b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;
>
> (c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;
>
> (d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;
>
> (e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;
>
> (f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

28 Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

> (a) it is made in good faith;
>
> (b) it does not breach any applicable law;
>
> (c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and
>
> (d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

29 In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

30 The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

31 The requested Order is to issue in the form signed.

Motion granted.

Footnotes

1 Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

End of Document

9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Shermag Inc., Re | 2009 QCCS 537, 2009 CarswellQue 2487, [2009] R.J.Q. 1289, EYB 2009-156550, J.E. 2009-897, 51 C.B.R. (5th) 95 | (C.S. Qué., Mar 26, 2009)

2003 CarswellOnt 787
Ontario Superior Court of Justice

Laidlaw, Re

2003 CarswellOnt 787, [2003] O.J. No. 865, 120 A.C.W.S. (3d) 935, 39 C.B.R. (4th) 239

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of the Business Corporations Act (Ontario), R.S.O. 1990 c. B. 16, as Amended

In the Matter of Laidlaw Inc. and Laidlaw Investments Ltd.

Farley J.

Heard: February 28, 2003
Judgment: February 28, 2003
Docket: 01-CL-4178

Counsel: *J. Carfagnini*, *B. Empey*, for Laidlaw Applicants
D. Tay, for Ernst & Young Inc., Monitor
S.R. Orzy, *K.J. Zych*, for Bondholders Subcommittee
D. Byers, for Bank Subcommittee
J. Marin, for Safety Kleen Corporation
R. Jaipargas, for Federal Insurance Company, Chubb Insurance Company

Subject: Corporate and Commercial; Insolvency

Headnote

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

Applicant debtors and others commenced proceedings under chapter 11 of United States Bankruptcy Code — Joint plan of reorganization for debtors was confirmed by U.S. judge — Debtors brought application for order pursuant to s. 18.6(2) of Companies' Creditors Arrangement Act recognizing and implementing order confirming plan and for order pursuant to s. 18.6(2) of Act recognizing and implementing plan in Canada — Application granted — Section 18.6(2) of Act provides court with authority to coordinate proceedings under Act with any foreign proceeding — Applicant debtors were entitled to relief under Act and U.S. proceedings had been recognized as foreign proceeding for purposes of Act — Global nature of plan of restructuring was appropriate consideration on application — Over 90% of revenues for debtors were produced by operations in United States — Ontario court had been apprised of developments relating to U.S. proceedings on regular basis — In these circumstances, full force and effect should be given in Canada to confirmation order and to plan of reorganization pursuant to s. 18.6(2) of Act.

Table of Authorities

Cases considered by *Farley J.*:

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

Babcock & Wilcox Canada Ltd., Re, 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — followed

Beatrice Foods Inc., Re (October 21, 1996), Doc. 295-96 (Ont. Gen. Div.) — considered

Loewen Group Inc., Re, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

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

s. 173 — considered

s. 173(1)(o) — considered

s. 176(1)(b) — considered

s. 191 — considered

s. 191(2) — considered

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

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — referred to

s. 18.6(2) [en. 1997, c. 12, s. 125] — considered

s. 20 — referred to

APPLICATION by debtors for order recognizing and implementing United States order confirming plan of reorganization and for order recognizing and implementing plan in Canada.

***Farley J.*:**

1 The applicants sought an order as follows:

a. an order pursuant to section 18.6(2) of the *Companies' Creditors Arrangement Act* (the "CCAA") recognizing and implementing in Canada the Order (the "U.S. Confirmation Order") of the Honourable Judge Kaplan of the United States Bankruptcy Court for the Western District of New York (the "U.S. Court") providing for, *inter alia*,

confirmation of the Third Amended Joint Plan of Reorganization of Laidlaw USA, Inc. and its Debtor Affiliates, as may be amended from time to time prior to the date of the U.S. Confirmation Order (the "POR");

b. an order pursuant to section 18.6(2) of the CCAA recognizing and implementing in Canada the POR;

c. an order, pursuant to section 191 of the *Canada Business Corporations Act* ("CBCA"), authorizing the amendment of LINC's articles in accordance with articles of reorganization substantially in the form attached as Schedule "A" hereto;

d. an order extending the stay of proceedings.

2 The facts in this matter have been appropriately summarized in the factum of the applicants as follows:

PART II — THE FACTS

A. The Cross Border Reorganization

. . . . .

3. On June 28, 2001, the Applicants, together with Laidlaw USA, Inc., Laidlaw One, Inc., Laidlaw International Finance Corporation and Laidlaw Transportation, Inc. (collectively, the "Debtors") commenced proceedings under chapter 11 of the United States Bankruptcy Code in the U.S. Court, which proceedings are jointly administered under Case Nos. 01-14099 K through 01-14104 K (the "U.S. Proceedings").

4. Pursuant to the order of this Honourable Court dated June 28, 2001 (the "June 28 Order"), this Honourable Court, among other things, ordered that the Applicants were entitled to relief under the CCAA and granted a stay of proceedings.

5. Pursuant to the June 28 Order, this Court also recognized the U.S. Proceedings as foreign proceedings for the purposes of the CCAA.

6. By Order dated August 10, 2001 (the "August 10 Order"), this Honourable Court, among other things, approved a cross-border insolvency protocol (which has also been approved by the U.S. Court) (the "Protocol") to assist in coordinating activities in these proceedings and the U.S. Proceedings.

7. The Protocol was developed to promote the following mutually desirable goals and objectives:

(a) harmonize, coordinate and minimize and avoid duplication of activities in the proceedings before the U.S. Court and this Court;

(b) promote the orderly and efficient administration of the proceedings in the U.S. Court and this Court to, *inter alia*, reduce the costs associated therewith and avoid duplication of effort, all in order to allow the businesses operated by LINC's subsidiaries to be recoganized as a global enterprise; and

(c) promote international cooperation and respect for comity among the Courts.

8. For the past several years, United States-based operations have generated more than 90% of LINC's revenue on a consolidated basis.

B. Single Claims Process

9. Pursuant to the August 10 Order, this Honourable Court also recognized and approved, as the single claims process applicable to and binding on all creditors, wherever located, of the Debtors, a claims process approved by Order of the U.S. Court on August 7, 2001, (the "Claims Process").

10. Notice of the Claims Process was (i) published in the national editions of the *National Post* and *The Globe and Mail* and, in French, in *La Presse*, as well as in *The Wall Street Journal* and *The New York Times*, (ii) mailed to addresses of known creditors of the Debtors in the United States, Canada and elsewhere and (iii) posted on LINC's website.

11. Approximately 950 proofs of claim were received in response to the Claims Process. The Debtors have entered into settlement agreements involving many of the largest unliquidated claims.

C. POR and Disclosure Statement

(a) Previous Versions of the POR and Disclosure Statement

12. Previous versions of the POR and a Disclosure Statement for the POR (the "Disclosure Statement") have been filed with the U.S. Court and with this Honourable Court at the commencement of the respective proceedings in June, 2001 and on August 6, 2002 and September 20, 2002 (the "September Disclosure Statement").

(b) Initial Solicitation Process

13. On September 24, 2002, the U.S. Court entered an order (the "September 24 Order") which, among other things: (a) approved the September Disclosure Statement; (b) approved a form of confirmation hearing notice (the "September Confirmation Hearing Notice"); (c) scheduled the hearing for the confirmation of the POR by the U.S. Court (the "November Confirmation Hearing"); and (d) required the Debtors to publish a notice substantially in the form of the September confirmation Hearing Notice not less than 25 days before the November Confirmation Hearing.

14. On September 27, 2002, this Honourable Court granted an Order (the "September 27 Order") which, among other things: (a) declared that the U.S. Court has the jurisdiction to compromise claims against the Applicants; (b) recognized, and declared to be effective in Canada, the September 24 Order; (c) relieved the Applicants from any obligation to file a separate plan in Canada under the CCAA; (d) provided for the Applicants to publish a notice of the granting of such relief (the "Canadian Notice") in various newspapers in Canada; and (e) allowed interested persons to bring a motion to apply to this Court to vary or rescind the September 27 Order within 14 days after the publication of the Canadian Notice.

15. The Canadian Notice was published on Friday, October 4, 2002 in the *National Post, The Globe and Mail* and *La Presse*. No person has brought a motion to vary the September 27 Order.

(c) Amended POR and Disclosure Statement

16. Following the granting of the September 24 Order and the September 27 Order, the Debtors and their advisors continued their efforts to resolve certain outstanding issues before the September Confirmation Hearing Notice could be published and before the September Disclosure Statement could be printed. Included in those efforts were discussions with the Pension Benefit Guaranty Corporation (the "PBGC") of the United States which contacted the Debtors after the Orders had been granted and advised that it had concerns about the impact of the POR on certain claims that the PBGC had or may assert.

17. As discussions continued, the Debtors and their advisors determined that the September Disclosure Statement would not be printed and the September Confirmation Hearing Notice would not be published until the material issues were resolved. As a result, the Confirmation Hearing did not take place as scheduled.

18. An agreement in principle had been reached between the Debtors and PBGC. The POR and Disclosure Statement have been amended to reflect the discussions and settlement reached among the Debtors and PBGC.

19. The POR provides for, among other things: (a) cancellation of approximately US$3.4 billion of indebtedness in exchange for cash or newly-issued common stock (the "New Common Stock") of Reorganized LIL ("New LINC"), which will, through a series of restructuring transactions, become the ultimate parent holding company of the remaining Reorganized Debtors and their non-debtor affiliates; (b) the cancellation of the Old Common Stock and Old Preferred Stock of LINC; (c) the assumption, assumption and assignment or rejection of certain Executory Contracts and Unexpired Leases to which one or more of the Debtors is a party; (d) settlements of certain disputes between or among the Debtors and various creditor groups; and (e) implementation of the Laidlaw Bondholders' Settlement and the Safety-Kleen Settlement, each of which has previously been approved by this Honourable Court and the U.S. Court.

(d) Amended Solicitation Process

20. As a result of the amendments to the POR and the Disclosure Statement, on January 23, 2003 amended versions of the POR and the Disclosure Statement were filed with the U.S. Court and the U.S. Court granted a further Order (the "January 23 Order") approving the form of Disclosure Statement, establishing procedures for solicitation and tabulation of votes, setting 5:00 p.m., Eastern Time, February 24, 2003, as the Voting Deadline for the submission of ballots, scheduling the Confirmation Hearing before the U.S. Court for February 27, 2003 at 10:00 a.m., Eastern Time, and approving the Form of Notice of the Voting Deadline and the Confirmation Hearing (the "February Confirmation Hearing Notice").

21. Other than the necessary changes to dates involved in the process, neither the January 23, Order nor the February confirmation Hearing Notice are substantially different from the September 24 Order and November Confirmation Hearing Notice which were recognized by this Honourable Court pursuant to the September 27 Order. No party was prejudiced by the subsequent delay in the voting process.

D. Approval of POR

22. The February Confirmation Hearing Notice was published on or about January 31, 2003 in the following newspapers in Canada and the United States: (a) the *National Post*; (b) *The Globe and Mail*; (c) *La Presse*; (d) *The Wall Street Journal*; and (e) *The New York Times*.

23. The Voting Deadline set out in the January 23 Order has now passed. The voting in all relevant Classes has been overwhelmingly in favour of the POR.

24. Prior to the objection deadline established by the U.S. Court and after distribution of over 100,000 copies of the POR and Disclosure Statement to parties in interest, only 6 objections to confirmation of the POR were filed. The Debtors and their advisors expect that these objections (to the extent not resolved or withdrawn) will be overruled at the Confirmation Hearing.

25. On February 27, 2003, the U.S. Court issued the U.S. Confirmation Order. The U.S. Court found, among other things, that the POR complied in all respects with the requirements of the United States Bankruptcy Code and related rules. In particular, the U.S. Court found that:

(a) the POR contained all provisions required by law;

(b) the POR was proposed in good faith;

(c) the POR was in the best interests of the creditors of the Debtors;

(d) the POR was feasible; and

(e) the POR satisfied the "cram-down" requirements of the United States Bankruptcy Code.

> 26. The POR, as approved by the U.S. Confirmation Order, expressly contemplates and requires that the Applicants will seek an order effecting and implementing in Canada certain elements of the Restructuring Transactions and the POR.

3 Allow me now to turn to the law as it applies to this particular fact situation. Section 18.6(2) of the CCAA provides the Court with authority of latitude to coordinate proceedings under the CCAA with any "foreign proceeding" (that term being defined in s.18.6(1) to mean "a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally").

> s.18.6(2) The Court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

The applicants are debtor companies entitled to relief pursuant to the CCAA and the U.S. Proceedings have been recognized by the June 28 Order as a "foreign proceeding" for the purposes of the CCAA.

4 The purpose of s. 18.6(2) is to give the Court broad and flexible jurisdiction to facilitate cross-border insolvency proceedings which involve concurrent filings in Canada under the CCAA and in a foreign jurisdiction under the insolvency laws of that latter jurisdiction. The discretion given to a Canadian judge thereby must be exercised judicially. In appropriate circumstances, this may include a Canadian Court making an order which recognizes and gives effect to insolvency proceedings in foreign Courts and orders thereby emanating from those foreign Courts. As I observed in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at pp 107-8, factors which reasonably ought to be considered under the "recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged" and that an enterprise should be permitted to "reorganize as a global unit."

5 Given that in this case, there are the following facts:

> (a) the Protocol has been implemented by both this Court and the U.S. Court;
>
> (b) the U.S. Proceedings are foreign proceedings for the purposes of the CCAA;
>
> (c) the stakeholders of the Applicants (and the other Debtors) have been subject to a single claims process which treats them equally regardless of the jurisdiction in which they reside;
>
> (d) the global nature of the restructuring proposed by the POR;
>
> (e) ample notice has been given of the existence of these proceedings and the U.S. Proceedings;
>
> (f) over 90% of revenues for the Debtors are produced by operations in the United States; and
>
> (g) this Court has been apprised of developments relating to the U.S. Proceedings on a regular basis.

and further that in applying the guidelines set out in *Babcock & Wilcox Canada Ltd.* I granted the September 27 Order providing *inter alia*:

> (a) ordering and declaring that the U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interest of claimants against, including creditors and shareholders of, the Applicants; and
>
> (b) relieving the Applicants from the obligation to file a Plan of Compromise in Canada under the CCAA unless and until the proposed POR was rejected or refused by the U.S. Court.

and further given that I have already determined that the U.S. Court is the appropriate forum for adjudicating, determining, compromising or otherwise affecting all claims against the applicants and given that I have relieved the

applicants (in the particular circumstances of this case) of the obligation to file a CCAA plan, it seems to me that it is appropriate in the circumstances to recognize and give full force and effect in Canada, to the Confirmation Order and the POR pursuant to s.18.6(2). I note in that respect that the POR has now been approved by the creditors of the Debtors, including the creditors of the applicants and confirmed by the U.S. Court following a Confirmation Hearing. That approval by the creditors of the applicants was by an overwhelming vote of over 96% in number and over 99% in value of each of the classes of creditors, which creditors had the benefit of fulsome disclosure.

6 The POR expressly contemplates that the Canadian Court would be asked for a s.18.6(2) order recognizing and implementing in Canada the Confirmation Order and the POR. In my view in the circumstances of this case that would be a fair and reasonable result *vis-à-vis* all affected persons on either side of the U.S. — Canadian border in providing an equitable solution. See *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]) for a case of quite similar circumstances.

7 In addition the applicants sought an order pursuant to s.191 of the CBCA amending LINC's articles. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder or dissent rights.

> 191(1) In this section, "reorganization" means a court order made under
>
> (a) section 241;
>
> (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
>
> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
>
> (2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.
>
> (3) If a court makes an order referred to in subsection (1), the court may also
>
> (a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and
>
> (b) appoint directors in place of or in addition to all or any of the directors then in office.
>
> (4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by section 19 and 113, if applicable.
>
> (5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.
>
> (6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.
>
> (7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

8 The CCAA is an "other Act of Parliament that affects the rights among the corporation, its shareholders and creditors". See s.20 of the CCAA; *Beatrice Foods Inc., Re* (October 21, 1996), Doc. 295-96 (Ont. Gen. Div.), Houlden J.A., unreported.

9 The amendment to the articles would effect a cancellation of all presently outstanding shares of LINC. This is appropriate in the circumstances since:

(a) such shares do not have value and are not likely to have value in the foreseeable future;

(b) subsection 191(2) of the CBCA, which permits the Court to amend articles to effect any change that might be made under Section 173 of the CBCA, grants substantive, and not simply procedural, powers to amend the articles of a CBCA corporation;

(c) paragraph 173(o) of the CBCA provides that articles may be amended to "add, change or remove any other provision that is permitted by the [CBCA] to be set out in the articles"; and

(d) Section 173 of the CBCA is supported by paragraph 176(1)(b) of the CBCA, which contemplates amendments to the articles of a corporation to effect the cancellation of all or part of the shares of a class of shares.

See *Beatrice Foods Inc., Re*; *Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), R. Dickerson, L. Getz and J. Howard, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at p. 124.

10 The requested relief is granted. Order to issue as per my fiat.

11 I would wish to reiterate my comments at the end of today's hearing as to my appreciation to counsel on all sides throughout these CCAA proceedings and to Judge Kaplan of the U.S. Bankruptcy Court who shouldered so well the bulk of the burden of these coordinated U.S./Canadian proceedings.

Application granted.

10

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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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.

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

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 &*

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

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

proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity

Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the

ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
>
> b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
>
> c) The Canadian banks provide below-cost financing for the margin funding facility and,
>
> d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 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

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?
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> 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;
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> c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
>
> d) the releases are invalid under Quebec rules of public order; and because
>
> e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the

powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

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

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

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

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

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as

> altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> >
> > (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

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

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund

against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

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

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

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

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

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

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement

involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H*]*owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

. . . . .

> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

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

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

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

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The

assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act*, *1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate

them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

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

I agree.

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

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

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

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

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

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

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

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

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

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